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The 'Principles' Paradox*

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Abstract
This essay, prepared for a University of Cambridge conference on 'Principles Versus Rules in Financial Regulation', posits a new issue in that debate. Although principles-based regulation is thought to more closely achieve normative goals than rules, the extent to which that occurs can depend on the enforcement regime. A person who is subject to unpredictable liability is likely to hew to the most conservative interpretation of the principle, especially where that person would be a potential deep pocket in litigation. This creates a paradox: unless protected by a regime enabling one in good faith to exercise judgment without fear of liability, such a person will effectively act as if subject to a rule and, even worse, an unintended rule.

Keywords: financial regulation, public bond markets, indenture trustee, liability, mortgage-backed securities.

1. INTRODUCTION

Principles are thought more closely than rules to approximate normative goals. Although '[r]ules have their virtues [and] have been widely used', rules 'may

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allow corporate actors to find ways to comply with the letter of the law while circumventing its spirit.'[1]

In action, however, the extent to which principles more closely approximate normative goals can depend on the enforcement regime. I will discuss how the use of a principle can unintentionally approximate a rule – and, even worse, an unintended rule – by virtue of the applicable enforcement regime.[2]

Principles give the actor more discretion than rules,[3] and the discretion is often intended to enable the actor to exercise good judgment. But if the actor is, or feels he is, subject to unpredictable liability for varying from the principle, he – especially if he would be a 'deep pocket' in future potential litigation – will be likely to hew to the most conservative interpretation of the principle.[4] This creates a paradox: unless protected by a regime enabling him in good faith to exercise judgment without fear of liability, such a person will effectively act *as if* subject to a rule.[5]

I will discuss two areas, both in the context of financial regulation, where this paradox is operating. The first is the role of an indenture trustee in US public bond markets. The second is the role of a servicer of mortgage-backed securities, as is becoming all too clear in the recent subprime mortgage crisis.

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[1] Cary Coglianese, Elizabeth K. Keating, Michael L. Michael and Thomas J. Healey, 'The Role of Government in Corporate Governance', 1 *New York University Journal of Law and Business* (2004) p. 219, at p. 222.

[2] Cf., Cristie L. Ford, 'New Governance, Compliance, and Principles-Based Securities Regulation', 45 *American Business Law Journal* (2008) p. 1, at p. 10 (observing that 'principles may slide into rules over time because people and systems may desire more certainty than they find principles provide').

[3] Provisions are often functionally classified as principles or rules based on the discretion given to the actor. The exact manner of classifying provisions as principles or rules is contested, however, the relative discretion reposed in actors being but one way to classify. Lawrence A. Cunningham, 'A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting', 60 *Vanderbilt Law Review* (2007) p. 1411, at pp. 1420-22.

[4] Although this may well be a rational response, it is probably exacerbated by the normal human tendency towards risk aversion. See, e.g., Linda Babcock, Henry S. Farber, Cynthia Fobian and Eldar Shafir, 'Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values', 15 *International Review of Law and Economics* (1995) p. 289, at pp. 290, 296-97 (discussing risk aversion); Steven L. Schwarcz, 'The Inherent Irrationality of Judgment Proofing', 52 *Stanford Law Review* (1999) p. 1, at p. 27 (same).

[5] Uncertainty resulting in sub-optimisation is not a new concept. Cf., John E. Calfee and Richard Craswell, 'Some Effects of Uncertainty on Compliance with Legal Standards', 70 *Virginia Law Review* (1984) p. 965, at pp. 975-79 (analysing uncertainty under a negligence standard to demonstrate how over-compliance can sub-optimise social costs).

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2. THE PRUDENT MAN AND THE BEST-INTEREST PRINCIPLE

An indenture trustee's role in US public bond markets is to represent the diverse bondholders. The indenture trustee's standard of performance under applicable law is governed by a principle: to act, after default on the bonds, as a 'prudent man' in like circumstances.[6] However, even though this standard has existed since 1939, there are few interpretive guidelines because most lawsuits against indenture trustees are settled.[7] Thus, 'courts have not even resolved such fundamental issues as the extent, if any, to which an indenture trustee's post-default duty to bondholders is fiduciary in nature.'[8] Moreover, typically being large financial institutions, indenture trustees are often the only deep pocket if the issuer of bonds defaults and thus are highly exposed to lawsuits.[9] They therefore generally operate *as if* they will be sued if the issuer defaults.[10]

For these reasons – the risk of unpredictable liability exacerbated by the likelihood of being sued as a deep pocket – the unintended result of the 'prudent man' standard is that some of the best financial institutions avoid acting as indenture trustees, and those institutions that do act as indenture trustees devote substantial energy to avoiding personal liability and often hew to excessively conservative courses of action, thereby failing to optimally protect bondholders.[11]

For example, liability-avoiding strategies may incongruously entail strict enforcement of an indenture's remedial provisions, even when inaction by the indenture trustee might be the optimal course for bondholders.[12] Strict enforcement sometimes can even unnecessarily force the issuer into bankruptcy, resulting in less recovery for bondholders than in the case of an out-of-court restructuring.[13] If the indenture trustee does not take enforcement action, however, 'it will most likely be liable for negligence.'[14] The indenture trustee therefore can find itself

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[6] US Trust Indenture Act, § 315(c).

[7] Steven L. Schwarcz and Gregory M. Sergi, 'Bond Defaults and the Dilemma of the Indenture Trustee', 59 *Alabama Law Review* (2008) pp. 1037-1072.

[8] *Id.* at p. 1049.

[9] *Id.* at p. 1050.

[10] *Id.* at p. 1053.

[11] *Id.* at p. 1056.

[12] See, e.g., Robert I. Landau and John E. Krueger, *Corporate Trust Administration and Management* (New York, Columbia University Press 1998) p. 138 (observing that 'the trustee may logically be inclined to take immediate action under the remedial provisions [of the indenture] to avoid being subjected to substantial potential liability').

[13] See James E. Spiotto, *Defaulted Securities: The Prudent Indenture Trustee's Guide XII-14* (New York, CFA Institute 1990).

[14] Henry F. Johnson, 'The "Forgotten" Securities Statute: Problems in the Trust Indenture Act', 13 *University of Toledo Law Review* (1982) p. 92, at p. 111: 'Clearly, if the trustee initiates default proceedings, its actions may well result in bankruptcy, the result of which would be that its bondholders receive nothing. On the other hand, if the trustee does not act, it will most likely be liable for negligence. What, then, is "prudent"?'

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between the proverbial Scylla and Charybdis – having to decide between forcing the issuer into bankruptcy on one side and facing potential liability for inaction on the other.[15]

Another area where this paradox is operating is the role of the servicer of mortgage-backed securities.[16] After mortgage loans are originated, they are packaged into securities which, in turn, are sold to investors. Not unlike an indenture trustee, servicers act to represent the diverse holders of the mortgage-backed securities, although for the limited purpose of servicing and administering collections on the underlying mortgage loans.[17]

The servicer's standard of performance is governed by a principle: to act 'in the best interests' of the investors holding the mortgage-backed securities.[18] Subject to that principle, the servicer may restructure defaulting mortgage loans by changing the rate of interest, the principal amount, or the maturity dates.[19] Investors in securities backed by a defaulting loan generally recover more if the loan is restructured than if the mortgage is foreclosed.[20]

In practice, though, restructuring can expose the servicer to unpredictable liability because of the nature of the cash flows on mortgage-backed securities. Cash flows deriving from principal amounts and interest on the underlying mortgage loans are separately allocated to different investor classes, or 'tranches', of the securities.[21] Thus, a restructuring that, for example, reduces the interest rate on an underlying loan could adversely affect investors in an interest-only tranche of the securities. These conflicts become even more complicated for subprime mortgage-backed securities, which sometimes include prepayment-penalty tranches 'hav[ing] different priorities relative to one another for the purpose of

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[15] See *Harris Trust and Savings Bank v. E-II Holdings*, 926 F.2d 636, 638 (7th Cir. 1991) (likening an indenture trustee's position to navigating between Scylla and Charybdis).

[16] For a description of the various types of mortgage-backed securities, including their contribution to the subprime mortgage crisis, see Steven L. Schwarcz, 'Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown', 93 *Minnesota Law Review* (2008), at pp. 373-406.

[17] See, e.g., James A. Rosenthal and Juan M. Ocampo, *Securitization of Credit: Inside the New Technology of Finance* (New York, Wiley 1988), at pp. 49-51 (explaining the servicing of assets underlying asset-backed securities).

[18] Schwarcz, *supra* n. 18. Although in the case of servicers the principle is established contractually rather than by statute, the analysis conceptually should be the same except insofar as potential solutions are concerned. See *infra* n. 55 and accompanying text (observing that a principle imposed by contract is subject to *ex post* negotiation).

[19] Schwarcz, *supra* n. 18.

[20] Presentation by Joseph R. Mason, Associate Professor of Finance and LeBow Research Fellow, LeBow College of Business, Drexel University, to the Federal Reserve Bank of Cleveland at its workshop on 'Structured Finance and Loan Modification', 20 November 2007 (notes on Mason's presentation on file with author).

[21] See, e.g., Jon D. Van Gorp, *Capital Markets Dispersion of Subprime Mortgage Risk* (unpublished November 2007 manuscript, on file with author) pp. 7-8.

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absorbing losses and prepayments on the underlying subprime mortgage loans.'[22] To try to minimise their potential liability, servicers of mortgage-backed securities usually eschew restructuring a defaulted mortgage loan, which involves the exercise of judgment, and instead favour foreclosing on the mortgage, which is much more ministerial.[23] As a result, it is questionable whether servicers truly act 'in the best interests' of investors in mortgage-backed securities.

These are but two examples of the principles paradox. Other examples might arise in myriad ways, such as under US anti-money laundering regulations, in which banks face penalties if they fail to file 'Suspicious Activity Reports' with the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) for any transaction that 'has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage' if the bank 'knows of no reasonable explanation for the transaction after examining the available facts.'[24] Given these broad principles, the cost of making an examination and the penalties for non-compliance, banks file Suspicious Activity Reports for virtually all conceivably suspicious transactions, effectively overloading FinCEN with reams of worthless paper.[25]

Although these examples of the principles paradox are centred in the United States, the potential for this type of paradox has been noticed abroad. In the United Kingdom, for example, the recent push by the Financial Services Authority (FSA) for more principles-based regulation[26] has motivated some observers to note that, when faced with unpredictable liability, 'senior management will err on the side of caution …, potentially hampering innovation and stifling competition.'[27] The FSA itself may be inadvertently exacerbating this paradox by 'often stat[ing] that it will hold senior management to account for a firm's failures'[28] –

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[22] *Id.* at p. 8.

[23] Presentation by Kathleen C. Engel, Associate Professor of Law, Cleveland-Marshall College of Law, to the US Federal Reserve Bank of Cleveland, 20 November 2007 (notes on this presentation on file with author).

[24] 12 C.F.R. § 21.11(c)(4)(iii) (2008). This example was suggested by Professor Charles M. Kahn, Department of Finance, University of Illinois, and Houblon-Norman Fellow, Bank of England.

[25] See, e.g., Scot J. Paltrow, 'U.S. Says Banks Overreport Data for Patriot Act', *Wall Street Journal*, 7 July 2005, at C1. (reporting '[A] handful of banks … were fined for failing to report suspect transactions. This has prompted executives to file more "suspicious-activity reports" – the majority of which involve activity that isn't suspicious at all').

[26] FSA, *Principles-based Regulation, Focusing on the Outcomes That Matter* (April 2007).

[27] Carlos Conceicao and Rosalind Gray, 'Principles-Based Regulation – Problems of Uncertainty', 26 *International Financial Law Review* (June 2007) p. 42, at p. 43.

[28] Conceicao and Gray, *supra* n. 29, at p. 42. See also Julia Black, 'Using Rules Effectively', in C. McCrudden, ed., *Regulation and Deregulation: Policy and Practice in the Utilities and Financial Services Industries* (Oxford, Clarendon Press 1999) at p. 95 [pinpoint cite]) (observing that imposing personal liability on management for non-compliance 'could prompt the tendency for managers to follow internal guidelines by the letter, rather than allowing

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thereby targeting management not unlike deep-pocket exposure.[29] Other observers have likewise noted that the inherent ambiguity of principles, as compared to rules, makes

> 'the anticipated error costs for firms of "getting it wrong" … higher with respect to Principles than detailed rules (assuming the approach to enforcement is otherwise the same), and firms will structure their behaviour accordingly. There is a potential danger that this will lead to "over-compliance", with firms adopting overly conservative courses of action thinking that to do otherwise will be considered by the FSA to constitute non-compliance.'[30]

3. HOW TO RESOLVE THE 'PRINCIPLES' PARADOX

In order to avoid this paradox, either the risk of unpredictable liability must be reduced or parties must be compensated sufficiently to accept the risk.[31] Because of the human tendency towards risk aversion,[32] a 'sufficient' amount of compensation is likely to be higher than the risk would objectively justify.[33] I therefore focus on reducing the risk of unpredictable liability.

In concept, there are at least two ways to reduce the risk of unpredictable liability. The first is to grant a measure of discretion to parties attempting to comply with the regulatory principle. In the trust indenture context, for example, I recently argued that the liability of indenture trustees under the prudent-man standard should be interpreted by a business judgment rule, to encourage inden-

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flexible approaches to be adopted to fit the circumstances, or remove the motivation to undertake particular activities at all').

[29] For a discussion of possible distinctions between principles-based regulation enforced by government regulators, like the FSA, and principles-based regulation enforced by private lawsuits, see *infra* n. 59 et seq. and accompanying text.

[30] Julia Black, Martyn Hopper and Christa Band, 'Making a Success of Principles-based Regulation', 1 *Law and Financial Markets Review* (May 2007) p. 191, at p. 199. Yet another example of the principles paradox was identified by Professor Kahn at the University of Cambridge Conference. During a discussion of cross-border delegation of insurance regulation, he observed that a regulator in one country would be more cautious about delegating regulatory authority to another country's insurance regulator if the latter's performance were to be based on principles rather than precise rules. (Notes of this discussion on file with author.)

[31] Cf., Charles M. Kahn, *Discussion of Steven L. Schwarcz 'The "Principles" Paradox'* (unpublished manuscript presented at the University of Cambridge Conference on 11 April 2008, on file with author) (posing the possibility of paying managers higher salaries that take into account the risk of unpredictable liability).

[32] See *supra* n. 6.

[33] Perhaps this is why, in a corporate governance context, the law evolved to protect directors under a business judgment rule rather than directors being paid salaries sufficient to accept the risk absent that protection. See *infra* nn. 37-38 and accompanying text (discussing the business judgment rule).

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ture trustees to exercise their judgment.[34] In the corporate governance context, a business judgment rule is intended to protect directors who take calculated risks in an attempt to maximise corporate value.[35] Courts examine a corporate director's decision 'only to the extent necessary to verify the presence of a business decision, disinterestedness and independence, due care, good faith, and the absence of an abuse of discretion.'[36] The business judgment rule is justified by the duty of corporate directors to maximise value for shareholders, which requires the exercise of discretion. Similarly, the duty of an indenture trustee after default is (unlike the duty of traditional trustees to merely preserve existing value) to maximise recovery for bondholders, again requiring the exercise of discretion.[37] An indenture trustee's duty to act prudently therefore should be tempered, as in corporation law, by a business judgment rule.

Granting a measure of discretion to parties attempting to comply with regulatory principles may not always work, however. Although this essay argues that principles can cause parties to hew to the most conservative interpretation, principles sometimes can have the opposite effect – motivating only minimally compliant behaviour.[38] Discretion works well when the parties are subject to overall community norms, as should be the case for the relatively small community of professional institutional indenture trustees. But when such norms are lacking, granting discretion to parties subject to principles-based regulation can become a blank check for abuse. For example, some parties, especially those only minimally risk averse, may 'adopt a minimum standard and, as the [principle] is not precise in the conduct it requires, simply hope to argue the point with the regulator at a later date.'[39] Parties also might take advantage of limited governmental enforcement capability.[40] For these reasons, it is less obvious that servicers of mortgage-backed securities, who are often smaller and less well-established

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[34] Schwarcz and Sergi, *supra* n. 9.

[35] See *Smith* v. *Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (explaining that the purpose of the business judgment rule is to 'protect and promote the full and free exercise of the managerial power granted to Delaware directors').

[36] Nancy Barton, Dennis J. Block and Stephen A. Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors* (Aspen Publishers, NY, 1998), at p. 20. The business judgment rule does not directly affect the standard of conduct but is more properly characterised as a 'tool of judicial review'.

[37] Schwarcz and Sergi, *supra* n. 9.

[38] Cf., Black, *supra* n. 30, at p. 95 (asserting that unless law 'set[s] out the conduct required in some detail[,] there will be those who seek only to do the minimum necessary to comply').

[39] Black, *supra* n. 30.

[40] According to the US General Accounting Office, for example, the SEC has had an increasingly inadequate labour force since 1995. *GAO Report GAO-02-302, SEC Operations: Increased Workload Creates Challenges* (5 March 2002) (describing workload exceeding available workers since 1995 and also the SEC's small salaries compared to other federal agencies, which contributes to very high turnover), available at: <http://www.gao.gov/new.items/d02302.pdf>.

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companies in a relatively new area of financing,[41] should be granted the same measure of discretion[42] when complying with their servicing duties.

Another possible way of reducing the risk of unpredictable liability is to provide interpretive guidelines for complying with the principle.[43] For example, many questions of commercial law in the United States turn on the seemingly vague principle of 'commercial reasonableness', but this principle is well defined through the Uniform Commercial Code's detailed Official Comments[44] as well as custom and usage of trade.[45] There are also other sources of interpretive guidance. Outside the context of financial regulation, for example, the 'reasonable man' standard of negligence law in the United States benefits from centuries of interpretive guidance through court decisions,[46] making negligence liability reasonably predictable.[47]

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[41] Schwarcz, *supra* n. 18 (observing that these servicers are usually the originators of the securitised mortgage loans or a specialised servicing company such as Countrywide Home Loans Servicing LP).

[42] That is, protection against liability under a 'business judgment'-type rule.

[43] Cf., Colin S. Diver, 'The Optimal Precision of Administrative Rules', 93 *Yale Law Journal* (1983-84) p. 65, at p. 69 (observing that an ambiguous principle can become more transparent in an interpretive context). Interpretive guidance is not, however, foolproof, and sometimes can be misleading, especially if it is issued non-contemporaneously with the principle or by different, less informed, regulators. Also, the use of interpretive guidelines transforms a principles-based system into more of a principles-and-rules blended system. Cf., Cunningham, *supra* n. 5 (arguing that the practical need for interpretive guidance makes illusory the goal of a pure 'principles-based' system).

[44] Each section of the UCC is accompanied by one or more Official Comments which, though not technically enacted into law, are viewed as 'authoritative statements concerning the intent of the drafters.' Richard Hyland and Dennis Patterson, *An Introduction to Commercial Law* (Los Angeles, West Group Publishing 1999), at p. 7. As such, they often 'ease the comprehension difficulties' of interpreting UCC sections.

[45] See, e.g., UCC § 1-303 (making course of dealing and usage of trade relevant to interpreting what is commercially reasonable in the circumstances). But cf., Alan Schwartz and Robert E. Scott, *Commercial Transactions, Principles and Policies*, 2d. edn. (West Publishing Company 1991), at pp. 17-18 (observing that Karl Llewellyn, the principal architect of the UCC, contemplated that vague terms like commercial reasonableness would be interpreted by merchant juries, thereby having 'courts … deduce moral norms from the customs of "good" merchants'; that other drafters of the UCC overruled Llewellyn on merchant juries; and that '[e]liminating the merchant jury while retaining the vague admonitions [like commercial reasonableness] is a drafting disaster').

[46] For an explanation of why this interpretive guidance does not, and should not, inform the 'reasonable man' standard of indenture trustees, see Schwarcz and Sergi, *supra* n. 9.

[47] The case law has clearly defined this standard in the negligence context.

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4. CONCLUSIONS

The principles paradox[48] can be avoided by reducing the risk of unpredictable liability. Although in concept that risk can be reduced by either granting a measure of discretion to the actor *when* complying, or providing the actor with interpretive guidelines *for* complying, with the regulatory principle, realistic solutions to the paradox are very much contextually driven. For this essay's indenture-trustee example, interpretive guidelines are lacking because most lawsuits against indenture trustees are settled.[49] Granting discretion through a business judgment rule, however, has been shown to be an appropriate solution in this particular case.[50]

Contrast this essay's example of servicers of mortgage-backed securities. Not only are interpretive guidelines lacking (due to the complexity and relative novelty of the servicing functions[51]) but granting discretion, whether through a business judgment rule or otherwise, is less clearly appropriate than in the indenture-trustee context.[52] That the servicing function is contractual, however, suggests a solution that might work in this particular context: parties to existing servicing contracts could attempt to renegotiate their contracts *ex post*, and future servicing contracts could be written, to actually provide interpretive guidelines.[53]

It will also be interesting to observe what lessons arise from the FSA's push for more principles-based regulation.[54] The FSA might, for example, be able to avoid the principles paradox by granting good-faith discretionary leeway to firms when complying with FSA regulation[55] or by providing interpretive guidance, perhaps not unlike the UCC's Official Comments.[56] In the latter case, the ultimate question will be whether, given FSA-promulgated principles and guidance, firms

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[48] Recall that under this paradox, an actor who is, or feels he is, subject to unpredictable liability for varying from a principle is likely, especially if he would be a 'deep pocket' in future potential litigation, to hew to the most conservative interpretation of the principle, effectively acting *as if* subject to a rule.

[49] See *supra* nn. 8-10 and accompanying text.

[50] See *supra* nn. 36-39 and accompanying text.

[51] See *supra* nn 22-24 and accompanying text.

[52] See *supra* nn. 43-44 and accompanying text.

[53] See Schwarcz, *supra* n. 18 (proposing this solution).

[54] See *supra* n. 28 and accompanying text.

[55] Cf., Black, Hopper and Band, *supra* n. 32, at p. 197 (observing that '[a] degree of uncertainty can be accepted if firms know that the regulator will allow them a certain "margin of appreciation" in their interpretations, and will respect due efforts to construct a reasonable interpretation and act accordingly').

[56] Cf., *Principles-based Regulation*, *supra* n. 28, at p. 22 (stating that 'firms … concerned that it will be harder to make … predictions in a more principles-based world … will be able to place reliance on materials we [FSA] publish or confirm').

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will be able to predict the consequences of their actions.[57] The answer to this question will partly depend on what type of 'interpretive community'– or relationship between a regulator and regulated parties in which 'the interpretive assumptions and procedures are so widely shared … that the [regulatory principle] bears the same meaning for all'[58] – the FSA fosters with regulated parties.

The concept of an interpretive community also provides a useful perspective from which to view possible distinctions between principles-based regulation enforced by government regulators and principles-based regulation enforced by private lawsuits. Government regulators should be willing to form at least some type of interpretive community with regulated parties.[59] In contrast, plaintiffs and their lawyers are, by definition, adversaries of the regulated party and thus unwilling, at least absent a settlement process, to form such a community; litigants indeed represent the antithesis of an interpretive community.

The result is that, in a governmentally-enforced context, vague terms like 'prudent man' and acting 'in the best interests' of investors may gain definition through use and regulatory feedback,[60] whereas in a privately-enforced context these terms (as this essay demonstrates) will remain vague unless clarified by courts. Absent such clarification, plaintiffs and lawyers will engage in rent-seeking behaviour, claiming that regulated parties failed to comply with their required standards.[61] Like this essay's example of indenture-trustee behaviour, regulated parties will then be motivated to hew to the most conservative interpretation of the principle to avoid litigation.

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[57] Compare comments of Eilis Ferran, Professor of Company and Securities Law, University of Cambridge Faculty of Law, at the University of Cambridge Conference, 12 April 2008 (expressing concern that, because its strategy is to enforce on the basis of principles alone, the FSA's assurance that firms will find it possible to predict the consequences of their actions will be 'just empty words').

[58] See Black, *supra* n. 30. Professor Black also uses the terms 'general rules' to mean what this essay describes as principles and 'precise rules' to mean what this essay describes as rules. For clarity, this essay substitutes the word 'principle' in the above quotation.

[59] Cf., e-mail from Cristie Ford, Assistant Professor, University of British Columbia Faculty of Law, to the author (19 April 2008) (observing that 'Regulators need information from industry to remain relevant, just as industry needs information from regulators to remain compliant').

[60] Cf., Black, *supra* n. 30 (arguing that vague terms 'such as "fair", "reasonable", or "due care"' can gain 'particular meaning in a particular community, in which case [these terms] will be clear to members of that community, although opaque to those outside it').

[61] Such standards being governed by the applicable principle.

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