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MEADOR LECTURE SERIES 2005-2006: FIDUCIARIES

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INTRODUCTION TO THE MEADOR LECTURES ON FIDUCIARIES

Meinhard v. Salmon[1] offers perhaps one of the best known declarations of a fiduciary duty in business law.[2] In that case, Justice Benjamin Cardozo, then Chief Judge of the New York Court of Appeals, explored possible fiduciary duties among participants in a joint venture.[3] Cardozo famously proclaimed that such "[j]oint adventurers, like copartners, owe to one another, while the enterprise continues, *the duty of the finest loyalty*."[4] Although the duty of loyalty examined in *Meinhard* represents but one type of fiduciary duty,[5] Cardozo's language particularly resonates with the reader as it captures the most intuitive notion of a fiduciary—one who by his or her position owes certain others extreme fidelity.

The significance of Cardozo's proclamations in *Meinhard* extends beyond expertly capturing the basic nature of fiduciaries and their duties through his eloquent word-smithing. While Cardozo's writings in *Meinhard* may constitute the prototypical *classic* legal opinion, they are far from entirely *original*. His opinion is noteworthy for drawing on a legal tradition of the fiduciary in addition to originating its own unique phrasing studied by

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1. 164 N.E. 545 (N.Y. 1928).

2. Since its issuance, through the decades, numerous courts have cited the opinion. *See, e.g.*, NLRB v. Amax Coal Co., 453 U.S. 322, 330 (1981); Buffum v. Peter Barceloux Co., 289 U.S. 227, 237 (1933); Merger Mines Corp. v. Grismer, 137 F.2d 335, 340-41 (9th Cir. 1943); Bakalis v. Bressler, 115 N.E.2d 323, 326 (Ill. 1953); Sokoloff v. Harriman Estates Dev. Corp., 754 N.E.2d 184, 189 (N.Y. 2001); Howard v. Murray, 372 N.E.2d 568, 570 (N.Y. 1977); Lichtyger v. Franchard Corp., 223 N.E.2d 869, 874 (N.Y. 1966); Fischer v. KPMG Peat Marwick, 607 N.Y.S.2d 309, 311 (N.Y. App. Div. 1994).

3. *See Meinhard*, 164 N.E. at 545.

4. *Id.* at 546 (emphasis added).

5. In business law alone, courts have proclaimed the existence of other duties, such as the duty of care. ROBERT CHARLES CLARK, CORPORATE LAW 123-36 (1986). And, the increased presence of statutory as well as common law fiduciary duties continues to raise the possible existence of additional, separate fiduciary duties. *See In re* Walt Disney Co. Deriv. Litig., 907 A.2d 693, 753-57 (Del. Ch. 2005) (identifying possible duty of good faith), *aff'd*, 906 A.2d 693 (Del. 2006).

generations of law students. Although Cardozo found no precedent that exactly mimicked the facts of the case before him, he sought to broadly apply existing notions of duties developed in equity:

> Equity refuses to confine within the bounds of classified transactions its precept of a loyalty that is undivided and unselfish. Certain at least it is that a "man obtaining his locus standi, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his copartners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them." Certain it is also that there may be no abuse of special opportunities growing out of a special trust as manager or agent.[6]

Moreover, Cardozo's opinion explicitly reflects his recognition of the place of his holding in a longer line of precedents chastening fiduciaries about their conduct. He recognizes the important role of case law in reinforcing a special level of fidelity for fiduciaries to those with whom they are bound:

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. *It will not consciously be lowered by any judgment of this court*.[7]

Just as Cardozo's opinion is not the first to identify a fiduciary duty, it is not the last. Notions of fiduciaries and their duties continue to permeate the law. Their importance only continues to grow. This is reflected both by efforts to formalize fiduciary duties and to introduce fiduciary concepts into additional areas of law. Accordingly, it is more important than ever to understand fiduciaries and their duties, and it is especially appropriate that the 2005-2006 Meador Lectures focus on fiduciaries.[8]

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6. *See Meinhard*, 164 N.E. at 547-48 (citation omitted) (quoting Cassels v. Stewart, [1881] 6 App. Cas. 64, 73 (H.L.)).

7. *Id.* at 546 (emphasis added) (citation omitted) (quoting Wendt v. Fischer, 154 N.E. 303, 304 (N.Y. 1927)); *cf.* Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1692-99 (1990) (evaluating the rhetoric of *Meinhard*).

8. The Meador Lectures are named in honor of Daniel J. Meador, a graduate of and the former Dean of The University of Alabama School of Law and the James Monroe Professor of Law Emeritus at the University of Virginia School of Law.

FORMALIZATION OF FIDUCIARY DUTIES

Formalization of fiduciary duties occurs in various ways. For instance, law may designate additional, official fiduciaries and also may identify new duties for a broadening array of fiduciaries. Moreover, law may codify those fiduciaries' duties to further enshrine their significance and the nuances of their application.

Because fiduciary doctrine earlier focused on fiduciary duties specifically arising from certain positions one might hold,[9] law's formal recognition of additional fiduciaries deserves notice. The number of officially designated fiduciaries increases with the introduction of new legal vehicles that utilize fiduciaries in their administration. So today, the earlier fiduciaries, such as the administrators of simple trusts, are joined by fiduciaries critical to the supervision of complex plans, such as those envisioned by the Employee Retirement Income Security Act (ERISA). Enacted by Congress in 1974 to protect the interests of participants in employer-sponsored retirement and welfare benefit plans, ERISA adopted a broad definition of statutory fiduciaries,[10] who are subject to rigorous duties of prudence[11] and of fidelity to plan participants.[12] Accordingly, a plan's investment advisors, its administrators, its trustees, and others with either discretionary administrative authority or any authority to deal with plan assets, are ERISA fiduciaries.[13]

Moreover, the types of fiduciary duties facing those who possess them are increasingly formalized as those duties become more categorical. In areas of the law that apply fiduciary principles, it is now common to see a variety of specific duties, each with their own nuances. For instance, students of business organizations law will be familiar not only with the fiduciary duty of loyalty recognized by Cardozo but also with a duty of care.[14] Accordingly, in addition to violating her duties by taking self-serving action at the expense of the business entity and associated persons to which she owes fidelity, a fiduciary also could violate her duties by failing to exercise required prudence in making decisions on behalf of the entity—even if a personal benefit does not inure to her through that poor decision-making.[15]

Over time, courts further recognized different types of violations of each of these separately classified duties. Thus, actions classified as violations of a duty of loyalty might encompass situations where the fiduciary

9. *See* ERNEST VINTER, A TREATISE ON THE HISTORY AND LAW OF FIDUCIARY RELATIONSHIP AND RESULTING TRUSTS 1 (3d ed. 1955) (noting confinement of doctrine "to persons occupying certain recognised fiduciary positions, such as trustees and guardians" prior to being "extended to embrace all those who are placed in any position of trust").

10. *See* 29 U.S.C. § 1002(21)(A) (2000).

11. *See id.* § 1104(a)(1)(B). ERISA also imposes an explicit duty of investment diversification. *See id.* § 1104(a)(1)(C).

12. *See id.* § 1104(a)(1)(A).

13. *See id.* § 1002(21)(A).

14. *See* CLARK, *supra* note 5, at 123-36.

15. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

takes an opportunity from the entity to which she owes a duty of loyalty[16] as well as cases where she engages in other conflicts of interest or self-interested transactions with that entity.[17] As courts and policy-makers more formally distinguish the nuances of different types of fiduciary violations, it becomes possible to craft a variety of legal tests for determining when fiduciary violations occur.[18]

Codification of guidance on various fiduciary duties over time indicates further formalization of these duties and their increasingly nuanced nature. For example, "Section 8.70 [of the Model Business Corporation Act (MBCA)] provides a safe harbor for a director weighing possible involvement with a prospective business opportunity that might constitute a 'corporate opportunity.'"[19] As noted above, limitations on the taking of corporate opportunities from an entity that one owes fidelity constitutes an important part of a fiduciary's duty of loyalty.[20] Accordingly, it is an important legal development to provide a road map—in this instance involving disclosure and approval by other parties of the taking of an opportunity—that a fiduciary might use to avoid violating his position of trust in the eyes of the law.[21] Similarly, Subchapter F of the MBCA provides important guidance on conflicts of interest transactions, another possible pitfall under the duty of loyalty.[22] Taken together with other efforts to identify new fiduciaries and separate fiduciary duties, such codification indicates the increased formality of the law of fiduciaries which in turn reflects the growing importance of fiduciaries.

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16. *See* FRANKLIN A. GEVURTZ, CORPORATION LAW 362-74 (2000).

17. *See id.* at 321-62.

18. *See, e.g.*, Ne. Harbor Golf Club, Inc. v. Harris, 661 A.2d 1146, 1148-52 (Me. 1995) (contrasting different jurisdictions' approaches to corporate opportunity doctrine cases with the American Law Institute's approach in its Principles of Corporate Governance).

19. MODEL BUS. CORP. ACT § 8.70 cmt. (Supp. 2005).

20. *See supra* note 16 and accompanying text; *see also* MODEL BUS. CORP. ACT § 8.70 cmt. (discussing common law doctrine on corporate opportunity).

21. *See* MODEL BUS. CORP. ACT § 8.70. Alternative codification efforts also have attempted to address corporate opportunity issues. *See, e.g.*, 1 AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 5.05 (1994).

22. *See generally* MODEL BUS. CORP. ACT, ch. 8, subchap. F. Of note, in Delaware, codification helped to frame a debate over whether a separate duty of good faith existed alongside the duties of care and loyalty. Section 102(b)(7) of the Delaware General Corporation Code provides corporations with the ability to limit director liability for some fiduciary duty breaches, but not, among other items, for "any breach of the director's duty of loyalty" or "for acts or omissions not in good faith." DEL. GEN. CORP. L. § 102(b)(7) (2004). The legislature's choice not simply to state that corporations could exculpate directors only for violations of a duty of care—the intended purpose of section 102(b)(7)—but to state that corporations cannot exculpate bad faith behavior, potentially implies separate legal significance of that particular behavior. *See* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 346-63 (5th ed. 2006). In tandem with Delaware case law discussing good faith, including opinions related to the recent Disney litigation, a debate arises as to whether a separate duty of good faith now exists. *See id.*; *see also* Kenneth M. Rosen, *Mickey Can You Spare a Dime? DisneyWar, Executive Compensation, Corporate Governance, and Business Law Pedagogy*, 105 MICH. L. REV. 1151 (2007) (discussing the Disney litigation).

APPLICATION OF FIDUCIARY CONCEPTS IN ADDITIONAL AREAS

Further reflecting the significance of fiduciaries to the U.S. legal system is the importation of fiduciary concepts into increasingly diverse areas of the law.[23] These principles have proven useful even where formally designated fiduciaries are not obviously present. Such use is longstanding. As noted in the above discussion of *Meinhard*, Cardozo utilized earlier fiduciary notions from the world of equity to craft his opinion on the law of co-adventurers. Not surprisingly, later jurists drew from Cardozo's eloquently stated vision of fiduciary fidelity in other contexts.

For instance, Cardozo's successors on the New York Court of Appeals cited *Meinhard* in addressing an alleged unfair bargain of an attorney. *Howard v. Murray* involved the court of appeals revisiting an "action to rescind a mortgage, bond and option arrangement[,]" where "[i]n essence, the plaintiffs claim[ed] that the defendant, an attorney specializing in tax law, took unfair advantage of the attorney-client relationship in contriving the agreements . . . sought to be avoided."[24] The opinion suggests allegations that the defendant attorney "had originally been consulted for tax advice on the plaintiffs' desired sale or refinancing of their primary capital asset—a lot and commercial building" and that "the defendant in the end acquired for himself 'the right to purchase . . . property at an amount considerably below its actual value.'"[25] In recalling the case's initial evaluation by the court of appeals, writing for the majority, Judge Wachtler asserted:

> The bargain itself was patently one-sided. We could not say at that point and on that basis alone, however, that the underlying agreement was unfair as a matter of law. Instead we remitted the matter to the Appellate Division for appropriate review in light of our preliminary analysis. Having yet to review the merits, it was for that court to first respond to the essence of the fairness problem: "The crucial question is whether the defendant attorney established that the contract 'was made by the client with full knowledge of all material circumstances known to the attorney, . . . and that a reasonable use was made by the attorney of the confidence reposed in him.'"
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> This classic formulation of the legal standard to be applied on remission assumes a level of scrutiny far "stricter than the morals of the market place."[26]

23. *See* Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795 (1983) (recognizing various types of fiduciaries in numerous areas of the law).

24. 372 N.E.2d 568, 569 (N.Y. 1977).

25. *Id.* at 569 (quoting Howard v. Murray, 346 N.E.2d 238, 239 (N.Y. 1976)).

26. *Id.* at 569-70 (citations omitted) (quoting *Howard*, 346 N.E.2d at 239, and Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).

Thus, the court of appeals infused the settlement of this dispute related to the attorney-client relationship with the spirit of Cardozo's proclamations of fidelity owed by persons in special positions of trust. It seems especially significant that fiduciary concepts now permeate the conception of the legal profession and lawyers' relationship with their clients.[27]

Moreover, the extension of fiduciary concepts to additional areas of the law is not limited to law governing the behavior of members of the legal profession. Creative uses of these concepts know few bounds.[28] Some applications may be more advisable than others. But regardless of the merits of individual applications, the pervasiveness of attempts to utilize fiduciary concepts, at a minimum, make it necessary to further the dialogue on fiduciaries and their duties.

THE MEADOR LECTURES ON FIDUCIARIES

In the 2005-2006 Meador Lectures, three preeminent scholars—Professors Deborah A. DeMott,[29] John H. Langbein,[30] and Jill E. Fisch[31]—offer their own views on fiduciaries. In doing so, they contribute greatly to our understanding of the trends to formalize fiduciary principles and to apply fiduciary concepts in a widespread fashion.

Professor DeMott revisits the fiduciary duty of loyalty in the context of agency law.[32] The context is especially appropriate because fiduciary concepts often share consideration with those from agency law.[33] As Professor DeMott observes, some define agency itself as a fiduciary relationship. Yet, that cannot be the end of a nuanced understanding of agency's fiduciary

27. The lawyer's role as fiduciary continues to be a subject for vigorous dialogue. *See, e.g.*, Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. ILL. L. REV. 1181.

28. *See, e.g.*, John Burritt McArthur, *The Restatement (First) of the Oilfield Operator's Fiduciary Duty*, 45 NAT. RESOURCES J. 587 (2005) (discussing possible recognition of oilfield operator fiduciary responsibilities); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006) (exploring a model of administrative law utilizing fiduciary notions); Paul B. Miller & Charles Weijer, *Fiduciary Obligation in Clinical Research*, 34 J.L. MED. & ETHICS 424, 424 (2006) (calling for "recognition of the fiduciary nature of the relationship between patient-subject and physician-researcher"); Sara R. Kusiak, Comment, *The Case for A.U. (Accountable Universities): Enforcing University Administrator Fiduciary Duties Through Student Derivative Suits*, 56 AM. U. L. REV. 129, 134 (2006) (arguing analogy of students to members of nonprofit corporations and that judges should "allow them to bring derivative suits to enforce the fiduciary duties that university presidents and trustees owe to the school"); Alexandria Streich, Comment, *Spousal Fiduciaries in the Marital Partnership: Marriage Means Business But the Sharks Do Not Have a Code of Conduct*, 34 IDAHO L. REV. 367 (1998) (exploring fiduciary duties of spouses); Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art To Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041 (1996) (using fiduciary concepts to discuss sale of art by museums).

29. Professor DeMott is the David F. Cavers Professor of Law at Duke University School of Law.

30. Professor Langbein is the Sterling Professor of Law and Legal History at Yale University.

31. Professor Fisch is the T.J. Maloney Professor of Business Law and Director of the Center for Corporate, Securities and Financial Law at Fordham Law School.

32. *See* Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1048 (2007).

33. *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2403 (1995).

story. Separate types of fiduciary duties are important because they derive from different legal principles, possess distinctive purposes, and result in unique consequences. Consequently, the presence of a fiduciary duty of *loyalty*, as opposed to other duties, truly matters. Professor DeMott's analysis belies characterizations of the fiduciary duty of loyalty as a product entirely of tort or contract theory and usefully explores the very specific consequences and remedies arising out of an agent's violation of a duty of loyalty. In distinguishing the duty of loyalty from performance duties, Professor DeMott reinforces the impact of fiduciary's duties' categorization over time.

Professor Langbein focuses on fiduciaries in another classic context—trust law—and, in doing so, further illuminates why codification of fiduciary principles is so momentous.[34] He updates the story of codification by reflecting on the Uniform Trust Code of 2000 and its adoption by various states as part of a larger story of trust law moving from judge constructed law to statute law. As he explains, while the Uniform Trust Code might be viewed as "the first national-level codification of the American law of trusts," it nonetheless follows in the wake of other uniform acts of the last century that helped to shape trust law in the United States.[35] Although trust law and its principles are longstanding, Professor Langbein proffers why statutory law is increasingly significant for trust law's development as it is with rapidly developing and complex new areas of the law that rely on statutes for quick implementation of legal change. He suggests that the very nature of trusts and their purposes changed over the last century, making it important to quickly implement those changes in statute to reflect the changing tasks of the trustee that acts as a fiduciary—trustees engaged in very active management of different types of assets than their predecessors. Thus, the formalization of fiduciary principles through codification possesses very practical consequences.

Finally, Professor Fisch provides important insight into attempts to apply fiduciary concepts across a broadening swath of the law.[36] She reflects on the regulation of research analysts following problems at various public companies from Enron to WorldCom. Such failures raised questions about potential biases of analysts that study such companies and whether those analysts should be regulated as fiduciaries. Although such regulation might be attractive to some, Professor Fisch identifies costs of enforcing any mandatory independence for analysts and their treatment as fiduciaries. She suggests that more limited reforms, short of fiduciary liability with its accompanying uncertain scope, might prove the best solution. In reaching her conclusions, Professor Fisch contrasts the role of analysts with that of other individuals with heightened independence requirements, such as public

34. *See* John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069 (2007).

35. *Id.* at 1069-71.

36. *See* Jill E. Fisch, *Fiduciary Duties and the Analyst Scandals*, 58 ALA. L. REV. 1083 (2007).

auditors. Significantly, she imparts an important lesson—caution must precede wholesale incorporation of fiduciary concepts into additional areas of the law.

Thus, taken together, the following Meador Lectures reveal both the growing importance of the law of fiduciaries as well as that law's limits.