

performance of the portfolio? Is this situation any different from a transaction in which an investment bank sells stock belonging to one client to another client?

Now suppose that the largest long-term investor in the portfolio, I-Analytics International, has the privilege and responsibility of independently approving the selection of

the CCBS in the portfolio. If I-Analytics uses its own methods and approves the CCBS in the portfolio, how, if at all, should that affect Karol's analysis? Should it matter whether the offering circular states that I-Analytics selected the portfolio? Should it matter that Danimark plans to buy the securities for its own firm account?

INSIDE STORY

HP Discovers Corporate Spying Is an Ultrahazardous Activity

Corporate demand for private investigative services has grown steadily since the 1980s. For example, in 2000 Oracle acknowledged that it had hired detectives who attempted to obtain the trash of a think tank that had defended the aggressive business practices of Oracle's archrival, Microsoft Corporation. Companies that hire private investigators (PIs) generally share three characteristics: (1) they are desperate to obtain sensitive information, (2) they have been unable to obtain the information through ordinary means, and (3) they often feel that the targets of their investigation have been fighting dirty.²⁴ Companies typically subcontract their investigative work to independent PI firms. One of the benefits of subcontracting the work is that it should shield the company from liability because employers are not liable for torts committed by an independent contractor, unless the contractor engages in an ultrahazardous activity. The experience of Hewlett-Packard (HP) has made it clear, however, that both the company and its management may be held liable, legally and in the court of public opinion, for the acts of independent PIs.

In 2005, HP was a \$90 billion publicly held company that prided itself on commitment to uncompromising integrity.²⁵ For several years, however, HP had suffered from leaks of confidential information. The leaks became a subject of increased concern for Patricia Dunn, chair of the board of directors, when an unidentified person leaked the board's selection of Mark Hurd as CEO to replace Carly Fiorina. The leak caused Hurd to reconsider whether he would take the job, and last-minute negotiations were required to allay his concerns. Frustrated by these and other leaks that suggested that a top-level insider was the source, Dunn hired a Boston-based PI, Ron DeLia, to find the source of the leaks. Dunn named the investigation Project Kona because she was vacationing in Hawaii at the time.

24. Michael Orey, *Corporate Snoops*, BUSINESSWEEK.COM, Oct. 8, 2006, http://www.businessweek.com/magazine/content/06_41/b4004008.htm.

25. HP Global Citizenship Report: Ethics and Compliance, available at <http://www.hp.com/hpinfo/globalcitizenship/07gcreport/ethics/approach.html>.

Two months later, Dunn mailed a seven-page report from DeLia to HP's general counsel, Ann Baskins. The report discussed phone record searches and an investigative technique known as "pretexting" whereby a person pretends to be someone else, typically over the phone, in order to obtain information. DeLia later recalled that Baskins was curious about pretexting and concerned about its legality. When Baskins asked DeLia whether pretexting was lawful, DeLia replied that he was aware of no laws that made it illegal or of any criminal prosecutions for pretexting. E-mails showed that pretexting continued through August 2005, when Anthony Gentilucci, the manager of HP Global Security investigations, reported that the investigators still had not discovered the source of the leaks.

When confidential information about a potential HP acquisition was leaked to CNET Networks in January 2006, HP initiated a new investigation, dubbed Kona II. Kevin Hunsaker, the senior HP counsel assigned to the investigations, reported regularly to both Baskins and Dunn. On several occasions, Baskins asked Hunsaker to explore the legality of pretexting further. In response, Hunsaker had several e-mail and phone conversations with DeLia, who continued to assure him that pretexting was legal. Hunsaker also engaged in approximately one hour of online legal research himself. At separate times, DeLia and Gentilucci consulted DeLia's outside attorney, John Kiernan (with whom DeLia shared office space), who confirmed that pretexting was not a crime.

On March 10, 2006, Hunsaker sent a draft report to Dunn, Baskins, and Hurd. It identified board member and renowned physicist George Keyworth II as the source of the leaks. On March 15, Baskins and Dunn told Hurd that the investigators had concluded that Keyworth was the leaker. After consulting with Larry Sonsini, HP's outside attorney, they told the directors at the May 18 board meeting that Keyworth was the leaker. Despite strong protests about how the investigation had been conducted from HP director and prominent venture capitalist Tom Perkins, the board voted six to three to ask

