The Odd Couple: Wall Street, Union Benefit Funds, and the Looting of the American Worker

John Adler, Jay Youngdahl

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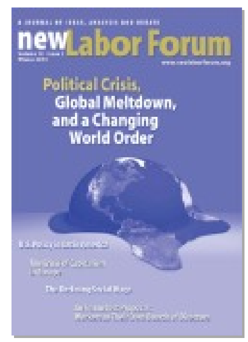

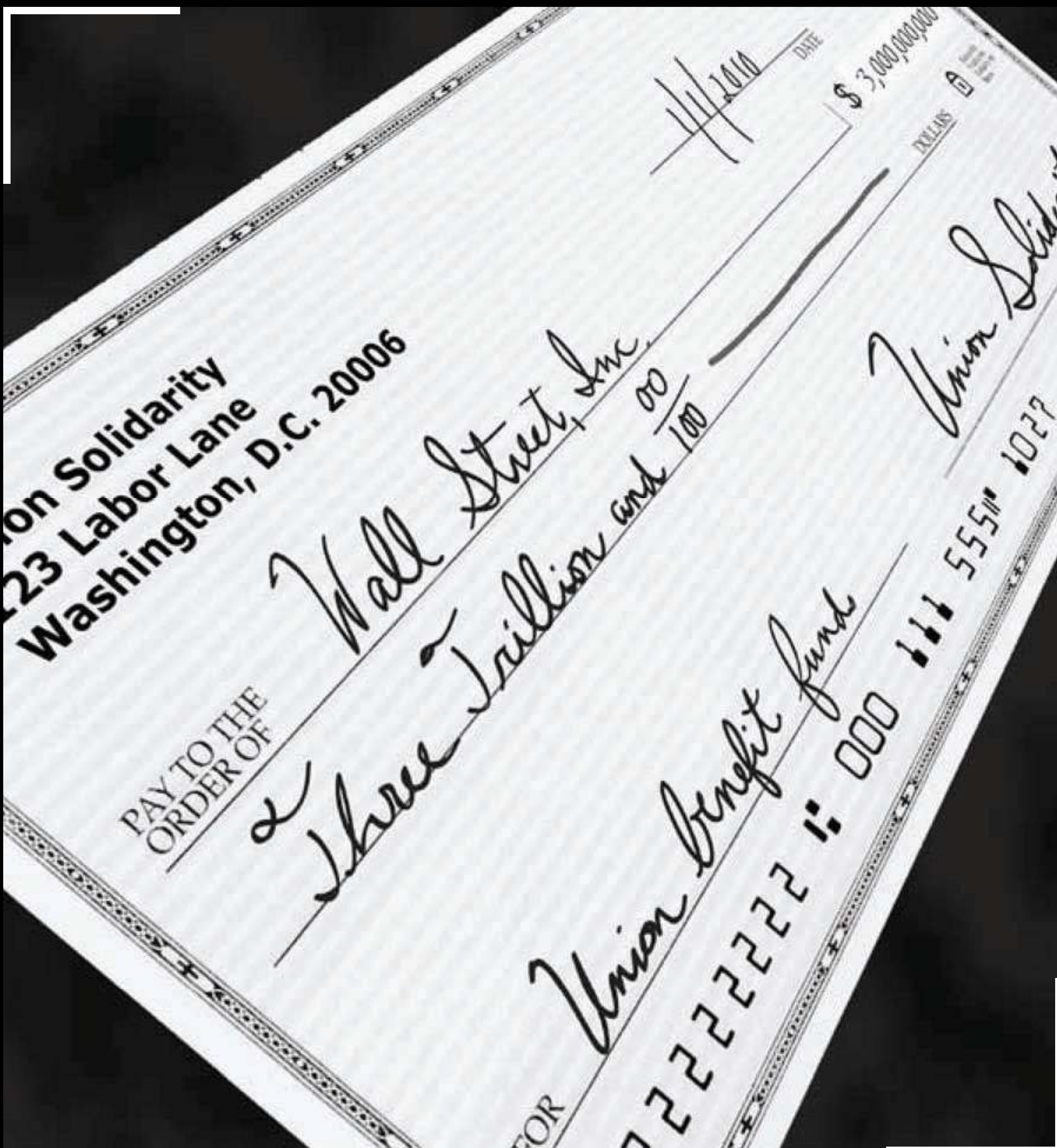

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By John Adler and Jay Youngdahl

THE ODD COUPLE

Wall Street, Union Benefit Funds, and the Looting of the American Worker

Readers of this journal are familiar with the contemporary struggles of American workers to retain health and pension benefits, long promised but now often denied. The painful and shameful treatment of retired auto and other industrial workers—who have seen their pensions and health insurance eviscerated and ridiculed as undeserved "Cadillac" legacy benefits—has recently occupied center stage.

What has received less notice is the amount, status, and use of the money that unionized workers have accumulated to pay for health and pension benefits in labor-affiliated benefit funds.[1] The sums involved are huge. Before the market crash of the "Great Recession" in the last quarter of 2008, defined-benefit pension funds that are affiliated with unions and unionized public employers held assets in excess of $3 trillion.[2] Even with the downturn in financial markets and the attacks on the safety net that workers built through collective bargaining, assets of labor-affiliated benefit funds serve as important providers of capital for the U.S. and global economies.

The fundamental role of labor-affiliated funds is to provide decent benefits for the worker participants. Yet in their efforts to provide and safeguard these benefits, these funds have invested with Wall Street in ways that have been, for the most part, indistinguishable from those of any other large investment pool. Labor-affiliated funds are universal investors; that is, as a group, they invest in every nook and cranny of the economy, in every type of asset, and with nearly every major investment manager. Their collective, though often unfocused, decision-making has a major effect on the economy.

By their nature, nearly all labor-affiliated funds are long-term investors, though they often do not act like it. These funds invest in order to protect and grow the assets necessary to pay off benefit liabilities that stretch out for years in the future. An understanding of the real potential of progressive capital strategies for these funds, and a concerted effort to implement a coherent approach across the labor movement, could dramatically

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affect the current dynamics of the capital markets, and, indeed, the overall economy. Instead of being at the mercy of financial gyrations, we could build and truly protect assets held in trust for those who labor.

Before the last quarter of 2008, defined-benefit, union-affiliated pension funds held assets in excess of $3 trillion.

Comparing the assets in labor-affiliated funds to the falling union density rates, it is obvious that the labor movement has the ability to punch significantly above its weight in the capital markets, as it has in its engagement in electoral politics. Yet labor has not exercised this ability; it should.

A PROBLEM RECOGNIZED BUT UNADDRESSED

FOR SOME TIME, ADVOCATES FOR LABOR HAVE noted the inherent potential available to labor in this arena. Three decades ago Jeremy Rifkin and Randy Barber wrote *The North Will Rise Again*, a book which marked the beginning of labor's contemporary consciousness about the nascent power in these labor-affiliated funds.[3] Writing in 1978, as the economic decline of the unionized Midwest was in its youth, Rifkin and Barber argued that labor's capital could and should play a central role in protecting the interests of workers and a just society. They also recognized what could happen if this issue were not forcefully addressed. Speaking of workers and the labor movement, Rifkin and Barber wrote, "[T]he question is whether they will continue to allow their own capital to be used against them, or whether they will assert direct control over these funds in order to save their jobs and their communities."[4]

Over twenty years after the Rifkin/Barber book, Leo Gerard, the perceptive president of the United Steelworkers of America (USW), wrote that the "use of workers' capital is one of the key challenges facing the labor movement today."[5] In 2001 he pointed out that, in spite of the huge pool of assets that sits in benefit funds in which worker representatives are trustees, labor's efforts had "not altered financial market operations in any significant way. All too often, investments made with our savings yield short-term gains at the expense of working Americans and their families."[6]

Unfortunately, for all the good intentions, the labor movement has been unable to fulfill the promise noted by Rifkin, Barber, and Gerard. There are many reasons for this deficit. They include: the lack of a coordinated strategy, which has resulted in a confusing array of approaches; trustee indifference or self-interest; and pressure from the corrupting influences of money and the financial services industry. In addition, efforts in this area are undermined by the lack of high-level capital markets expertise in the labor movement, a legal straitjacket imposed by federal and state pension laws, and a lack of worker-friendly ideas in the setting of investment policy.

Buffeted by these forces, and mesmerized by a furious chase for short-term financial returns, workers' benefit funds in many cases have paradoxically become silent and unwitting, yet crucial, supporters of the very economic arrangements which are often responsible for the plant closings, long-term stagnation in real wages, and diminished benefits that afflict working Americans.

Over the past thirty years or so, financial services became an oversized part of the U.S. economy. Through the use of new leverage-based products—that is, making debt-based investments (such as leveraged buyouts, junk bonds, collateralized debt obligations, and credit default swaps) with other people's money (OPM)—Wall Street financial firms claimed to be able to sometimes generate higher returns on capital than could be found in other parts of the economy, justifying the participation of labor-affiliated funds in these financial engineering strategies.

Labor-affiliated funds invest in every nook and cranny of the economy, in every type of asset, and with nearly every major investment manager.

Workers' assets have been used as pawns in this cold and calculating game, sometimes even backing the most vicious anti-worker maneuvers perpetrated by financial engineers. In the Chrysler bankruptcy of 2009, once the fundamental deal was cut in bankruptcy court with the involvement of the United Auto Workers (UAW), a group of hedge fund managers put together a "Committee of Chrysler Non-TARP Lenders." Claiming to represent "many of the country's teachers' unions"—including teachers and other public workers in Indiana, as well as major pension and retirement plans—these hedge funds attempted to disrupt the Chrysler settlement and the few benefits that had been retained for past, present, and future Chrysler workers. Many of these funds were "vulture" investors that had bought Chrysler bonds when they were trading at their lowest levels. The battle was framed in the media as auto workers against teachers, with the only question being how big a killing the hedge fund operators would make.[7]

While comprehensive data is unavailable, due to a lack of transparency on Wall Street, much of the capital used by financial engineers comes from benefit funds, some labor-affiliated. Participation in this system is problematic. It is from OPM leverage and cuts from workers that a substantial portion of the financial engineers' profits is generated. Numerous cases of Wall Street greed abound. On October 8, 2009, the Stella D'oro bakery in New York closed, throwing 136 unionized employees out of work. The company was purchased in 2006 by a private equity fund, Brynwood Partners V, whose investors include pension funds, at least one of whom, Pennsylvania State Employees' Retirement System, has thousands of union participants and two labor trustees. Brynwood demanded extensive concessions from the Bakery Workers local. The workers refused, and went on strike. When a National Labor Relations Board judge ordered the company to reinstate the workers with back pay, due to the misdeeds of the company, Brynwood immediately announced its intention to shutter the plant. It has now sold the brand to a publicly traded company, Lance Inc., which closed the Bronx bakery and plans to move production to a nonunion bakery in Ohio.[8]

Or consider the venerable Simmons Mattress Company that is currently facing bankruptcy. Under the ownership of Thomas H. Lee Partners, a private equity firm with capital from many labor-affiliated pension funds, the company is, as of this writing, $1.3 billion in debt and a thousand people have been laid off. A bankruptcy-induced change of hands will be its seventh such sale in little more than twenty years, each of them undertaken by machinations of financial engineers. Leo Gerard recently wrote, "Repeatedly, new owners stuck their greedy hands under the mattress and pulled out money. Each time, that hurt the company and the workers."[9]

Labor must acknowledge that, as participants in hedge funds and exotic investments, the capital that is being saved and invested for the benefits of workers has played a substantial role in the system that generates these travesties.

MOVING TOWARD A NEW BENEFIT FUND INVESTMENT STRATEGY

Given this backdrop, where should the labor movement focus its efforts? We suggest three initial steps that could pave a way toward changing the current dynamics. First, labor needs to advocate a more intentional selection of fund trustees, and should reinvest in education and coordination so that trustees can more meaningfully and progressively participate in fund investment and management decisions. Second, labor needs to end the reliance of workers' capital on harmful short-term investment strategies, and focus instead on the long-term needs of beneficiaries. We must develop and articulate a clear approach to investment, and its inherent risks, that does not get subsumed by the drive for short-term returns that results in asset bubbles that wreak destruction when they burst. Finally, labor needs to adopt strategies to redefine the legal conception of the "fiduciary duty" of trustees as it applies to investing, so that it allows and promotes an approach that can emphasize economic growth over short-term profits. Trustees must be able to incorporate a consideration of environmental, social, and corporate governance (ESG) risks that will make longer-term, sustainable investment returns possible.

Workers' benefit funds have become silent and unwitting, yet crucial, supporters of economic arrangements responsible for plant closings and the long-term stagnation in real wages.

To consider the first point, the leadership of the labor movement has been unable to provide a common structure through which trustees could come together in a way that can produce a robust response to these concerns.[10] Without a common movement based on collective labor-oriented values, as pension expert Teresa Ghilarducci has noted, it is very difficult for any individual trustee to act in a progressive manner in this area.[11] The lack of a center with labor-oriented values, that would educate trustees on useful information needed to ask difficult questions of outside advisors, significantly hampers trustees' ability to invest and deploy funds in a manner that is good for the economy and ensures stable long-term returns. The labor movement should work to create common guidelines for trustee selection, training, and involvement that are not controlled by "service providers" who make their living working with the funds. Far too many trustees cannot resist the blandishments of these professionals or the institutional inertia that makes independent and creative thinking difficult. An effective organizational structure—with buy-in across the labor movement—must be developed, which clarifies the true effects of labor's present activity and gives trustees the tools they need to ensure that workers' benefit funds are not unwittingly used against them.

FOCUSING ON A SUSTAINABLE LONG-TERM STRATEGY

The second step for labor is to begin to more cogently address the disconnect between the prevailing short-term investment strategies, which have infected labor-affiliated benefit funds, and the true long-term needs of workers' capital.

Despite their fundamental long-term time horizon, labor-affiliated funds have tended to choose investment strategies that seek to maximize their annual and quarterly returns rather than their long-term returns. Many have sought to "juice" their short-term returns by availing themselves of the various tricks that Wall Street marketed to them. All of these "genius" strategies generated Midas-like fees for Wall Street, yet many of them contributed to the credit bubble that burst in 2007 and collapsed with the market crash of 2008. We have seen firsthand that union-affiliated funds lost millions of dollars when their securities were lent out for short-selling, backed by complex financial "products" that failed.[12] And many of the faulty mortgages at the heart of the credit crisis were held by these funds directly in their fixed-income portfolios, and indirectly through hedge funds and other parts of the so-called shadow banking system.

We must develop and articulate a clear approach to investment that does not get subsumed by the drive for short-term returns.

What happens now that the constructs of the financial "experts" have collapsed? It is the participants who will ultimately pay for these "mistakes." The workers who depend on these monies are facing reduced pension and health benefits, or reduced wages to maintain their benefits, or both. Trustees of labor-affiliated funds have been left scratching their heads, trying to figure out what went wrong, where they should go from here, and how to explain the disaster to the participants in the funds. Trustees must ask themselves and their service providers, "How do we invest so that our capital helps the overall economy grow and positions our funds to earn long-term, sustainable returns that come from solid economic growth?"

The reality is that, while financial lightning occasionally strikes, it is not ordinarily possible for any fund to earn a consistent nominal rate of return of 8 percent—over the long term—if the economy in which it invests is shrinking, flat, barely positive, or punctuated by booms and busts, as the last decade's economy has been.[13] For example, the largest U.S. pension fund, CalPERS, which covers public workers in California, achieved overall annual returns of less than 3.7 percent for the ten-year period ending on June 30, 2009.[14] Yet many funds' actuarial assumptions continue to be based on an annual return expectation in the vicinity of 7 to 8 percent, or more.

In addition to short-termism failing as an investment strategy, this strategy has come at the expense of sustainable economic growth. The pressure for short-term returns drives companies to cut costs, reduce research and development, shirk capital expenditures, and lay off or otherwise reduce their number of employees. These actions sometimes benefit a company's stock price in the short run, but they can also undermine its long-term growth and profitability.

Finally, as part of the change in direction toward long-term investment, the concept of risk must be addressed. Economic theories about risk, sometimes developed by Nobel Prize winners, have driven investment decisions that—twice in the last decade—have produced devastating drops in the market. In each case—the Internet-telecom bubble that burst in 2001, and the housing finance bubble that burst in 2007-2008—the risk models employed by investors, from pension funds to investment banks, gave no hint of the true risks those investors were facing. To maximize short-term returns, too many labor-affiliated funds focused on searching for "alpha,"[15] while forgetting about managing risk. The relationship between risk and return often became submerged. Investors thought risk had diminished. After all, the "Maestro" himself—the former chairman of the U.S. Federal Reseve Board, Alan Greenspan—reassured the world that the rise of financial alchemy, such as was seen in the dazzling array of "derivatives," had made the financial system more diversified and safer by spreading risk. Now we know that this attitude put everyone at greater risk, causing arguably the worst economic downturn since the Great Depression, and generating the worst investment performance most labor-affiliated funds have experienced in their entire existence.

Yet even today, as Wall Street leverage-driven strategies and gigantic bonuses seem to be back on the agenda, there is scant indication that members of the investment community, or trustees, are paying sufficient attention to risk in the risk-return trade-off about which they are making decisions at every investment committee meeting. Developing a sustainable, long-term risk management strategy will require disregarding the self-interested schemes that most financial services providers promote.

REDEFINING THE LEGAL DUTY OF TRUSTEES

The current legal landscape acts as a third significant factor that limits labor's effectiveness in positive capital market engagement. Over the last fifteen years or more, a battle has raged in the Department of Labor (DOL) about the ability of trustees to do anything other than invest solely along the lines of Wall Street's short-term profit mania. Depending on the administration, the DOL has issued guidance that, by turns, has tepidly allowed or strongly discouraged an approach to investment that takes into account broader considerations than only the drive for short-term gains.[16] The current DOL, under Secretary Hilda Solis, has not yet weighed in, but is expected to show sympathy to greater long-term considerations.

At the foundation of this dispute is the definition and interpretation of pension fund trustees' fiduciary duty codified in the landmark 1974 Employee Retirement Income and Security Act (ERISA). ERISA prescribes that pension funds are to be managed "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[17] While the concept of fiduciary duty is an old legal concept that operates in many areas of legal and regulatory practice, the ERISA standard is often rigidly and strictly interpreted by lawyers, in contrast to the looser fiduciary duty that applies to corporate directors and other financial officers.[18] The effect is to stifle attempts to invest fund monies in ways that take ESG concerns, as well as how corporations are governed, into account.

Recent research makes clear that companies that pay attention to ESG issues are better long-term investments than those that do not. Many investors have recognized this and are employing such analysis in their investment decisions.[19] ESG-informed investing is becoming an integral part of benefit funds in many parts of the world. The UNPRI, a UN-sponsored group which promotes principles of responsible investment that include ESG considerations, is expanding its presence in the U.S. Labor-affiliated funds should consider working with the UNPRI, or institute a similar effort that can gain traction in their ranks.[20]

A recent example of the impact of ESG-oriented investing on the often shortsighted perspectives of corporate management is G4S, the largest company in the global security industry and one of the largest employers in the world. As G4S expanded, its labor practices in less developed countries became the subject of criticism by labor advocates, and the target of a global campaign led by UNI, the international union network. European investors asked why a company known for constructive labor relations in its home market, the U.K., was embroiled in escalating labor controversy globally. This investor engagement helped foster a global agreement between G4S and UNI, in December 2008, that has the potential to raise standards for millions of workers in the security industry, in countries such as Malawi, Uganda, and India.[21] At the same time, the agreement rationalizes the company's labor practices, stabilizes its relationship with labor organizations worldwide, and reduces the risks to the company's continued growth and profitability. At the core of the agreement is an understanding that an industry's leading company can help set standards that lead to a sustainable economy, rather than fueling a race to the bottom that destabilizes the industry and the economies the pension fund broadly participates in. The effective role of European investors and U.K. pension funds in this case stands in contrast to the typical timidity of U.S. pension funds in stepping beyond their narrowly defined fiduciary roles.

The labor investment community should actively work with groups committed to environmental and economic sustainability.

Further, the actual operation of labor-affiliated funds has exacerbated the problem as well. Most of them are fairly small, so they rely on outside consultants to advise them. These consultants—including investment consultants, lawyers, actuaries, and others—cost too much and tend to arrogate authority to themselves by scaring the trustees into going along with them. The easiest, safest path for trustees is to go along with these "experts."[22] The fragmented set-up of the labor-affiliated fund universe exacerbates the stranglehold of the current definition of fiduciary duty that makes any other road extraordinarily difficult for an individual trustee to traverse. A redefined concept of fiduciary duty could improve this situation.[23]

Therefore a coordinated legal and political strategy, which targets the debilitating current definition of "fiduciary duty," must be developed. There are several places to begin. First, there needs to be a regulatory effort to incorporate benefit funds' long-term investment horizon into the interpretation of their fiduciary duty under ERISA. Labor should push for a DOL interpretation that states that the exercise of fiduciary duty should be guided by the need for prudent investment of assets in a manner that will be for the long-term benefit of fund beneficiaries. This simple change would empower trustees to demand investment strategies that focus on sustainable returns that will match their liabilities rather than short-term, annual, or quarterly returns. This work should come in conjunction with efforts to improve trustee knowledge and performance, as outlined earlier.

Second, the labor investment community should actively work with groups committed to environmental and economic sustainability. A blue-green investing alliance should be developed to encourage Congress and regulators to become sensitive to these concerns. Finally, if necessary, a targeted litigation strategy could be employed that could address common law impediments to a workable definition of "fiduciary duty." Labor has the tools to make these efforts happen.

CONCLUSION

While many in labor are working hard on crucial initiatives—including new organizing strategies, organizational models, international solidarity, and legislative and political campaigns—insufficient attention and coordination have been given to the labor-affiliated benefit funds. The current approach to investment of this capital has paradoxically produced negative results for workers' benefits, and has contributed to the boom-and-bust cycles, income inequality, and financial distortions of the overall economy.

We believe that bringing a long-term investment horizon, and ESG considerations, to the forefront of decision-making in labor-affiliated trust funds can result in capital being directed to companies that will generate sustainable economic growth, fueling productivity, wage increases, and job creation, rather than financial engineering. Most importantly, this approach will better secure workers' benefits. But, in addition, such an investment approach will have positive ramifications throughout society, resulting in better income distribution. Trustees in labor-affiliated funds will be creating a stronger and more sustainable economy through their investment decisions, which will improve their long-term investment returns. Investing in activity that fosters growth in the real economy will improve the purchasing power of working families and their ability to buy the products that fuel our consumer economy, which now accounts for more than two-thirds of economic activity.

It is time for the entire labor movement to take a frank and serious look at this situation and reposition workers' capital to assume its natural role in support of long-term, sustainable economic growth that will benefit those who directly rely on labor-affiliated funds, as well as all working families.

Notes

1. There are a number of ways to describe these entities. Often they are called "Taft-Hartley" or "multi-employer" plans, as many are established pursuant to Section 302 of the National Labor Relations Act, and require equal voting power for labor and management trustees. See 29 U.S.C. 186(c). In addition, benefit funds for workers are increasingly being held in Voluntary Employee Benefit Associations (VEBAs) that have varying forms of trustee selection. For clarification, we shall use the term "labor-affiliated" to apply to all such funds. Closely linked are public employee benefit funds that cover teachers, public safety workers, and other public employees (such as CalPERS). Many of these funds have some labor trustees.

2. According to the Investment Company Institute's *Research Fundamentals* report, as of the end of 2007, state and local pension funds had assets of $3.3 trillion. "The U.S. Retirement Market, First Quarter 2009," *Research Fundamentals* (Washington, D.C.: Investment Company Institute, 2009), figure 1, p. 2, available at http://www.ici.org/pdf/09_q1_retmrkt_update.pdf. Given the overall market declines since the fourth quarter of 2008, it is likely that the current value of the aggregate assets in these funds is slightly below the $3 trillion figure. This figure does not include money held in other types of labor-affiliated funds, such as health and training funds of various types. According to the Pension Benefit Guarantee Corporation, as of the end of 2006 (the most recent data available), private multi-employer pension funds had assets of $392 billion. Pension Benefit Guarantee Corporation, *Pension Insurance Data Book 2008* (table M-9, p. 105), available at http://www.pbgc.gov/docs/2008databook.pdf.

3. Jeremy Rifkin and Randy Barber, *The North Will Rise Again: Pensions, Politics and Power in the 1980's* (Boston: Beacon Press, 1978).

4. Ibid., 13.

5. Archon Fung, Tessa Hebb, and Joel Rogers, eds., *Working Capital: The Power of Labor's Pensions* (Ithaca: Cornell University Press, 2001), vii.

6. Ibid.

7. For the Committee of Chrysler Non-TARP Lenders' statement, see http://blogs.wsj.com/deals/2009/04/30/statement-from-non-tarp-lenders-of-chrysler/. For an example of the media response framing the issue as auto workers against teachers, see http://dealbook.blogs.nytimes.com/2009/05/01/are-chrysler-hedge-funds-being-unfairly-blamed/?scp=5-b&sq=Chrysler+non-tarp+lenders&st=nyt.

8. http://www.crainsnewyork.com/apps/pbcs.dll/article?AID=/20091009/FREE/910099984 http://www.nydailynews.com/opinions/2009/09/13/2009-09-13_highfinance_lowlifes_fastmoney_tactics_have_killed_136_jobs_at_stella_doro_.html#ixzz0THLR4BrL.

9. http://www.huffingtonpost.com/leo-w-gerard/anything-goes-capitalism_b_313013.html.

10. This is not to say that the labor activists in finance do not issue important and useful guidance to trustees. The work of the

AFL-CIO Office of Investment was crucial, for example, in the fight over Social Security privatization. See its report dated October 18, 2007, "Retirement Security: How Do Investment Managers Stack Up?," available at http://www.aflcio.org/issues/retirementsecurity/upload/AFL-CIO_Retirement_Security_Report.pdf.

11. Teresa Ghilarducci, "Solving the Paradox of Workers as Shareholders: A Comment on Sanford Jacoby," *Comparative Labor Law & Policy Journal* 30, no. 1 (Fall 2008): 91. In the 1990s, the AFL-CIO established a "Center for Working Capital" to train and engage trustees, independent of pension fund investment managers. For a variety of reasons, the Center never took off and is defunct today.

12. The investment technique of short-selling involves selling a stock the seller has borrowed, with the expectation that the stock will decrease in value. Short-sellers make profits when the stock price decreases.

13. A nominal rate of return is one which does not factor in the direct effect of inflation or deflation.

14. CalPERS, *Executive Summary of Performance*, Investment Committee Agenda (December 14, 2009): 4.a-1, available at http://www.calpers.ca.gov/eip-docs/about/board-cal-agenda/agendas/invest/200912/item04a-01.pdf.

15. "Alpha" is the amount by which a manager outperforms her performance benchmark. If a manager is managing against the S&P 500, and she generates an annual return of 12 percent—vs. the S&P 500 return of 10 percent—then she is said to have generated 2 percent, or two hundred basis points, of alpha. When the manager under-performs the benchmark, she is said to have generated "negative alpha."

16. The recent history of this issue began in 1994 in the Department of Labor, under the administration of President Clinton. The most recent government proclamation on this matter was issued by the DOL under the Bush administration, and can be seen at 29 U.S.C. 2509.08, Part 1590—Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974, http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=f4b0d34303359af0c82d2e2a7899fe0f&rgn=div8&view=text&node=29:9.1.3.1.1.0.16.1&idno=29.

17. 29 USC §18.1104.

18. For additional legal background on this, see the forthcoming chapter by Jay Youngdahl, "Varying Concepts of Fiduciary Duty," (tentative title) in the *2010 Comparative Law Yearbook of International Business.* For a comparative and comprehensive description of the law by an international corporate law firm, see http://www.socialfunds.com/news/article.cgi/1851.html.

19. Today, many research studies support this approach. See, e.g., http://www.unepfi.org/work_streams/investment/materiality/, and http://www.unpri.org/files/PRI%20Report%20on%20Progress%2009.pdf. A recent study by McKinsey & Co. found that two-thirds of corporate financial officers, and three-quarters of investment professionals, agree that ESG activities create value for their shareholders in normal economic times. See *McKinsey Global Survey Results: Valuing Corporate Social Responsibility* (2009), available at http://commdev.org/files/2393_file_McKQ_Valuing_Corporate_Social_Responsibility.pdf.

20. In 2009, the trustees of the Middletown Works VEBA became signatories to these UN principles. The UNPRI principles are available at http://www.unpri.org/principles/.

21. For a news release describing the G4S-UNI Ethical Employment Partnership, see http://www.uniglobalunion.org/uniinfo.nsf/c4bdf194bc536c81c12567bb0057c767/3936bec54f482d53c1257521003c4030?OpenDocument.

22. See, e.g., *Donovan v. Bierwirth*, 680 F. 2d 263 (2d Circ. 1982).

23. For further discussion of the problems of "herding" and short-termism among pension funds, and for an argument in favor of modernizing the interpretation of fiduciary duty, please see Keith L. Johnson and Frank Jan de Graaf, "Modernizing Pension Fund Legal Standards for the 21st Century," consultation paper no. 2 (Network for Sustainable Financial Markets, February 2009), available at http://utpjournals.metapress.com/content/1886248461787p57/?p=afe5f2f39b434d0f8e27cc915bf0dbd5&pi=7.