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Insiders & Instrument: The Seventh Circuit's Reversal of the Tax Court in United Cancer Council v. Commissioner

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COMMENTS

INSIDERS & INUREMENT:
THE SEVENTH CIRCUIT'S REVERSAL
OF THE TAX COURT IN
UNITED CANCER COUNCIL v.
COMMISSIONER

INTRODUCTION

Can a charitable organization, exempt from Federal income tax under Internal Revenue Code section 501(c)(3),1 be managed so ineptly that it ceases to be charitable? More specifically, can the IRS attack the tax-exempt status of a charitable organization because the organization and its professional fundraiser incurred $26 million in expenses and fees in the process of raising $28 million in donations?2 The Supreme Court has consistently rejected state attempts to regulate charities based on the efficiency of their fundraising on the ground that charitable solicitation is a form of protected speech.3 Neverthe-

1 I.R.C. § 501(c)(3) (1994) provides that the following organizations shall be exempt from Federal income tax:
Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.
3 See, e.g., Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781 (1989) (holding unconstitutional a law that regulated the fees professional fundraisers could charge and required disclosure to potential donors of the percentage of receipts that the charity would receive); Maryland v. Munson, 467 U.S. 947 (1984) (striking down a law that prohibited charitable solicitation by organizations who did not use at least 75 percent of their receipts for charitable
less, the IRS made such an attempt in the case of *United Cancer Council v. Commissioner*.\(^4\)

In 1997, after considering the case for several years, the Tax Court upheld the IRS’s revocation of the tax exemption for United Cancer Council (“UCC”).\(^5\) The decision shocked and disturbed the nonprofit community because it seemed to expand broadly the power of the IRS to regulate exempt organizations. In reaching its decision, the Tax Court adopted a novel theory, proposed by the IRS, that a contractual relationship negotiated at arm’s length between an exempt organization and a professional fundraiser, could violate the inurement prohibition of section 501(c)(3) of the Internal Revenue Code.\(^6\) The logical step in the decision that disturbed onlookers most was the Tax Court’s finding that the Watson & Hughey Company (“W&H”), UCC’s professional fundraiser, had become an “insider” and gained “control” of UCC due to the terms of their fundraising contract.\(^7\)

In a strongly worded opinion written by Judge Posner, the Seventh Circuit reversed the Tax Court.\(^8\) Judge Posner ridiculed the IRS’s position that a contract negotiated at arm’s length could result in a party to the contract becoming an “insider” for purposes of the inurement prohibition of section 501(c)(3).\(^9\) He also criticized the IRS’s attempt to expand their regulatory power over exempt organizations by using a broad interpretation of the inurement prohibition.\(^10\) Finally, Judge Posner remanded the case for a consideration of the private benefit issue, which the Tax Court failed to rule on.\(^11\)

This Comment will address the central issue discussed in both *United Cancer Council* decisions, whether a contract negotiated at arm’s length between an exempt organization and a professional fundraiser can make the fundraiser an “insider” for purposes of the

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5. See *United Cancer Council*, 109 T.C. at 326.
6. See id. at 385-90. One of the requirements of Section 501(c)(3) for exemption from Federal income tax is that the net earnings of the organization should not “inure to the benefit of any private shareholder or individual.” I.R.C. § 501(c)(3) (1994).
8. See United Cancer Council v. Comm’r, 165 F.3d 1173 (7th Cir. 1999).
9. See id. at 1176-79; see also infra notes 72-76 and accompanying text (defining these terms).
10. See id.
11. See id. at 1179-80. The private inurement prohibition, which is the central issue discussed in this Comment, is in reality a sub-set of the general prohibition against retained private benefit and was not dealt with by the Tax Court as an independent justification for the withdrawal of UCC’s tax-exempt status.
inurement prohibition of section 501(c)(3). First, I will examine the background and history of UCC and their contract with W&H. In Section II, I will give a brief introduction into the law of Federal income tax exemption, and in that context, discuss the inurement prohibition. In Section III, I will do a comparison of the decisions by the Tax Court and the Seventh Circuit. Finally, in Section IV, I will suggest that the IRS's attempt to expand their regulatory authority of charitable organizations via the inurement prohibition was ill conceived.

I. BACKGROUND

UCC was created as the result of a dispute between the American Cancer Society ("ACS") and a number of its local affiliates. ACS had decided to shift its focus from direct patient services to support of basic research to find a cure for cancer. A number of local affiliates of ACS who refused to go along with these changes were either expelled or voluntary left ACS and formed UCC.

UCC was incorporated in Delaware in 1963 and was granted an exemption from federal income tax in 1969. The goal of the organization was to "concentrate on cancer prevention and alleviation of pain and suffering of cancer victims, rather than research to develop a cure for cancer." UCC acted as an umbrella organization for its member agencies and provided professionally produced films, film strips, brochures and other educational materials to its local affiliates. In addition, UCC supported post-graduate research fellowships and the continuing education of its members. The local affiliates attempted to meet "the direct needs of cancer patients through the providing of medical supplies, cancer research, and public education about cancer prevention, detection, and treatment."

UCC's financial support came primarily from the membership dues paid by the local affiliates. The number of local affiliates fluctuated from year to year and in 1983 and 1984 the withdrawal of

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13 See id.
14 See id.
15 See United Cancer Council, 109 T.C. at 329.
16 Id.
17 See id. at 329-30.
19 United Cancer Council, 109 T.C. at 329.
20 See id. UCC also received a small amount of support from donations from the public.
21 See Priv. Ltr. Rul. 1991 PRL Lexis 2085, at *4 (July 9, 1991). For example, in 1986 there were 26 local affiliates and in 1987 there were 39.
several local affiliates created a budget crisis. UCC faced the option of dissolution or making up the budget shortfall in some other manner. The Board of Directors of UCC made the fateful decision to authorize the Executive Director to hire a professional fundraiser.

A. The Contract Between UCC and W&H

Prior to 1984, UCC’s annual budget had never exceeded $50,000, yet as a result of the withdrawal of several of the local affiliates the organization was facing a budget deficit of $13,000 for the year. On June 11, 1984, with UCC on the verge of insolvency, UCC and W&H entered into a five-year fundraising contract, which called for W&H to conduct a direct-mail fundraising campaign for UCC. The Agreement had several provisions that met UCC’s needs. First, the contract was a “no-risk” contract for UCC because W&H provided the initial capital to start the direct mail campaign and W&H would only be reimbursed for their initial contribution from the funds they were responsible for generating. Also, UCC was only responsible for reimbursing W&H for fundraising expenses out of funds generated by W&H’s efforts. W&H further agreed to advance money to UCC so they could meet their budget for the year and continue to operate until the fundraising campaign began to generate income. Finally, UCC retained final approval of all mailing lists and the content of the direct mail solicitations that W&H distributed.

In exchange for providing the initial capital and absorbing the risk of losses, W&H obtained several concessions from UCC. First, W&H were retained as UCC’s exclusive fundraiser and UCC could not retain another fundraiser. Second, W&H’s fees were at the “high-end” of the normal range that professional fundraisers typically charged their exempt organization clients. Most importantly, W&H

22 See id. at *5.
23 See United Cancer Council, 109 T.C. at 329.
24 See id. at 330.
25 See id.
27 See United Cancer Council, 109 T.C. at 330.
28 See Fundraising Agreement, supra note 26, at § 9.
29 See United Cancer Council, 109 T.C. at 347.
30 See Fundraising Agreement, supra note 26, at § 3.
31 See id. at § 1.
32 See United Cancer Council, 109 T.C. at 393. W&H charged UCC a fee of five cents ($0.05) for each letter mailed and a fee of ten cents ($0.10) for each letter mailed to a previous contributor of UCC plus creative costs. Creative costs amounted to $2,500 for each mailing under 50,000 and $5,000 for each mailing of 50,000 and up. UCC also paid a retainer of $1,500 a month as a draw against the fees. See Fundraising Agreement, supra note 26, at § 8.
retained co-ownership with UCC of the mailing list created by their direct-mail solicitations, but, as part of the contract, UCC was restricted in their use of the mailing list, while W&H’s use of the list was totally unrestricted.

B. W&H Raises $28 Million for UCC

Over the term of the contract, between 1984 and 1989, W&H mailed approximately 79.6 million letters on UCC’s behalf. These letters resulted in $28,763,387 in contributions to UCC. W&H incurred $26,523,917 in expenses and fees in raising the money.

33 See Fundraising Agreement, supra note 26, at § 14.
34 Under the agreement, UCC was permitted to use the names generated by the direct mail campaign in future campaigns for UCC. However, UCC was restricted either during the life of the agreement or any time thereafter from renting, leasing, exchanging, selling or giving away the names. W&H were not restricted in any manner in their use of the names. See id.
In the lingo of direct mail fundraising there are two types of solicitation letters. First, there are “prospect” letters, which are basically blind letters mailed to those who have not contributed previously to the organization. Next, there are “housefile” letters, which are letters to those who have previously donated to the organization, sometimes in response to a prospect letter. The goal of a direct mail fundraising campaign for an organization like UCC is to develop a productive housefile list of contributors who give ongoing support to the organization. In addition, a housefile can be a valuable asset of an organization because there is an active market for the renting, sale and exchange of mailing lists. Therefore, UCC forfeiting their right to sell or exchange their housefile mailing list was a major concession. W&H did not disclose the amount of money they earned from the sale or lease of UCC’s housefile list so their earnings do not reflect their use of this asset. See United Cancer Council, 109 T.C. at 334-39 (discussing thoroughly the workings of the direct mail fundraising industry).
35 See United Cancer Council, 109 T.C. at 331. About 51.8 million letters were “prospect” letters and 27.8 million were “housefile” letters. See id.; see also supra note 34 (discussing the difference between prospect and housefile letters).
36 See United Cancer Council, 109 T.C. at 331. The yearly breakdown was:

<table>
<thead>
<tr>
<th>Year</th>
<th>Contributions, in dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>240,380</td>
</tr>
<tr>
<td>1985</td>
<td>5,087,453</td>
</tr>
<tr>
<td>1986</td>
<td>7,869,015</td>
</tr>
<tr>
<td>1987</td>
<td>10,740,045</td>
</tr>
<tr>
<td>1988</td>
<td>3,883,352</td>
</tr>
<tr>
<td>1989</td>
<td>1,943,142</td>
</tr>
<tr>
<td>Total</td>
<td>28,763,387</td>
</tr>
</tbody>
</table>

37 See id. at 332. The yearly breakdown was:

<table>
<thead>
<tr>
<th>Year</th>
<th>Expenses, in dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>241,251</td>
</tr>
<tr>
<td>1985</td>
<td>4,980,949</td>
</tr>
<tr>
<td>1986</td>
<td>7,255,744</td>
</tr>
<tr>
<td>1987</td>
<td>9,734,233</td>
</tr>
<tr>
<td>1988</td>
<td>3,220,425</td>
</tr>
<tr>
<td>1989</td>
<td>1,082,315</td>
</tr>
<tr>
<td>Total</td>
<td>26,523,917</td>
</tr>
</tbody>
</table>
received about $2,224,000 of the proceeds and W&H received $4,118,560 in fees. In addition, a subsidiary of W&H, Washington Lists, received another $3,901,204 from UCC for mailing list rental fees and commissions. W&H did not report how much income they received from selling or exchanging UCC’s mailing list.

Even though W&H were very effective at direct mail fundraising, their methods created significant adverse publicity for UCC. The complaints centered around four issues: “(1) W&H’s control of another cancer charity, AICR, (2) the mailing packages [UCC] employed, (3) the adverse impact of mailings done in certain areas covered by [UCC’s] member agencies, and (4) whether [UCC] was spending a sufficient portion of its receipts for charitable purposes . . . .”

The most serious problem for UCC was accusations that they were using deceptive techniques in their fundraising. The mailings that created the most controversy were the “sweepstakes” mailings. UCC received numerous complaints about the sweepstakes mailings and discontinued their use, even though they were extremely profitable. In addition, the attorneys general of several states conducted investigations into UCC’s fundraising techniques, and lawsuits were initiated by the attorneys general of New York and Pennsylvania.

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38 See id. at 332-33. The yearly breakdown of amounts paid to W&H was:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amounts Paid, in dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>43,965</td>
</tr>
<tr>
<td>1985</td>
<td>143,196</td>
</tr>
<tr>
<td>1986</td>
<td>842,219</td>
</tr>
<tr>
<td>1987</td>
<td>1,974,247</td>
</tr>
<tr>
<td>1988</td>
<td>999,527</td>
</tr>
<tr>
<td>1989</td>
<td>115,406</td>
</tr>
<tr>
<td>Total</td>
<td>4,118,560</td>
</tr>
</tbody>
</table>

39 See id. at 333. These fees resulted from Washington Lists procuring mailing lists from other organizations for prospect mailings. Washington Lists also charged UCC fees when they exchanged UCC’s mailing list for another organization’s mailing list or used the mailing list of another Washington List/W&H client.

40 See id.

41 See id. at 365 (stating that UCC was the subject of negative newspaper articles and television stories in just about every area of the country where fundraising letters were sent).

42 See id.

43 See id. at 366. As the name implies, the sweepstakes mailings were prospect letters that informed recipients that they were winners in a contest with a prize of $5,000. The letter asked the recipients to make a donation to UCC, but informed them they could enter the contest without making a donation. The fine print also stated that the actual amount won would be determined by a later drawing and the $5,000 was usually split between all those who entered the contest and resulted in an average winning of $0.09.

44 See id.

The other issue that caused significant public relations problems for UCC was the release of a report that concluded that 97.7% of UCC's contributions in 1985 went to defray fundraising expenses.\textsuperscript{46} Even though UCC disputed this computation,\textsuperscript{47} the organization was consistently exposed to adverse publicity. UCC's board of directors met and considered discontinuing the direct mail campaign, but a majority of the board realized that UCC had become dependent on the funds that the campaign generated and voted to continue the direct mail fundraising campaign.\textsuperscript{48}

In 1989, presumably because of all the adverse publicity, UCC decided not to renew their contract with W&H.\textsuperscript{49} UCC retained another fundraiser, but was unable to raise enough funds to pay their expenses.\textsuperscript{50} On June 1, 1990, UCC filed for bankruptcy protection.\textsuperscript{51} Later that year, the Internal Revenue Service revoked UCC's exempt status retroactively to June 11, 1984, the day UCC and W&H had entered their agreement.\textsuperscript{52}

II. THE LAW OF FEDERAL INCOME TAX EXEMPTION AND THE INUREMENT PROHIBITION

A. A Brief Introduction to the Law of Federal Income Tax Exemption

Internal Revenue Code section 501(c)(3) lays out the basic qualifications that an organization must meet to qualify for exemption from Federal income tax. First, the organization must be organized as a corporation, community chest, fund or foundation.\textsuperscript{53} Second, the organization must be organized and operated exclusively for one of

\textsuperscript{46} See United Cancer Council, 109 T.C. at 366. Two organizations, The Council of Better Business Bureaus ("CBBB") and the National Charities Information Bureau ("NCIB"), review the activities of charitable organizations. The CBBB recommends that the fundraising costs of a charity should not exceed 35% of contributions and the NCIB recommends that no more than 30% of the income of an organization should be spent on fundraising. Both the CBBB and NCIB recognize that some charities will not be able to meet these standards (even though the large majority of charities they review meet their standards), but suggest that a prospective donor inquire as to the reasons a charity can not meet these standards. See id. at 338-39.

\textsuperscript{47} In issuing their report, NCIB ignored UCC's allocations of expenses between public education and fundraising expenses. UCC attempted to allocate approximately half of their expenses from the direct mail campaign to public education and half to fundraising expenses. UCC made these allocations because they felt all of their direct mail solicitations contained significant amounts of educational materials. NCIB considered all the expenditures on the direct mail campaign to be fundraising expenses. See id. at 378-81.

\textsuperscript{48} See id. at 365-66.


\textsuperscript{50} See id. at *15-16.

\textsuperscript{51} See United Cancer Council, 109 T.C. at 328-29.


\textsuperscript{53} See I.R.C § 501(c)(3) (1994).
the exempt purposes enumerated in the statute. 54 Third, none of the net earnings of the organization may inure to the benefit of a private individual or shareholder. 55 Fourth, a substantial part of the organization’s activities must not constitute lobbying activities. 56 Finally, the organization may not participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office. 57 The IRS also requires the organization to establish that its exempt purpose is not contrary to public policy. 58 The requirements listed above are conjunctive and the failure to satisfy any one of them will prohibit an organization from qualifying for an exemption from Federal income tax under section 501(c)(3). 59

The second qualification for exemption has been elaborated in the Treasury Regulations to form two tests, the “organizational test” and the “operational test,” which must be met in order to qualify for exemption from Federal income taxation. 60 The organizational test requires that the articles of organization (or other formative document) of an organization meet certain requirements. 61 The operational test requires the organization to engage primarily in activities that accomplish its exempt purpose. 62

54 See id. (including the permissible exempt purposes of religious, charitable, scientific, testing for public safety, literary, educational, to foster national or international amateur sports competition, and the prevention of cruelty to animals or children). This clause creates what is referred to in the Treasury Regulations as the organizational and operational tests. See Treas. Reg. § 1.501(c)(3)-1(b) & (c) (1999); see also infra notes 60-62.


56 See id.

57 See id.

58 See Bob Jones Univ. v. United States, 461 U.S. 574, 591-93 (1983) (upholding the withdrawal of exemption of a university with racially discriminatory policies). This case could be narrowly read for the holding that racial discrimination is contrary to a clearly articulated public policy and thus inconsistent with section 501(c)(3) status. However, the IRS has broadly construed the holding into a general requirement that section 501(c)(3) organizations not have exempt purposes contrary to public policy.


60 See Treas. Reg. § 1.501(c)(3)-1(b) & (c) (1999) (describing the organizational and operational tests).

61 See Treas. Reg. § 1.501(c)(3)-1(b)(1) (1999). The articles of organization must: (1) limit the purpose of the organization to one or more listed in I.R.C. § 501 (c)(3); (2) not empower the organization to engage in any activities which do not further one or more of its exempt purposes; (3) require upon dissolution that the organization’s assets are dedicated to the government or their exempt purpose and not the members of the organization. See Treas. Reg. § 1.501(c)(3)-1(b)(1), (3), & (4) (1999).

62 See Treas. Reg. § 1.501(c)(3)-1(c) (1999). An “exempt purpose” as used in both the organizational test and operational test is defined in Treas. Reg. § 1.501(c)(3)-1(d)(1)(i) to mean the purposes described in I.R.C. § 501(c)(3) including: religious, charitable, scientific, testing for public safety, literary, educational, and the prevention of cruelty to animals or children. Even though the list of exempt purposes seems somewhat narrow, the regulations broadly define “charitable.” The regulation states that the term “charitable” is used in § 501(c)(3) in its “gener-
B. The Inurement Prohibition

The private inurement provision in section 501(c)(3) provides that an organization will qualify for exemption from Federal income tax only if “no part of the net earnings [of that organization] ... inures to the benefit of any private shareholder or individual.” In addition, the Treasury Regulations provide, “an organization is not operated for one or more exempt purposes if its net earnings inure in whole or part to the benefit of private shareholders or individuals.”

An analysis of the inurement provision must recognize that, “[e]ach phrase of the statute has significance.” The first words of the provision “no part,” means, “[t]he organization loses tax exempt status if even a small percentage of income inures to a private individual.” In addition, “Courts have broadly construed the term ‘net earnings.’ Net earnings includes more than gross receipts minus disbursements as shown on the books of the organization.”

The most important part of the inurement prohibition is the phrase, “inures to the benefit.” This begs the question, what exactly is “inurement.” The most obvious case that will result in a finding of inurement is “payment of excessive salaries.” However, “inurement can also result from distributions other than the payment of excessive salaries. Unaccounted for diversions of a charitable organization’s resources ... can constitute inurement.”

If inurement is the diversion of an organization’s resources through excessive salaries, perks to members or otherwise, the final question is, who is the prohibition designed to cover? The final phrase of the statute states that it applies to “any private shareholder or individual.” The Treasury Regulations define “private shareholder or individual” as “persons having a personal and private interest in the activities of the organization.” Courts have consistently held that a
“private shareholder or individual” means only the organization’s founders, controlling members or their families, commonly referred to as “insiders.” The key factor is the individual’s control of the organization. Explicitly excluded from coverage are unrelated third parties.

III. THE TAX COURT AND SEVENTH CIRCUIT DECISIONS

The first step in determining whether the net earnings of UCC inured to the benefit of W&H, is to judge whether W&H was an insider of UCC or just an unrelated third party. The Tax Court and the Seventh Circuit reached drastically different conclusions on this point.

A. The Tax Court Decision

The Tax Court focused on several factors in concluding that W&H was an insider of UCC. First, the court conceptualized W&H’s relationship with UCC as “analogous to that of a founder and major contributor to a new organization.” Even though UCC has existed since the 1960s, the court reasoned that because UCC was in danger of becoming insolvent and W&H was providing the funds for their continued existence, W&H had somehow founded UCC.

The main factor that the Tax Court focused upon in determining whether W&H was an insider of UCC was the extent of W&H’s control over UCC. The court recognized that W&H and those who controlled it had no “formal voice in the selection of any director or officer of [UCC].” However, the court noted, “On the other hand, in exchange for (a) funds to keep [UCC] operational and get it past its 1984 financial crisis and (b) fundraising services, W&H received (1) compensation, (2) effectively exclusive control over [UCC] fundraising activities, and (3) substantial control over [UCC’s] finances.”

The court focused on three issues that it felt illustrated W&H’s control over UCC. Two of these concerns related to what the court

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75 See id.
76 See id. (citing Broadway Theatre of Lynchburg, Va., Inc. v. United States, 293 F. Supp. 346 (W.D. Va. 1968)).
77 See supra notes 63-76 and accompanying text.
78 United Cancer Council, 109 T.C. at 387.
79 See supra notes 12-19 and accompanying text.
80 See United Cancer Council, 109 T.C. at 387.
81 See id. (citing People of God Community v. Comm’r, 75 T.C. 127, 133 (1980)).
82 Id.
83 Id.
perceived as W&H’s financial control of UCC. First was W&H’s control over the parties’ joint escrow account.\textsuperscript{84} The court found that W&H had control of the escrow account because the caging company\textsuperscript{85} only issued checks in response to requests by W&H.\textsuperscript{86} Control over the escrow account resulted in W&H having total control over payments to UCC. It also resulted in W&H having total control over the payment of expenses incurred in the direct mail campaign, including payments for their fees. As additional evidence of W&H’s control, the court detailed UCC’s several failed attempts to gain more control over the funds in the escrow account.\textsuperscript{87} Furthermore, the court found that UCC could not have obtained the funds in the escrow account even if they had terminated the escrow agreement.\textsuperscript{88}

The other concern of the Tax Court regarding W&H’s financial control of UCC related to UCC’s liability to W&H for cash advances UCC had taken from the funds generated by the direct mail campaign.\textsuperscript{89} UCC began to “draw” from the funds generated by the direct mail campaign soon after it began to generate revenue, but before the campaign became profitable.\textsuperscript{90} Under the terms of the Fundraising Agreement, UCC was liable to W&H on a recourse basis for amounts it was advanced, over and above what it was entitled to under the Fundraising Agreement.\textsuperscript{91} The Tax Court did not articulate how UCC’s potential liability to W&H for excess draws gave control of

\textsuperscript{84} UCC and W&H entered into a separate escrow agreement with Washington Intelligence Bureau ("WIB") around the time the original contact was executed. \textit{Id.} at 345. WIB is known in the direct mail fundraising business as a “caging company” and their use is customary in the direct mail fundraising business. \textit{Id.}

Caging involves receiving, opening, and processing the return mail generated by a direct mail campaign. A caging company generally performs such functions as depositing the return mail receipts with a bank, providing to the client an account of these receipts, verifying and correcting name and address information with respect to contributors, recording pertinent information with respect to contributors, and relaying such contributor information to a computer company selected by the client. \textit{Id.} at 345, n.8.

\textsuperscript{85} See supra note 84 for a discussion of caging companies.

\textsuperscript{86} See \textit{United Cancer Council}, 109 T.C. at 368.

\textsuperscript{87} See \textit{id.} at 368-77.

\textsuperscript{88} See \textit{id.} at 368. (finding that if a dispute had developed between UCC and W&H, WIB would have frozen the escrow account pursuant to the escrow agreement).

\textsuperscript{89} See \textit{id.} at 388.

\textsuperscript{90} See \textit{id.} at 347-49.

\textsuperscript{91} See Fundraising Agreement, supra note 26, at § 9; \textit{United Cancer Council}, 109 T.C. at 347-49. UCC’s liability to W&H greatly concerned UCC’s accountants and they refused to issue an unqualified opinion unless the contract was modified. The practice that concerned the accountants was that UCC budgeted for the next fiscal year based on the past success of the fundraising campaign, and if the fundraising campaign faltered UCC would be liable to W&H. The accountants felt UCC would be unable to repay such a liability. \textit{See United Cancer Council}, 109 T.C. at 347-49. The contract was amended on April 9, 1987 to provide that UCC would no longer be liable to W&H for draws in excess of what they were entitled under the fundraising agreement. However, W&H was required to consent to all draws before they occurred. \textit{See Addendum to Watson & Hughey Contract} (on file with the author).
UCC to W&H. Presumably, the court felt that given UCC’s precarious financial position, the prospect of having to repay money to W&H gave W&H great leverage over UCC. Also, UCC’s dependence upon the money generated by the direct mail fundraising campaign gave them little room to challenge W&H’s decisions regarding the fundraising campaign.

The Tax Court’s final example of W&H’s control over UCC related to W&H’s control over the main asset created by the relationship, UCC’s mailing list. Beginning in July of 1988, UCC contacted W&H and attempted to get a copy of their housefile list.92 W&H consistently stalled UCC’s attempts to get the list and UCC threatened to invoke the arbitration clause of the contract.93 UCC was unable to obtain a copy of the housefile list until after the termination of the contract.94 These facts were compounded by the fact that UCC had basically negotiated away in the Fundraising Agreement their rights to earn any income from use of the housefile list.95

Based on the factors listed above, the Tax Court concluded, “W&H exercised substantial control over [UCC’s] finances and direct mail fundraising campaigns. . . . In light of W&H’s extensive control over [UCC] and [UCC’s] near-insolvent financial condition when the fundraising agreement was entered into. . . . we conclude that W&H was an ‘insider’ with respect to [UCC].”96 After determining that W&H was an insider of UCC, the Tax Court concluded that UCC’s net earnings had inured to the benefit of W&H.97

B. The Seventh Circuit Decision

In a short and sharply worded opinion, the Seventh Circuit reversed the Tax Court and remanded the case for further considera-

92 See United Cancer Council, 109 T.C. at 376-77. See generally supra note 35 and accompanying text (discussing “housefile” mailing lists).
93 See United Cancer Council, 109 T.C. at 367-77.
94 See id.
95 UCC was only allowed to use the housefile list to solicit further donations and could not sell, rent or exchange the mailing list. See supra notes 33-34 and accompanying text. There was also some disagreement about the value of the list that UCC was left with. Due to W&H’s heavy use of sweepstakes mailings, UCC’s housefile list contained names of people who were likely to enter a sweepstakes but who were not necessarily interested in continuing to support UCC in the future. In other words, W&H had created a list that would prove useful in sending out future sweepstakes mailings for other clients but was not as useful to UCC as a housefile list created from “straight” letters. See United Cancer Council, 109 T.C. at 363-64.
96 United Cancer Council, 109 T.C. at 388.
97 See id. at 389-90. I will not discuss the Tax Court’s conclusion that UCC’s earnings inured to the benefit of W&H. The Seventh Circuit did not reach the issue of whether UCC’s earnings inured to the benefit of W&H because they determined that W&H was not an insider of UCC. See infra notes 98-125 and accompanying text.
In contrast to the Tax Court, the Seventh Circuit rejected the argument that W&H had become an insider of UCC. The Seventh Circuit found that there was no basis for the conclusion that W&H had gained control of UCC and thus was an insider for the purposes of the inurement prohibition. The court also rebuked the IRS for attempting to expand the inurement prohibition, stating, "[the inurement prohibition] is designed to prevent the siphoning of charitable receipts to insiders of the charity, not to empower the IRS to monitor the terms of arm’s length contracts made by charitable organizations with the firms that supply them with essential inputs, whether premises, paper, computers, legal advice, or fundraising services."

Even though their result differed from the Tax Court, the Seventh Circuit recognized that the key issue in the inurement analysis was whether W&H was an insider of UCC. The Seventh Circuit also recognized that the key issue in determining whether W&H was an insider of UCC was control. In determining if W&H controlled UCC, the court stated, "The test is functional. It looks to the reality of control rather than to the insider’s place in a formal table of organization. The insider could be a ‘mere’ employee—or even a nominal outsider . . . ."

The court began by analyzing the relationship between W&H and UCC. The court stated:

It is important to understand what the IRS does not contend. It does not contend that any part of UCC’s earnings found its way in to the pockets of any members of the charity’s board . . . . It does not contend that any members of the board were owners, managers, or employees of W&H, or relatives or even friends of any of W&H’s owners, managers or employees. It does not contend that the fundraiser was involved either directly or indirectly in the creation of UCC, or selected UCC’s charitable goals. It concedes that the contract between charity and fundraiser was negotiated on an arm’s length basis.

98 See United Cancer Council, 165 F.3d at 1180.
99 See id. at 1180.
100 See id. at 1176-79.
101 See id. at 1176.
102 See id.
103 See id.
104 See id. (citing examples where the inurement prohibition was applied to a physician at a charitable hospital, a licensor, and a fundraiser) (citations omitted).
105 Id. at 1175.
The court then analyzed what it considered to be the IRS's basic contention, that "the [fundraising] contract was so advantageous to W&H and so disadvantageous to UCC that the charity must be deemed to have surrendered the control of its operations and earnings to the noncharitable enterprise that it had hired to raise money for it."\textsuperscript{106}

The court systematically refuted each of the examples offered by the Tax Court and IRS to illustrate W&H's control over UCC.\textsuperscript{107} The IRS's arguments focused upon W&H's advances of funds to UCC to keep the charity operating, the exclusivity of the contract, UCC's limited rights in their donor list, and the high ratio of fundraising expenses to charitable proceeds.\textsuperscript{108} The court stated, "[s]ingly and together, these points bear no relation that we can see to the inurement provision."\textsuperscript{109}

As to W&H's advances of funds to UCC during the fundraising campaign, the court responded that these payments only occurred at the beginning of the campaign and were all repaid.\textsuperscript{110} The court was also concerned that this position would punish new and small charities because they are the organizations likely to need funds to start a fundraising campaign and those funds would likely come from a fundraising company like W&H.\textsuperscript{111}

The court also rejected the IRS's exclusivity argument because, "for the purposes of the inurement clause, it makes no difference how many fundraisers a charity employs."\textsuperscript{112} The court felt that W&H obtained an exclusive contract, "not because it sought to control UCC and suck it dry, but because it was taking a risk; the exclusive contract lent assurance that if the venture succeeded, UCC wouldn't hire other fundraisers to reap where W&H had sown."\textsuperscript{113} The court also rejected the IRS argument that the exclusive contract put UCC "at the mercy" of W&H because W&H could have stopped fundraising and UCC would have been prohibited under the agreement from hiring another fundraiser.\textsuperscript{114} The court stated that this position, "demonstrates the [IRS's] ignorance of contract law" because "[w]hen a firm

\textsuperscript{106} Id.
\textsuperscript{107} See id. It is worth noting that based on the Seventh Circuit's analysis the IRS brief to the Seventh Circuit must have relied on similar but not identical factors as the Tax Court used in its decision.
\textsuperscript{108} See id. at 1176-79.
\textsuperscript{109} Id. at 1176.
\textsuperscript{110} See id. at 1177. The court also dealt with the escrow accounts in this context, stating that they were just a detail to ensure W&H was repaid. See id.
\textsuperscript{111} See id.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 1177.
\textsuperscript{114} See id.
is granted an exclusive contract, the law reads into it an obligation that the firm use its best efforts to promote the contract's objectives.”

Next, the Seventh Circuit dispensed with the IRS's argument regarding W&H's control of UCC's mailing list. The court felt this arrangement was reasonable based on the positions of the two parties. UCC received a mailing list of previous donors that could be used in future UCC fundraising campaigns. W&H got access to a mailing list useful in their business.

Finally, the Seventh Circuit rejected the argument that since "90 percent of the contributions received by UCC during the term of the contract were paid to W&H to defray the cost of the fundraising campaign that brought in those contributions, . . . W&H was the real recipient of the contributions." First, the court claimed that just looking at UCC's net proceeds was inappropriate because UCC got "a charitable 'bang' for their buck" because the mailings all contained educational information about cancer. The court also argued that "the ratio of expenses to net charitable receipts is unrelated to the issue of inurement. . . . [I]t is a ratio of apples to oranges: the gross expenses of the fundraiser to the net receipts of the charity."

The court concluded, "[w]e can find nothing in the facts to support the IRS's theory and the Tax Court's finding that W&H seized control of UCC and by doing so became an insider, triggering the inurement provision and destroying the exemption." The court stated, "[t]here is nothing that corporate or agency law would recognize as control." In addition, the Seventh Circuit was concerned with the general implications for charitable organizations of the IRS's position. The court stated, "[f]undraising has become a specialized profes-

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115 Id. (citations omitted).
116 The court was referring to the fact that UCC received a housefile mailing list which contains names of previous donors who are perceived to be likely to donate again in the future. See id.
117 The court reasoned that W&H placed a high value upon obtaining a list that could be marketed to other potential clients as a list of previous charitable donors. See id.
118 Id. at 1176.
119 Id. at 1178. The court cited as an example that "[a] charity whose entire goal was to publish educational materials would spend all or most of its revenues on publishing, but this would be in support rather than in derogation of its charitable purposes." Id.
120 Id. The court further stated that UCC received a benefit from the contract the value of which was the amount of money they received plus the educational value of the mailings. The court felt gross expenses were irrelevant because from the record W&H's profits was seemed "modest". The court seemed to ignore the Tax Court's finding that W&H had received over $8 million in fees not including revenue from the sale or exchange of UCC's mailing list. See supra notes 38-40 and accompanying text.
121 United Cancer Council, 165 F.3d at 1178.
122 Id.
sional activity and many charities hire specialists to do it. If the charity’s contract with the fundraiser makes the latter an insider, triggering the inurement provision of section 501(c)(3) . . . the charity sector of the economy is in trouble.” The court chastised the IRS regarding the “facts and circumstances” standard that the IRS felt was appropriate to apply to inurement cases. The court replied, “[t]hat is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS.”

IV. THE STATE OF THE INUREMENT DOCTRINE AFTER UNITED CANCER COUNCIL

It is understandable that the relationship between W&H and UCC drew the attention of the IRS. The facts are undisputed that the fundraising campaign W&H conducted for UCC resulted in a vast waste of resources that could have been put to better use. There is no doubt that the IRS’s main goal in this case was to attempt to find a means to regulate what it sees as abusive practices by some direct mail fundraisers. The question remains whether the IRS will succeed where the states have failed and establish a basis for regulating the relationships between charities and their fundraisers. However, even if the relationship between W&H and UCC resulted in a vast waste of resources, it is a separate issue whether the inurement prohibition represents an appropriate means for the IRS to intervene. The Seventh Circuit’s strong repudiation of the IRS’s position makes it unlikely that the inurement prohibition will be the means the IRS chooses to challenge fundraising contracts in the future. However, the Seventh Circuit remanded the case on the issue of private benefit, and this may provide the avenue to intervene that the IRS seeks. In addition, fiduciary duties imposed by state nonprofit corporation law may provide a means, albeit not by the IRS, to attack abusive fundraising relationships.

A. The Aftermath of United Cancer Council

The Seventh Circuit’s reversal of the Tax Court was welcomed by charitable organizations because the Tax Court decision was seen as a threat by charities that employ fundraising companies. The decision, however, has left some confusion in its wake. Namely, after

123 Id. at 1176.
124 See id. at 1179.
125 Id.
126 See supra notes 24-52 and accompanying text.
127 See supra note 3 and accompanying text.
128 See United Cancer Council, 165 F.3d at 1180.
United Cancer Council, can a contractual relationship lead to a party gaining control of a charity and becoming an insider for purposes of the inurement prohibition? Neither opinion attempts to define "control," the issue at the heart of both courts' inurement analysis. A reading of both decisions leaves the impression that the Seventh Circuit, Tax Court, and the IRS define control very differently and find different factors relevant to making the determination. The Seventh Circuit's approach is more reasonable and provides the predictability that charitable organizations need to conduct their activities.

The Tax Court and the IRS listed factors that they felt supported a finding that W&H controlled UCC, without adequately articulating any general principles. The Tax Court relied upon W&H's advances of capital to UCC, W&H's control of the escrow account, UCC's liability to W&H for cash draws, and the imbalance of rights in the mailing list. The IRS argued that the exclusivity of the contract, UCC's inability to terminate the contract, UCC's limited rights in their donor list, and the high ratio of fundraising expenses to charitable proceeds gave W&H control of UCC.

As the Seventh Circuit stated, it is not immediately clear how the factors listed above showed that W&H controlled UCC for purposes of inurement. The Tax Court argued that the fundraising contract gave W&H exclusive control over UCC's fundraising activities and substantial control over UCC's finances. However, although the IRS and the Tax Court made a strong showing that W&H had more control over the direct mail fundraising campaign than is desirable. The issue in inurement is whether W&H controlled UCC, not whether W&H controlled the fundraising campaign. Fundraising is just one of the activities engaged in by the average charitable organization. The point of the fundraising contract from UCC's perspective was to delegate fundraising responsibilities to W&H. In addition, most of the factors analyzed by the Tax Court and the IRS are also consistent with the conclusion that UCC and W&H entered the fundraising endeavor jointly, but without concern over it being an extremely inefficient means of raising funds. Other factors, like the exclusivity of the contract and the unequal rights in the mailing lists, do not show that W&H controlled UCC, but that UCC negotiated a bad deal.

The IRS and Tax Court did not present persuasive arguments that would support a finding of control. They did not rely on tradition notions of control, but were "using 'control' in a special sense not

129 See supra notes 78-96 and accompanying text.
130 See supra notes 107-108 and accompanying text.
131 See United Cancer Council, 165 F.3d at 1176.
132 See supra note 83 and accompanying text.
used elsewhere, so far as we can determine, in the law, including federal tax law.” The facts showing that W&H did not control UCC were overwhelming. The Tax Court and the IRS admitted that the fundraising contract was negotiated at arm’s length. There is no allegation that UCC was coerced or forced to enter a contract with W&H with unfavorable terms. Also, W&H had no representation on UCC’s board of directors, no influence on UCC’s day to day activities and no say in UCC’s use of the charitable donations. The IRS and the Tax Court also seem to ignore terms in the contract that left UCC with significant control over the fundraising campaign. One such factor that has been overlooked is that UCC retained final approval over all mailing lists W&H used and the content of the direct mail solicitations that W&H sent out. Also, as the Seventh Circuit noted, the fact that UCC refused to renew the contract illustrates that W&H did not control UCC.

Certainly there are aspects of the relationship between UCC and W&H that are troubling. In particular, W&H’s advances of the capital to begin the fundraising campaign, advances of operating expenses to UCC, UCC’s recourse liability to W&H for draws from the fundraising proceeds, and the high ratio of fundraising expenses to charitable proceeds are cause for concern. However, neither the IRS nor the Tax Court showed how any of these factors gave W&H control over UCC. UCC was not responsible for repaying (other than out of funds generated by W&H in the fundraising campaign) W&H for their capital contribution to begin the campaign or for the advances of operating expenses. So, it is unclear how W&H could use these facts to control UCC other than to pressure UCC to continue the campaign until W&H recovered their investment. But, the campaign was very profitable and this never became an issue.

It seems reasonable that UCC would have recourse liability to W&H for their draws from the fundraising proceeds over and above what they were entitled to under the contract. UCC and W&H agreed in the contract that revenues from the fundraising campaign would pay the expenses from the campaign (presumably including W&H’s

133 United Cancer Council, 165 F.3d at 1178. This is not to say the argument made by the IRS that a contract could make a fundraiser an insider of a charitable organization is without merit. The law recognizes that a contract can give control of one organization to another. For example, federal securities laws define control as, “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” 17 C.F.R. § 240.12b-2 (1999) (emphasis added).

134 See United Cancer Council, 109 T.C. at 387.

135 See supra note 30 and accompanying text.

136 See United Cancer Council, 165 F.3d at 1178.
fees) before UCC got their share of the funds. Again, if UCC had to return funds because they overdrew it would not show that W&H controlled UCC, just that W&H had obtained priority over UCC in receiving payment of their fees. Given the risk W&H took in supplying all the funds to start the campaign, W&H's priority in receiving fees before UCC got the charitable proceeds would seem to be a reasonable demand.

Finally, there is the issue of the high ratio of fundraising expenses to charitable proceeds. The Seventh Circuit responded to this argument by stating the Tax Court ignored the "charitable bang" UCC got from the educational material in the mailings and that it was irrelevant to the issue of inurement. This is another fact that does not show that W&H controlled UCC, but that the two organizations jointly embarked on a wasteful endeavor. The $2.1 million that UCC received over the course of the contract allowed them to expand their charitable operations greatly. The cost of $28 million to raise that money did not concern UCC (possibly other than the adverse publicity) because they could not have raised the money without W&H.

B. Deregulation v. Intervention

The opinions of the Seventh Circuit and the Tax Court represent decidedly opposite views of the role the IRS should have in regulating charitable organizations. One commentator, Professor Frances Hill, has suggested that the respective opinions of the Tax Court and the Seventh Circuit clearly present the different perspectives of the two courts. The Tax Court never calls into question the appropriateness of the IRS's attempt to expand their regulatory authority over charitable organizations via the inurement prohibition. Professor Hill states: "Tax law, in the Tax Court's opinion, is the basis of ensuring that exempt organizations operate for an exempt purpose and provide a public benefit."140

137 See supra notes 118-120 and accompanying text. Admittedly, the Seventh Circuit's logic is a little puzzling on this point. They somehow concluded that W&H's profits were modest, even though at a minimum they were over $8 million not including any income they received for renting or exchanging UCC's mailing list, because W&H had not reported what their expenses were related to the campaign (other than those directly chargeable to UCC). The logical inference from W&H not reporting their expenses would be that it was not a fact that would cut in their favor. However, the Seventh Circuit's overall point that the ratio of the total expenses of the fundraising campaign to net receipts of the charity is not meaningful is accurate, even though they do not clearly explain their reasoning.

139 See id. at 303.
140 Id.
In contrast, the Seventh Circuit explicitly rejects the IRS’s attempt at expanded regulatory authority. In fact, Professor Hill analyzes the Seventh Circuit’s opinion as “a call for deregulation of aspects of exempt organizations’ operations.” The Seventh Circuit, “was not writing primarily to refine inurement doctrine but to reject the regulatory framework in favor of a market analysis.” Professor Hill suggests that the market analysis employed by the Seventh Circuit offers an exciting new means to analyze the increasingly complex activities of exempt organizations. Professor Hill concludes, “[i]n reversing the Tax Court on inurement, the Seventh Circuit has confined inurement to a role as an anti-abuse provision and has interdicted the Service’s attempt . . . to make inurement fill a broader regulatory role.”

Professor Hill’s enthusiasm for the Seventh Circuit’s application of a market analysis to exempt organizations should be tempered. The Seventh Circuit admits in its opinion that a market analysis of exempt organizations may not always be appropriate. The court stated, “[c]haritable organizations are plagued by incentive problems. Nobody owns the right to the profits and therefore no one has the spur to efficient performance that the lure of profits creates.” The court makes an analogy between corporate shareholders and donors, but recognizes that donors “do not have a profit incentive to monitor the care with which the charity’s funds are used.”

C. Possible Solutions: Private Benefit Doctrine and State Nonprofit Corporation Law

The Tax Court failed to rule on the IRS’s alternative ground for revoking UCC’s exemption from federal income tax, the private benefit doctrine. Private benefit doctrine states that an organization is not organized or operated exclusively for an exempt purpose if it benefits private rather than public interests. Even though private inurement and private benefit are similar, “the two are distinct requirements which must independently be satisfied.” Private inurement is in reality a subset of private benefit, because “when an or-

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141 See United Cancer Council, 165 F.3d 1173.
142 See Hill, supra note 138, at 303.
143 Id. at 308.
144 See id. at 308-310.
145 Id. at 308.
146 See United Cancer Council, 165 F.3d at 1179.
147 Id.
148 Id.
149 See id. at 1179-80.
organization permits its net earnings to inure to the benefit of a private shareholder or individual, it transgresses the private inurement prohibition and operates for a nonexempt private purpose.\textsuperscript{152} The obvious advantage of using private benefit doctrine over private inurement is that it is broader because the party receiving the benefit in a private benefit transaction does not have to be an insider.\textsuperscript{153} However, the IRS tends to rely on private inurement more often than private benefit because private inurement is easier to prove.\textsuperscript{154}

The Seventh Circuit summarizes the private benefit argument for withdrawing UCC’s exemption as follows: “[A]s a result of the contract’s terms, UCC was not really operated exclusively for charitable purposes, but rather for the private benefit of W&H as well.”\textsuperscript{155} The appeal of this argument is that it does not rely on W&H’s status as an insider. The private benefit comes from UCC’s failure to negotiate a reasonable contract with W&H and thus benefiting W&H to such an extent that UCC ceased to be charitable. However, the Seventh Circuit also recognized that this was not a typical private benefit case, which usually involves a charity that has “dual public and private goals.”\textsuperscript{156}

The Seventh Circuit made another suggestion of how the relationship between UCC and W&H may violate the private benefit doctrine. The court stated, “the board of a charity has a duty of care, just like the board of an ordinary business corporation and a violation of that duty which involved the dissipation of the charity’s assets might . . . support a finding that the charity was conferring a private benefit . . . .”\textsuperscript{157} This is an interesting argument that the Seventh Circuit is raising, particularly in light of Professor Hill’s analysis that the court was rejecting an expansion of the IRS’s regulatory authority regarding private inurement.\textsuperscript{158} The conclusion is inescapable that Seventh Circuit is suggesting an expansion of private benefit doctrine to include some breaches of the duty of care by charitable organizations. It would be ironic if in the same decision the Seventh Circuit halted the expansion of the inurement prohibition and opened the door to the expansion of the private benefit doctrine. It will be inter-
esting to see how these issues are resolved by the Tax Court on re-
mand, and in all likelihood, eventually by the Seventh Circuit.

The corollary of the Seventh Circuit’s suggestion that the private
benefit doctrine may cover some breaches of the duty of care is that a
separate claim for a breach of the duty of care could be made under
state nonprofit corporation law. Most states apply a standard similar
to the corporate duty of care, the “business judgment rule,” to non-
profit corporations. However, unlike corporations who can be sued
derivatively by shareholders, there is not a large body of individuals
who have standing to sue nonprofit corporations.

This is a situation that cries out for the market analysis that Pro-
fessor Hill suggests should be applied to charitable organizations.
The actions of directors and managers of charities organized in the
corporate form are scrutinized under a deferential standard of care, as
are for-profit corporations. However, in contrast to for-profit corpo-
rations, none of the market forces that attempt to ensure efficient per-
formance by for-profit managers and directors are at work in the non-
profit context. The nonprofit corporation has no shareholders to
please and the likelihood of donors and beneficiaries (assuming they
had standing to sue under state law) having a large enough interest to
monitor the actions of directors is low. In this light, maybe it is
time that the standard of care for directors and managers of nonprofit
corporations be reevaluated.

V. CONCLUSION

The results of UCC’s direct mail fundraising campaign were
certainly shocking. Out of the $28 million raised only around $2 mil-

159 See, e.g., CAL. CORP. CODE § 5231(a) (West 1990) (applying the standard of care of
what “an ordinarily prudent person in a like position would use under similar circumstances”).

160 See JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 243-258
(1995) (stating that in most states the Attorney General and directors of the organization are the
only individuals with the standing to sue for breaches of fiduciary duty and that suits by the
Attorney General’s office are rare in most states).

161 See United Cancer Council, 109 T.C. at 331-32.

162 See United Cancer Council, 165 F.3d at 1179 (stating that donors do not have the profit
motive to monitor directors).
In addition, the duty of care under state nonprofit corporation law may provide a separate means to challenge these arrangements between charities and fundraisers.

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