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AMERICAN FIDUCIARY DUTY IN AN AGE OF NARCISSISM

CALVIN MASSEY*

The law of fiduciary obligation, originating in equity as a device to control abuses of confidence,1 has traditionally served to protect a congeries of relationships that possess one or more of the following characteristics: repose of trust or confidential information in the fiduciary, the presence of potential conflicting interests or duties between the fiduciary and the object of her trust (the beneficiary),2 or the presumptive aroma of undue influence of the fiduciary upon the beneficiary.3 The unifying thread of these relationships is the possibility of abuse of the power that is conferred upon the fiduciary.4 This unsavory possibility is, unfortunately, unavoidable for it results from two basic facts common to all fiduciary relationships. Fiduciaries serve as a substitute for their beneficiaries and hold power conferred upon them by beneficiaries (or third parties, like settlors of a trust, seeking to empower fiduciaries for the good of the beneficiaries) in order to discharge their substitutionary function.5 In order to reap the perceived benefits of substituted

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2 I use the term “beneficiary” to describe all persons to whom a fiduciary owes fiduciary obligations, whether such people be corporate shareholders, partners, principals in an agency relationship, beneficiaries under a trust, entrustors of confidential information, or occupiers of some other relationship to the fiduciary. The word is derived from the French legal term “bénéfice,” meaning “a benefit or advantage...given by the law rather than by agreement of the parties.” Black’s Law Dictionary, 5th ed. (St. Paul: West, 1979) at 142. Though many fiduciary-beneficiary relationships result from agreement, the extent of the fiduciary duty thus imposed is primarily defined by law rather than agreement.
4 See Frankel, ibid at 808-809.
judgment, power must be conferred. But with the power comes the possibility of self-dealing or neglect. Law’s resolution of this dilemma is the fiduciary obligation: the general requirement that the fiduciary be fair, honest, and, most important, act always in the best interest of the beneficiary.

Recognition of the problem and creation of the fiduciary concept to control it represent the faintest outlines of a solution. The first problem is that the method by which American courts develop the law of fiduciary duty is through unreflective resort to analogy, aphorism, and metaphor. As Professor Frankel has put it: “[c]ourts currently examine existing prototypes, such as agency, trust, or bailment that are defined as fiduciary. Then, courts create rules for new fiduciary relations by drawing analogies with these prototypes.”

This approach embodies two assumptions, neither of which has much to recommend it as a mode of analysis. First, courts rarely tell us what facts make the analogy compelling. Rather, this case, involving corporate directors is declared to be just “like” that case, involving trustees. The analytical crux of the matter — the presence of possible abuse of power necessarily vested in the putative fiduciary in order to achieve the substitutional goals — is not addressed directly. An additional unarticulated assumption is that fiduciary obligation is fundamentally uniform, with only minor tailoring necessary for a proper fit to new circumstances. Even if we make the unwarranted assumption that our statement of the fundamental problem which the law of fiduciary obligation seeks to control will guide the courts to a clear determination of when fiduciary obligations are properly imposed and to whom such obligations are owed, we are still left with the considerable burden of charting the extent of the fiduciary’s duty.

While courts seem to assume that a uniform set of obligations follow inexorably upon the conclusion that Mary is a fiduciary, it turns out that they act somewhat differently. Mary’s obligations vary depending upon the circumstances of the relationship that triggered the conclusion that Mary was a fiduciary. At this point the questions became quite specific. If Mary is a majority shareholder in a closely-held corporation, may she sell her shares to the corporation without offering a similar opportunity to minority shareholders? What if Mary, acting in her capacity as the sole director, discharges

6 Ibid. at 804. See also D. DeMott, “Beyond Metaphor: An Analysis of Fiduciary Obligation” [1988] Duke L.J. 879, criticizing judicial reliance on metaphorical use of contract ideas to inform the content of fiduciary obligation.

7 Occasionally, courts will justify this analogous treatment by asserting another analogy: that directors are akin to agents of their corporate shareholder principals. See, for example, Automatic Self-Cleansing Filter Syndicate Company, Limited v. Cuninghame, [1906] 2 Ch. 34 at 42-43.

8 See Sealy, supra, note 1 at 72-81.

Anne, a minority shareholder, from her position as the corporation’s chief financial officer? Does the result turn upon whether Anne is incompetent, or whether Mary is motivated by a desire to deprive Anne of all benefits of her share ownership? Given the fact-specific chameleon nature of the extent of fiduciary obligation, one is left to wonder why the courts seem to think that analogy to “close cases” is the best mode of locating fiduciaries in the first instance.

If the only incoherence were methodological, the problem might be susceptible to fairly easy correction. However, since law reflects (or at least should reflect) the structure of the society of which it is a part, there exists another dimension which is infinitely more difficult to solve in law’s domain. American society is intensely narcissistic. One aspect of that narcissism may well be the somewhat paradoxical expectation that others should conform to altruistic behavior in order to protect oneself from injury. The fiduciary concept is ideally suited to this belief. It is the fiduciary’s responsibility to look out for my welfare, even in the face of my own careless behavior. The trick is to be always a beneficiary and never a fiduciary. But, alas, a society configured not on status (as was medieval England) nor on contract (as was 19th century America) but on omnipresent fiduciary obligation is one where we will, indeed, be our brother’s and sister’s keeper.

Having sketched out this thesis, it is time to turn to a brief survey of recent American law in order to determine whether the future lies in omnipresent fiduciary obligation. Whether or not it does, it is useful to ask if there is some careful methodological correction that can be made in order to locate an appropriate niche for fiduciary obligation, or must we continue with an ad hoc jurisprudence of analogy and metaphor.

DEVELOPMENTS IN AMERICAN FIDUCIARY LAW

Unlike Canada, where the Supreme Court has jurisdiction over fiduciary issues decided by the appeal courts of the provinces, the United States


12 Supreme Court Act, R.S.C. 1985, c. S-26, s. 35, which confers broad jurisdiction upon the Supreme Court of Canada to hear and decide appeals raising questions of provincial law. See also P.W. Hogg, Constitutional Law of Canada, 2d ed. (Toronto: Carswell, 1985) at 171-73.
Supreme Court and the lower federal courts have a much more limited jurisdiction. Most fiduciary issues arise in the United States as a matter of state law, and in accordance with well-settled principles of federal constitutional law, are not susceptible to review by the United States Supreme Court if adequately grounded in state law. Accordingly, developments occur more disjunctively than in Canada, where *Lac Minerals Ltd v. International Corona Resources Ltd* serves as a unifying case on at least some aspects of the law of fiduciary obligation. The American picture is necessarily more fractured, consisting of a mosaic of over fifty pieces.

This survey treats selected areas and selected cases; it is not an exhaustive attempt to capture the entire picture. Rather, my goal is to paint some of the broader outlines in order to develop an appreciation of the main trends. I will first consider developments extending and defining the existence of a fiduciary obligation. I will then consider modifications to the scope of the fiduciary obligation and, finally, I will touch briefly on certain developments which, at first glance, do not seem to have very much to do with fiduciary obligation but which, upon reflection, seem to borrow from some of the legal and societal assumptions pertaining to the fiduciary relationship.

**I. ACQUISITION OF THE FIDUCIARY OBLIGATION**

It sometimes seems that, like mushrooms after a spring rain in the forest, new fiduciary duties are sprouting everywhere. It was traditionally thought that corporate agents owed fiduciary obligations to their shareholder principals, but it was only within the past fifteen years that it was thought that shareholders of closely held corporations, whether occupying majority or minority status, owe a fiduciary duty to each other. Banks may have thought that their depositors were customers, and that by the deposit, the bank merely became indebted to the creditor/depositor, but within the past five years they have learned that, at least in some circumstances, they occupy a fiduciary responsibility to their depositors. As if that were not enough to disturb a

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13 *Michigan v. Long*, 463 U.S. 1032 (1983). The adequate and independent state grounds doctrine is generally thought to be constitutionally required. It arose in *Murdock v. Memphis*, 87 U.S. 590 (1874), a case in which the Court concluded only that Congress had not intended to confer upon the Court jurisdiction of purely state law issues (at 619, 630). In doing so, the Court expressed doubts whether Congress possessed the constitutional power to do so (at 626, 633). Modern commentators, such as Professor Tribe, contend that *Murdock* has a "constitutional resonance" that prevents Congress from conferring on the federal courts the power unilaterally to decide state law issues. See L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, New York: Foundation Press, 1988) at 380.


banker's aplomb, courts in several states have concluded that, in certain ill-defined "special circumstances" bankers become fiduciaries with respect to their borrowers. Franchisors, who may think they are merely selling a license to use a tradename and marketing system, have discovered that, by doing so, they have also donned the mantle of fiduciary. Holders of "working interests" in oil and gas leases have found themselves treated as fiduciaries for the benefit of passive royalty interest holders in the same leases. Even that fictional beast, the corporation, has been found to owe fiduciary obligations to its shareholders, duties independent of those owed by its corporeal managers and directors. Since corporate interests have conventionally been thought of as synonymous with shareholder interests, this is a remarkable analytic leap.

A. SHAREHOLDERS AS FIDUCIARIES INTER SE

When Harry Rodd wished to retire from the Rodd Electrotype Company, a company he had nursed for his working life, the directors, consisting of himself and his children, decided to acquire a portion of his stock for $800 per share. After the corporation had done so, Euphemia Donahue, a minority shareholder, brought suit, contending that her fellow shareholders had

1989, review denied December 7, 1989 (disagreeing with Commercial Cotton that the depositor relationship could give rise to a fiduciary relationship on the part of the bank). Since the California Supreme Court refused to review Price, the law on this point in California remains in conflict.

17 Barrett v. Bank of America, 229 Cal.Rptr 16 at 20-21 (4th Dist. Ct. App. 1986) (special circumstances sufficient to trigger fiduciary obligation when the borrower perceived the relationship with the bank to be "very close" and relied on the bank's advice); Klein v. First Edina National Bank, 196 N.W.2d 619 at 623 (Minn. 1972) (special circumstances sufficient to create fiduciary obligation when the bank knows or has reason to know that the borrower places trust in the bank and is relying on the bank for advice); Deist v. Wachholz, 678 P.2d 188 (Mont. 1984) (bank held to owe a fiduciary obligation to a borrower where the borrower trusted the bank and relied on it for advice); Barnett Bank of West Florida v. Hooper, 498 So.2d 923 (Fla. 1986) (fiduciary obligation to a borrower triggered simply because customer maintained a nine year "confidential relationship" with the bank). Cf. Price v. Wells Fargo Bank, supra, note 16 (rejecting in dictum the suggestion that the bank-borrower relationship might ever be sufficiently special to trigger fiduciary obligations).

18 Arnott v. American Oil Company, 609 F.2d 873 (8th Cir. 1979), cert. denied, 446 U.S. 918 (1980). For a defense of the idea that fiduciary principles should apply in franchising relationships, see H. Brown, "Franchising — A Fiduciary Relationship" (1971) 49 Tex. L. Rev. 650.

19 Manges v. Guerra, 673 S.W.2d 180 at 183-84 (Tex. 1984).

breached their fiduciary obligations owed to her, by denying her an "equal opportunity" to sell her stock back to the corporation. The Massachusetts Supreme Judicial Court agreed with her, and announced the rule that, in a closely held corporation, all stockholders owe fiduciary duties to each other. Just like partners, shareholders in close corporations owe each other "the duty of the finest loyalty.... Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."\(^2\) But this most fastidious conception of fiduciary obligation swiftly declined into the pragmatic, for only a year later, in *Wilkes v. Springside Nursing Home, Inc.*,\(^22\) the same court concluded that, at least with respect to a shareholder's "equal opportunity" of employment with the corporation, fiduciary obligation demanded only that the controlling shareholders demonstrate a "legitimate business purpose." Thereafter, the burden of proof reverts to the complaining shareholder to establish "that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest."\(^23\)

*Donahue* and *Wilkes* fall most readily into the paradigm of conflicting interest cases, although there is an aspect of undue influence, or at least undue power, given the use of majority shareholding muscle in both cases to deprive a fellow shareholder of the economic benefits of ownership. That might explain adoption of a rule that would obligate majority shareholders to act in the best interests of a relatively dependent minority, as has been held to be the case even in the context of publicly held corporations,\(^24\) but hardly suffices to establish the vastly more general proposition that shareholders, whether occupants of minority or majority status, owe an undifferentiated fiduciary obligation to each other. The Massachusetts court leaned heavily on the art of analogy, for it thought that since shareholders in close corporations "fundamentally resemble partners they owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another."\(^25\) But, of course, the relationship is not identical, and the differences between partners and shareholders in a close corporation may be as important as the similarities. Most obviously, partners have unlimited liability for the obligations of the venture;\(^26\) shareholders, of course, do not. That fact alone might account for imposition of reciprocal fiduciary duties in a partnership context, since it implicates strongly the paradigms of undue


\(^{22}\) *Supra*, note 10.

\(^{23}\) Ibid. 663-64.


\(^{26}\) See, for example, Cal. Corp. Code paras 15013, 15015 (West 1977).
influence (or power) as well as that pertaining to conflicting interest. Its absence in the corporate context should have spurred the Massachusetts court to establish its new doctrine on analytical, rather than the vastly weaker analogical grounds that it chose. That may account for the Massachusetts decision in Wilkes to retreat from the initial position, though the Wilkes opinion is devoid of any indication that the court recognized this flaw. Nevertheless, the Donahue logic has been picked up and cited with approval or applied by courts in at least ten other states.\(^{27}\) Kansas, by contrast, has specifically rejected the Donahue approach.\(^{28}\) Other states which have considered the issue occupy a middle ground, either endorsing the less aggressive rule of Wilkes,\(^{29}\) impliedly accepting either Donahue\(^ {30}\) or Wilkes,\(^ {31}\) or concluding that fiduciary obligations attach not simply by virtue of the relationship of shareholders in close corporations, but are triggered by specific facts in each instance.\(^ {32}\)

This last approach has much to commend it, for it enables courts to locate fiduciary obligations only in those instances where there exist clearly identifiable opportunities for self-interested behavior which conflicts with legal duties owed to others, or where the putative fiduciary is entrusted with discretionary power over valuable rights of the beneficiary. Thus, not all shareholders ought to be classified as fiduciaries with respect to their fellow shareholders. Only those shareholders who possess the elements of discretionary and substitutionary power that define the fiduciary obligation ought to be so labelled.

\[\text{B. BANKS, DEPOSITORS AND BORROWERS}\]

It is virtually axiomatic in every American jurisdiction that banks and


depositors occupy the relationship of debtor and creditor, not fiduciary and beneficiary. In the 1985 case of Commercial Cotton Co., Inc. v. United California Bank, one of the California district courts of appeal concluded that because a “depositor...is totally dependent on the banking institution to which it entrusts deposited funds and depends on the bank’s honesty and expertise to protect them...[t]he relationship of bank to depositor is at least quasi-fiduciary....” The differences between fiduciary and quasi-fiduciary status were not revealed, and perhaps not very important to the court, for all that was needed to uphold the judgment against the bank was a finding that the bank’s relationship with its depositor was sufficiently “special” to warrant tort recovery for breach of the implied contractual covenant of good faith and fair dealing. For this purpose, there is evidently no meaningful difference, since both traditional and fledgling fiduciaries occupy this special relationship.

Once again the court relied on analogy, grounding its conclusion on the observation (it is hard to call it reasoning) “that banking and insurance have much in common, both being highly regulated industries performing vital public services substantially affecting the public welfare.” No attempt was made to relate the relationship to some previously recognized paradigm of fiduciary law. Perhaps it is just as well, for a conclusion that a commercial bank deposit is a sufficient entrustment to trigger fiduciary obligations would prove far too much. By this logic, almost any commercial transaction would trigger fiduciary obligations among the participants. Truly this would be a world of omnipresent fiduciary obligation.

A year after Commercial Cotton, another California Court of Appeal simply concluded, with no supporting analysis whatever, that “a similar relationship of trust and confidence exists between a bank and its loan customers....” Having thus found the predicate for a constructive fraud instruction to the jury, the court reversed for lack of the instruction.

Courts in other jurisdictions have at least attempted to bring analytical powers to bear upon the issue. The Montana Supreme Court, in Deist v.

34 Supra, note 16.
35 Ibid. at 554.
36 Ibid.
38 Supra, note 16 at 554.
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Wachholz, 40 grounded a bank's fiduciary duty to its borrower in years of conceded reliance by the borrower and her deceased husband upon the financial advice of a bank official. A similar analytical approach has been employed by appellate courts in Washington, Arizona, and Colorado. 41 In Missouri and Minnesota, courts have gone even further and concluded that circumstances that should make the bank aware that a borrower was seeking its financial advice are sufficient to impose a fiduciary obligation. 42 Though these cases attempt to ground the fiduciary obligation in the paradigm of entrustment, they do not complete the task with much analytical panache. Apart from the Montana and Arizona cases, little distinction is made between years of substantial reliance and entrustment to the advisor bank of confidential information, on the one hand, and more transitory advice, possibly uncoupled from entrustment of confidential information. Surely, this is an important, perhaps critical, inquiry. Why is it so frequently left undone?

An example of such shoddy workmanship is Barnett Bank of West Florida v. Hooper. 43 Richard Hooper was an ordinary depositor of Barnett Bank for eight years. About a year prior to the litigation, Hooper contemplated investing in a tax shelter being promoted by Joe Hosner, another Barnett Bank customer. Hosner introduced Hooper to Edwin Riffel, Barnett Bank's loan officer in charge of Hosner's account. Riffel told Hooper that Hosner's proposal was "sound and had passed Internal Revenue Service scrutiny." 44 Hooper then borrowed $50,000 from Barnett Bank, which he invested in Hosner's tax shelter. Ten months later the bank concluded that Hosner was kiting checks, and dishonored his checks. At that point, Hooper was persuaded by Hosner to borrow another $90,000 from Barnett Bank to invest with Hosner. Hooper did so and Hosner deposited the investment proceeds with Barnett Bank. Ten days later the bank closed Hosner's account and admitted that, but for the $90,000 Hooper loan and deposit, it would have suffered an $87,000 loss.

Plainly Joe Hosner was a scoundrel who duped Richard Hooper. But was

40 Supra, note 17.
42 Klein v. First Edina National Bank, supra, note 17 at 623 (special circumstances sufficient to create a fiduciary obligation when the bank knows or has reason to know that the borrower places trust in the bank and is relying on the bank for advice); Pigg v. Robertson, 549 S.W.2d 597 at 601 (Mo. Ct. App. 1977) (fiduciary obligation can be created by the bank's awareness that the customer was seeking the bank's advice).
43 Supra, note 17.
44 Ibid. at 924.
Barnett Bank Hooper’s fiduciary protector? Yes, said the Florida Supreme Court, because it became “involved in a transaction with a customer with whom it has established a relationship of trust and confidence, and it is a transaction from which the bank is likely to benefit at the customer’s expense....”45 Upon exactly what facts was the conclusion of a “relationship of trust and confidence” grounded? The court was a bit coy on this point, but there are only two possibilities: maintaining a checking account for eight years or a single meeting at which the bank opined that the IRS thought Hosner’s tax shelter complied with the federal income tax code. These facts fit no more easily into the familiar paradigms of fiduciary obligation than the feet of Cinderella’s stepsisters fit into the glass slipper.

The assertion that Barnett Bank was not Richard Hooper’s fiduciary is not to suggest that the bank’s conduct was exemplary, for its actions smack strongly of the same evil as preferential transfers by an insolvent. Knowing its customer Hosner to be insolvent, it willingly extended credit to another customer (Hooper) with the expectation that the loan proceeds would be promptly invested in Hosner’s scheme, thereby enabling the bank to assert its right of setoff and seize the funds. In essence, it made possible a transfer of obligations due the bank from Hosner (an insolvent) to Hooper. By the transaction, Hooper’s financial condition deteriorated and the bank’s improved.

But imposition of a fiduciary obligation upon the bank is not the only way to remedy whatever wrongdoing is implicit in this conduct. The bank’s desire to prefer itself at the expense of others might have been curbed by the simple expedient of denying it the right of setoff against Hosner’s account, at least with respect to funds traceable to the final Hooper loan and investment. While this remedy would have deprived the bank of an $87,000 setoff, it would have left it with a valid $90,000 claim against Hooper. Imposition of fiduciary obligation does more; it deprives the bank of any claim against Hooper and relieves him of his debt to the bank. But this is appropriate only if Barnett Bank owed fiduciary obligations to Hooper, and the unadorned fact that the bank acted in its self-interest should not, by itself, establish the existence of a fiduciary obligation. Self-interested behavior is legally objectionable when an independent duty exists to not engage in it. Some factual predicate other than mere self-preferential behavior is necessary to establish fiduciary obligation.

The problem in Hooper is that the factual predicate for fiduciary obligation is quite thin. Unlike Deist, Hooper had not entrusted his financial future to the bank through a lengthy history of reliance on the bank’s advice. At most, Hooper had been induced to make his initial investment in Hosner’s scheme partly by reason of the bank’s opinion, but there was not evidence that Hooper

45 Ibid. at 925.
had sought out the bank's advice in relation to the second loan and investment. With respect to the final transaction, Hooper was more like a stranger requesting a loan for the purpose of investing in another bank customer which, unknown to the borrower but known by the bank, is on the verge of financial collapse. Imposition of a fiduciary obligation on the bank to disclose this fact, or to deny credit without disclosure, would produce much mischief. Disclosure would likely violate the bank's obligation to its existing (and failing) customer to preserve its financial confidences entrusted by it to the bank. A duty to deny credit either raises unwarranted inferences about the borrower's financial condition or, if the bank explains that it is denying credit only because of the intended purpose of the loan, creates the likelihood of damaging public speculation about the economic health of its first customer.

*Barnett Bank v. Hooper* is thus a case study of the problems that can be created by a swift and lightly considered imposition of fiduciary obligation without rigorous examination of the factual predicates for its existence. In its rush to extricate Richard Hooper from his foolishness and to censure Barnett Bank, the Florida Supreme Court used the mace of fiduciary obligation when a scalpel would have been more in order.

**C. TORTIOUS BREACH OF THE IMPLIED CONTRACTUAL COVENANT OF GOOD FAITH AND FAIR DEALING**

It is not controversial that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Controversy has erupted, however, over the question of whether breach of the implied covenant triggers tort liability. California, as usual, has been the principal venue for this litigation. Initially, California courts permitted tort recovery with respect to an insurer's breach of the covenant, on the grounds that insurers were burdened with a heightened public responsibility and that the relationship between insurer and insured was so "inherently unbalanced" in favor of the insurer that it was a "special" form of quasi-trust.

The "special relationship" of insurers quickly gravitated toward other parties, including, as I have discussed, banks in relationship to their customers. But it also was applied to employers with respect to their employees, thus generating volumes of wrongful dismissal litigation. So far,

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48 The first California case to do so was *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr 722 (Cal. 2nd Dist. Ct. App. 1980).
two other states have followed the California lead, but courts in nine additional states have explicitly rejected the idea. The general utility of the idea of a special relationship became sufficiently evident that a California appeals court sought to identify the factors composing such special relationships. The first was "inherently unequal bargaining position" between the parties, but also included the plaintiff's "vulnerability." The second predicate was a motivation, on the part of the plaintiff, to enter the contract to seek "financial stability and peace of mind." Next was the presumed fact that "ordinary contract damages offered no incentive for defendant not to breach." The last factor was defendant's knowledge of plaintiff's vulnerable position.

These factors at least illustrate an attempt to analyze the attributes of the "undue influence" paradigm of fiduciary obligation. Though the court makes no mention of fiduciary obligation, it is evident that the conceptual logic is one which relies on aspects of both the entrustment and undue influence foundations for fiduciary obligation. Analysis might have been sharper had the court acknowledged that what it was really doing was attempting to define the components of fiduciary obligation in a new context, but at least this approach is a cut above analogy and metaphor.

The factors employed also resonate with the approach taken by Sopinka and McIntyre JJ. in *Lac Minerals v. International Corona Resources.*
Sopinka J. declared that the presence of “dependency or vulnerability” was “indispensable to the existence of the [fiduciary] relationship” and then quoted Wilson's J.’s definition of vulnerability, formulated in Frame v. Smith: “vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power.”

Encompassed in these views are the essential elements of the Wallis court’s test for locating the “special relationships” which trigger tort liability for breach of the implied contractual covenant of good faith and fair dealing. The similarity of approach provides additional certainty that “special relationships” are merely fiduciary obligations under a different nomenclature.

The rapid expansion in California of tort claims predicated upon breach of the implied covenant of good faith came to an abrupt halt in Foley v. Interactive Data Corporation, when the California Supreme Court concluded that tort recovery was not permissible for its breach in an employment context. But the court failed to address the fundamental underlying issue of when the fiduciary obligation of “special relationship” attaches. Thus, in a post-Foley case involving a tort claim by a borrower against a bank for breach of the implied covenant, the California Court of Appeal simply concluded, with no analytical struggle whatever, that the Foley “decision surely precludes the sort of loose extension of tort recovery, based on ‘quasi-fiduciary’ relationship, sanctioned in Commercial Cotton....”

Thus, the California tidal wave of wrongful dismissal litigation, based primarily on predicate findings of a fiduciary relationship, has crested, but in all the tumult there has been precious little critical examination of the predicate. Indeed, there has been almost no forthright recognition that the predicate “special relationship” is, in fact, a fiduciary relationship dressed up in a new linguistic disguise. It is too bad, for the law of fiduciary obligation should be made directly rather than by circumlocution.

D. CORPORATIONS AS FIDUCIARIES TO THEIR SHAREHOLDERS

A few courts have stated that a corporation itself, apart from its managers

56 Ibid. at 599.
58 Ibid. at 137, quoted in Lac Minerals Ltd v. International Corona Resources Ltd, supra, note 14 at 606.
60 Price v. Wells Fargo Bank, supra, note 16 at 741.
61 This section relies heavily upon Professor Deborah DeMott’s critique of this proposition. See DeMott, supra, note 6 at 916-23.
and directors, owes fiduciary duties to its shareholders. Such a suggestion indicates a fundamentally shallow approach to the concept of fiduciary obligation. The justification for imposition of a fiduciary obligation is to prevent or remedy self-interested abuses of power. This, in turn, presupposes that fiduciaries are capable of an interest directly in conflict with that of the beneficiary. But this is not true of corporations because the corporate interest is usually conceived as identical to that of its shareholders, at least when those shareholders are viewed as a collective entity. Even if we broaden, for a moment, the corporate stakeholding interests owed fiduciary obligations to include bondholders, all we have done is redefine the corporation’s interest that much more broadly. An even larger problem is the fact that corporations act only through the medium of real people, its agents. But the standard notion of fiduciary obligation is that a fiduciary holds non-delegable discretion. Thus, the notion of a corporate fiduciary obligation is one which requires delegation of the fiduciary’s non-delegable discretion.

The idea of corporate fiduciary obligation is also in conflict with existing, elementary corporate law. While directors are ultimately responsible for the corporation’s affairs they are not liable for good faith errors of business judgment. Moreover, at least twenty state corporations statutes expressly permit directors to take into account, in performing their fiduciary obligations, the interests of such groups as employees, suppliers, customers, creditors and the local community. The idea of a corporate fiduciary duty is

62 See note 20, supra.
64 See P. D. Finn, Fiduciary Obligations (Sydney: Law Book Company, 1977) at 20.
65 See, for example, Cal. Corp. Code para. 300(a) (West Supp. 1990); Revised Model Business Corp. Act s. 8.01(b).
66 Clark, supra, note 63, at 123-40.
both in irresolvable conflict with these rules and would require that no

corporate action be taken unless it is in the best interests of all the beneficiaries

of this corporate trust. Does this preempt the usual majoritarian rule for

shareholder action and require instead unanimity? If non-shareholder

constituencies are treated as beneficiaries, how can the inevitable conflict

between shareholders, bondholders, customers, employees, and the local

community ever be mediated? At bottom, this position seems incoherent. It is

yet another example of the thoughtless approach commonly taken to the very

consequential decision of clothing an actor with fiduciary obligation.

II. CHANGES IN THE SCOPE OF FIDUCIARY

OBLIGATION

When the existence of fiduciary obligation is conceded problems emerge

with respect to the proper scope of that fiduciary obligation. Justice

Frankfurter once observed that the label "fiduciary" was the beginning, not

the end, of analysis.\textsuperscript{68} The conclusion merely "gives direction to further

inquiry. To whom is he a fiduciary? What obligation does he owe as a

fiduciary?"\textsuperscript{69}

A. FIDUCIARY DUTIES OF CORPORATE DIRECTORS

As the courts have expanded the range of relationships which are labeled

fiduciary, they have also altered the nature of the duty owed by fiduciaries.

Corporate directors have been given great latitude to discount, or even

virtually ignore, the short-term profit maximization goals of their shareholders

in favor of corporate strategies that seek indeterminate longer-term rewards

that benefit a host of corporate stakeholders other than shareholders.\textsuperscript{70} This

trend has become so pronounced that the influential American Law Institute,

in this year's deliberations upon its long-running Corporate Governance

project, voted to retain the statement that corporate "directors may take an

action that has the foreseeable effect of blocking an unsolicited tender offer,

unless the action would \textit{materially} disfavor the long-term interests of the

shareholders."\textsuperscript{71}

Thus, directors are free to disfavor their shareholder/beneficiaries' interest, so long as they do not \textit{materially} do so. An indication of the degree of

\textsuperscript{68} Securities \& Exchange Commission v. Chenery Corporation, 318 U.S. 80 at 85-86 (1943).

\textsuperscript{69} Ibid.

\textsuperscript{70} See the statutes cited in note 67, \textit{supra}. See also Paramount Communications, Inc. v. Time,

Incorporated, 571 A.2d 1140 (Del. 1990).

\textsuperscript{71} \textit{Principles of Corporate Governance: Analysis and Recommendations} (Tentative Draft No.

10) (American Law Institute, 1990) sec. 6.02, at 122-23.
disfavoritism that may be tolerated can be seen from the Delaware Supreme Court's recent decision in Paramount Communications, Inc. v. Time, Incorporated. Time and Warner Communications had agreed to a complex merger, involving Time's issuance of new stock to Warner shareholders. Before the plan could be completed, Paramount announced to Time shareholders that it would pay $200 cash for each Time share. Time's directors reacted by authorizing a friendly tender offer for Warner shares. Paramount and two groups of Time shareholders then brought suit, seeking to enjoin the Time tender for Warner. The Delaware Supreme Court denied the injunction last summer but delayed its opinion until this January. According to the court, Time's directors were "not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy." From the perspective of a Time shareholder, the object of the Time director's trust, the decision resulted in the loss of an opportunity to sell one's shares for $200 cash. Within months of the Time-Warner merger, Time shares hit a low of $87.50. I suppose the Time shareholder selling at $87.50 can console herself with the knowledge that her interests had not been materially disfavored. However much solace there may be in that, there seems little congruence in all of this with the idea that the fiduciary is obligated to place the beneficiaries' interest above all else.

This approach to directorial duty is part of the larger notion that corporate interests are not synonymous with shareholder interests, but inclusive of the interests of other stakeholders as well: consumers, creditors, suppliers, employees, and municipalities. If that is so, then directors have acquired the well-nigh impossible task of determining when to prefer the interests of one beneficiary to that of another. It is perhaps for that reason that current attempts to establish the existence of a fiduciary duty on the part of corporate directors toward corporate bondholders have not yet proven successful. But,
as we have seen, such concerns have not prevented quite significant erosion of the scope of the fiduciary duty owed by directors to shareholders in connection with major corporate reorganizations.

B. DUTIES OF TRUSTEES

Even the scope of the duties owed by that most prototypical of fiduciaries, the trustee, has begun to change. Traditionally, trustees have been required “to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived.”75 But in the final draft of the Third Restatement of the Law of Trusts, approved in May by the American Law Institute, the rule has been significantly altered. The trustee is still under a duty “to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.”76 But now we are told that “[t]his standard...is to be applied to investments not in isolation but in the context of the trust portfolio and as part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.”77 Moreover, unless “it is prudent not to do so,” a trustee is under an obligation “to diversify the investments of the trust.”78

In essence, this is the recognition of modern portfolio theory, and it makes a great deal of sense to do so. Unlike the troubled contemporary development of the fiduciary obligations of corporate directors, this is an example of expansion of the scope of fiduciary obligation in a fashion that responds to the structural outlines of theoretical fiduciary obligation. There is absolutely no reason for a beneficiary to suffer the “uncompensated risk” of an undiversified portfolio. By contrast, there are a great many objections to forcing shareholder beneficiaries to suffer the “uncompensated risk” of a corporate strategy that ignores the shareholders’ direct and immediate economic interests.

III. CONCLUSION

Are these developments reactions to the cultural pursuit of narcissism, or

75 Restatement (Second) Trusts, para. 227 (American Law Institute, 1959). The rule is generally ascribed to Harvard College v. Amory, 26 Mass. (9 Pick.) 446 at 461 (1830) (trustees should “observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested”).
77 Ibid.
78 Ibid.
are they emblematic of the national mania for self-interest? Perhaps the only thing that can be safely said is that these developments provide another glimpse of what Judge Robert Bork has referred to, in his recent book,\(^7\) as the "cultural war" which rages in our time. Its manifestation in the otherwise prosaic garden of fiduciary obligation suggests a struggle between two competing views of complex social organization. One view is rooted squarely in the eighteenth century enlightenment tradition of John Locke, a view that individual liberty and its concomitant, individual responsibility, is paramount. I submit that the law of fiduciary obligation, as we have understood it, is in the mainstream of this tradition. The other view is one which sees the world in collective terms. Groups, rather than individuals, have rights, and obligations should be assigned in order to further the collective benefit of society. Thus, it is wholly appropriate to subjugate the individual claims of shareholders to the greater collective benefit of consumers, workers, suppliers, and communities. Similarly, it is appropriate to saddle employers, or banks, with fiduciary obligations in relation to their employees or customers because to do so will ultimately produce, it is thought, a greater collective benefit than the obverse legal rule. The ultimate destination of this viewpoint seems to be a world where we are all simultaneously fiduciaries and beneficiaries.

This may appear to be a world which makes little sense, but since law reflects social mores we may be observing the beginning of another large transformation in legal thought. If it is historically accurate to say that status governed the law pertaining to the pre-mercantile age and that contract was the legal fuel for the industrial age,\(^8\) perhaps fiduciary obligation will be the mechanism to govern relationships in the post-industrial era.

The industrial age witnessed an unprecedented volume of production and exchange of goods and the law of contract evolved in order to facilitate that process. But the post-industrial society is one in which the principal objects of exchange are information and personal services. Surely this fact increases the possibility that exchanges of confidential information, or even the simple proliferation (without exchange) of vast quantities of information dealing with the most intimate details of our lives, can be most effectively controlled by the imposition of fiduciary obligations upon those entrusted with such information. Moreover, to the extent that fiduciaries can be identified by their discretionary and substitutionary power over others, the mere possession of information about others (if important enough to vest the holder with such power) could trigger fiduciary obligations. Finally, in an economy exchanging services rather than goods the opportunities for undetected neglect surely increase. Perhaps imposition of fiduciary duty in the performance of such


services is the surest way to police such bargains, though it seems a trifle absurd to imagine my barber having a fiduciary obligation in the trimming of my balding pate. Let us not forget that law’s quiver has other arrows, like tort, that may prove more efficacious in controlling mere negligence in the performance of personal services.

As we grope forward in this new age, it would be prudent to keep a firm grasp on the predicates of fiduciary obligation, and remember its roots in equity as a device to remedy breach of trust, lest we entangle ourselves in a net of obligation which strangles rather than supports us.