

# THE VIRTUOUS TRUSTEE?

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What does it take to avoid hidden dangers?



Remember the lesson of Indy:  
Know the rule, interpret the rule, apply the rule





KNOW THE RULE

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# The Rules: State Law

## Duty of Care

- Good faith
- Person of ordinary prudence
- Decisions reasonably believe to be in the foundation's best interest
  - May be afforded protection from business judgment rule or trust indenture

## Duty of Loyalty

- Act unselfishly
- Transactions with the foundation (if allowed) must be fair
- Maintain confidentiality
- Don't take foundation's business/investment opportunities

## Duty of Obedience

- Remain faithful to and pursue the goals of the foundation
- Follow the governing documents
- Follow gift restrictions
- Abide by the law/IRC
- Ensure charitable assets are not diverted



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# The Rules: Federal Law

## Jeopardizing Investments

- Good faith
- Person of ordinary prudence
- Decisions reasonably believe to be in the foundation's best interest
  - May be afforded protection from business judgment rule or trust indenture

## Self-Dealing

- Act unselfishly
- Transactions with the foundation (if allowed) must be fair
- Maintain confidentiality
- Don't take foundation's business/investment opportunities

## Taxable Expenditures

- Remain faithful to and pursue the goals of the foundation
- Follow the governing documents
- Follow gift restrictions
- Abide by the law/IRC
- Ensure charitable assets are not diverted



# Self-Dealing – IRC 4941

- Imposes excise taxes with respect to any direct or indirect act of self-dealing between a PF and a DP
- Two tier tax: Applies to self-dealer and foundation managers who knowingly and willingly approve transaction
- Numerous special rules and exceptions apply



# Jeopardizing Investments – IRC 4944

- Imposes excise taxes with respect to any amount invested in such a manner as to jeopardize the accomplishment of PF's exempt purposes (short-term/long-term)
- Two tier tax: Applies to PF and any foundation manager who knowingly and willingly approved investment (care and prudence is key)
- Important exceptions: Donated investments; PRI's



# Taxable Expenditures – IRC 4945

- Imposes excise taxes with respect to any amount paid or incurred for non-exempt purposes
  - Lobbying, political intervention, grants to individuals for travel, study or similar purposes without IRS pre-approval of procedures, grants for non-charitable purposes, grants to non-public charities without expenditure responsibility
- Two tier tax: Applies to PF and any foundation manager who knowingly and willingly approve expenditure
- Due diligence and proper documentation is essential
  - Beware of special situations: PF to PF, PF to controlled entity, PF to certain SO's



## Operational-type liability may still exist



- Employment claims (e.g. sexual harassment)
- Fraud claims
- Contractual liability (personal guarantee, made in personal name)
- Failure to withhold and pay employment tax
- Aiding and abetting tax fraud
- Defamation

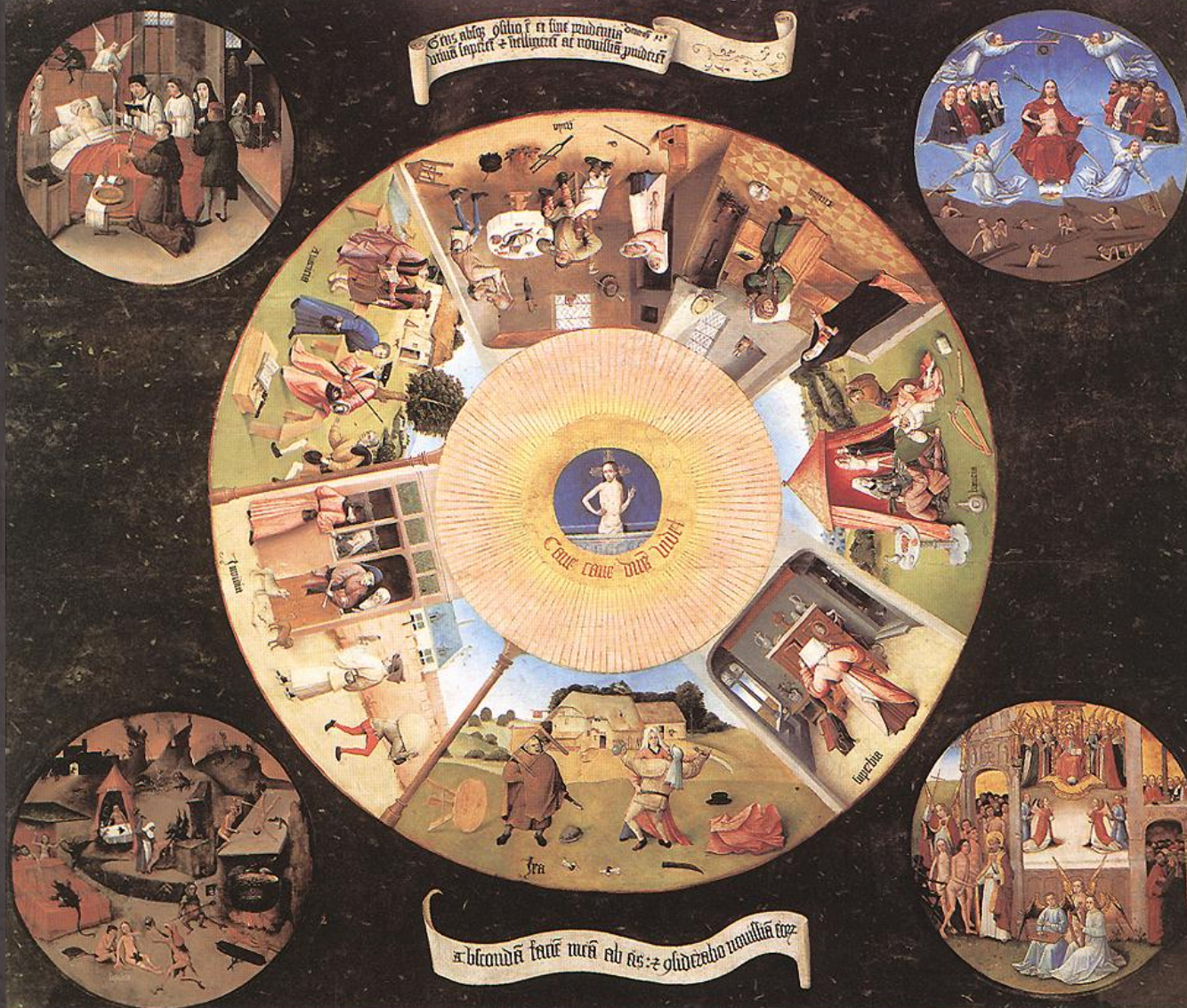


INTERPRET THE RULE

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# What's virtue got to do with it?



## The Seven Deadly Sins

- Hubristic pride
- Greed
- Lust
- Malicious Envy
- Gluttony
- Wrath
- Sloth

vs.

## The Seven Heavenly Virtues

- Humility
- Charity
- Chastity
- Kindness
- Temperance
- Patience
- Diligence

Credit Wikipedia for these lists

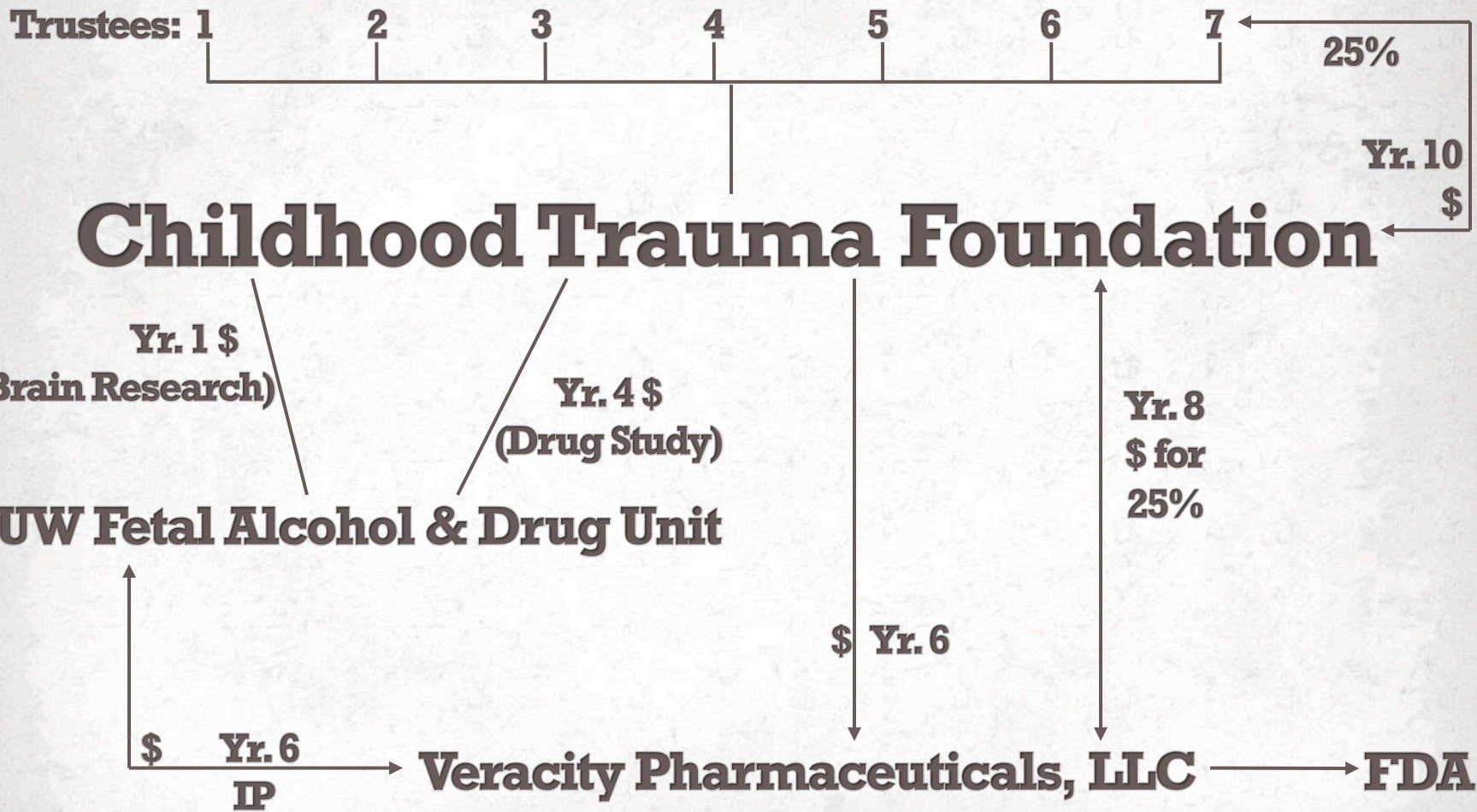
Hieronymus Bosch's *The Seven Deadly Sins and the Four Last Things*



APPLY THE RULE

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# Who's Watching?



**State Attorney General, IRS, and  
the Public a/k/a Whistleblowers**