Tulsa Law Review

Volume 41
Number 3 *Disputed Concepts in Contemporary Business Association Law: Discussion on Fiduciary Duty and Capital Lock-in* Volume 41 | Number 3

Spring 2006

Symposium Foreword

Barbara K. Bucholtz

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation
Barbara K. Bucholtz, *Symposium Foreword*, 41 Tulsa L. Rev. 405 (2013).

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol41/iss3/1

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

SYMPOSIUM FOREWORD

Barbara K. Bucholtz*

I. INTRODUCTION

In this symposium, the editors of the *Tulsa Law Review* have undertaken the important challenge of illuminating the contours of disputed concepts in contemporary business association law. Through the analysis of leading scholars in the field, the following articles clarify the nature of those disputes. The first is the concept of fiduciary duty. Under the title of "A Question of Duty," this concept was explored at the 2006 Annual Meeting of the American Association of Law Schools Section on Agency, Partnership, Limited Liability Companies, and Unincorporated Associations.[1] The authors of the articles in this symposium that speak about the topic of fiduciary duty presented earlier versions of their work at that meeting. The second concept discussed is the "capital lock-in" or "asset partitioning" characteristic of corporations. New scholarship in the field of corporate law and in the larger context of business association law has isolated for investigation this unique characteristic of corporations that serves as an additional analytical tool for understanding the nature and enduring utility of the corporate entity. We are most fortunate to have leading scholars in the field shed light on the concept in this symposium of the *Tulsa Law Review*.

The topics of fiduciary duty and capital lock-in have engaged business association law scholars in ongoing debate, and the editors of this symposium have selected scholars whose work is representative of the excellence and rigor those critical issues demand. With regard to each topic, the dialectics of argument in the articles go a long way toward identifying the pivotal issues involved, clarifying the analysis required, and illuminating the underlying public policies at stake. A brief overview of each article follows.

II. FIDUCIARY DUTIES

Debates over the proper place of fiduciary duties in business association law are longstanding. To what extent, if any, must business people curtail the pursuit of their own self-interest by complying with a duty owed to the business entity itself or to other participants within the business? The current version of the debate appears to create dialectic between those who favor deference to a freedom of contract model—usually

---

* Barbara K. Bucholtz is a professor at the University of Tulsa College of Law.

1. Assn. Am. L. Schs., Annual Meeting, *Empirical Scholarship: What Should We Study and How Should We Study It?* (D.C., Jan. 3–7, 2006).

dubbed "contractarians"—and those who espouse the imposition of a fiduciary restraint—sometimes called "fiduciarians."

In his article, *Fiduciary Duties and Unincorporated Business Entities: In Defense of the "Manifestly Unreasonable" Standard*, Professor Mark Loewenstein observes that contractarians have seemed to prevail.[2] As evidence, he points to a clear trend away from statutorily imposed fiduciary duties in unincorporated business association law. While the first Uniform Act of 1914 ("UPA") failed to delineate any fiduciary duties expressly, it was evident that under UPA, mandatory fiduciary duties were implied by UPA's presumptive reliance upon common law agency principles and the fiduciary duties inherent in the common law of agency. By contrast, the three modern Uniform Acts that followed: the revised Uniform Partnership Act of 1997, the Uniform Limited Liability Company Act of 1996, and the Uniform Limited Partnership Act of 2001, expressly gave parties latitude to contract around fiduciary duties, to a large extent. Loewenstein notes that post-RUPA, Delaware and other states have moved even farther in the direction of the contractarians' freedom of contract model by permitting parties to disclaim fiduciary duties.[3]

Nonetheless, a consensus of states seems to support a "middle ground" approach, permitting parties to limit fiduciary duties but only to the extent that "the limitation is 'not manifestly unreasonable.'"[4] Loewenstein supports this middle position on the basis of pragmatism. First because he fears that without this express limitation courts will insinuate their own notions of fairness into their analyses with uncertain and inappropriate results. Like Karl Llewellyn, he believes that "'covert tools are never reliable tools.'"[5] For example, the judge-made standard of unconscionability would be an inappropriate substitute for fiduciary duties in business governance because that doctrine was crafted to deal with unequal bargain power in contract formation—especially of consumer products contracts—where unconscionability must be evidenced both procedurally (no meaningful choice) and substantively (unfair terms). That kind of doctrine is simply unsuitable to an investor contract where there are investment options. Nonetheless, Loewenstein argues, courts are not wrong to insist that the public expects some protection from opportunistic overreaching by those who manage the public's investments. He concludes that a legislatively-devised standard like the "manifestly unreasonable" limitation imposed by many states upon fiduciary disclaimers "[sends] an unmistakable message to the courts—the agreement of the parties is to be given considerable, but not complete, deference."[6]

Like Loewenstein, Professor Robert W. Hillman frames the conundrum of fiduciary duties under two templates. The first template is the tension between the contractarian perspective and the fiduciarian view; the second template is the alternative source of law issue—legislative solutions, on the one hand, and decisional doctrine

2. 41 Tulsa L. Rev. 411 (2006).

3. *Id.*

4. *Id.* at 414.

5. *Id.* at 414 n. 21 (citing Karl N. Llewellyn, *Book Review*, 52 Harv. L. Rev. 700, 703 (1939) (reviewing O. Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (Sweet & Marshall 1937))); *see id.* at 414.

6. Loewenstein, *supra* n. 2, at 440.

developed by the judiciary, on the other. The particular focus of Hillman's analysis in his article, *Closely-Held Firms and the Common Law of Fiduciary Duty: What Explains the Enduring Qualities of a Punctilio?*, is the issue of fiduciary duty as it relates to closely-held businesses.[7] Hillman presents a fascinating perspective on the common law approaches to fiduciary duty. Offering some empirical support for his thesis, he argues persuasively that while judicial decisions in fiduciary duty cases over time evince all the indeterminacies of case-by-case or totality of the circumstances analysis, there have also been remarkable coherence and stability in the standards courts bring to bear on these cases. Using *Meinhard v. Salmon*[8] as the enduring exemplar of fiduciarianism and a fundamental standard for the common law on this issue, Hillman argues that in spite of *Meinhard*'s academic detractors, its authority in case law has continued since its inception virtually unabated. Further, there is some evidence that in the most recent five year period (2000 to 2005), citation to *Meinhard* as an authority may be increasing. The tenacity of the high standard set by *Meinhard* for parties in closely-held business entities seems remarkable in light of Loewenstein's demonstration that legislatures have moved in the opposite direction. It may be that courts reflect a public expectation that private investments will be protected from opportunistic overreaching.[9]

Professor Reza Dibadj is an unabashed fiduciarian. His article, *The Misguided Transformation of Loyalty into Contract*, situates fiduciary business standards as a species of common law agency principles.[10] He argues that the most recent uniform laws and Delaware statutes that have undermined the efficacy of fiduciary duties are misguided. He supports his position on several grounds. Moreover, because the duty of loyalty is considered to be the "most prominent" fiduciary duty in business association law, he uses it to illustrate his thesis that contractarianism is inherently flawed.[11]

First, he argues that conflating business association law with contract law elides the important distinction between a relationship of entrustment with a relationship of reciprocity. Entrustment requires that the party who has control over the business investments of another act as a fiduciary. Thus, the contractual duty of good faith and fair dealing—which presupposes relatively equal bargaining power between two self-interested principals—is no substitute for a fiduciary duty of loyalty in a relationship in which one party has control of another party's assets. Second, Dibadj argues that uniform and state statutes that have adopted the contractarian approach ignore the question of to whom or to what the duty of loyalty is owed and any differences of obligation entailed in that distinction.[12]

Dibadj also challenges the contractarian perspective for its reliance on neoclassical "law and economics" theory. That theory, he argues, has failed to live up to its doctrinal claims and has proven to be out of touch with the realities of business relationships.[13]

7. 41 Tulsa L. Rev. 441 (2006).
8. 164 N.E. 545 (N.Y. 1928).
9. Hillman, *supra* n. 7.
10. 41 Tulsa L. Rev. 451 (2006).
11. *Id.*
12. *Id.*
13. *Id.*

Finally, Dibadj asserts that the contractarian turn in uniform and Delaware statutes ignores the importance of social norms and tradition in law. Moreover, like Lowenstein and Hillman, Dibadj observes that courts have been markedly more cognizant of these imbedded aspects of law and, apparently for that reason, much more reluctant to follow the contractarian turn associated with statutory law.[14]

In spite of the foregoing, Dibadj fears the weight of the law seems to favor elimination of fiduciary duties. But, he concludes by suggesting an ironic twist that: "Unsurprisingly, the law is already finding it necessary to impose layers of regulation to compensate for eviscerated fiduciary duties."[15]

In *A Good Faith Revival of Duty of Care Liability in Business Organization Law*, Professor Carter G. Bishop undertakes a detailed analysis of fiduciary standards under Delaware corporate law and compares them with similar standards under the Uniform Acts covering unincorporated business and nonprofit entities.[16] In so doing, Bishop cautions us that the analytical boundaries separating corporate law norms of fiduciary duties from those of the law pertaining to unincorporated forms are porous, and he illuminates the tenuous demarcation between these two areas of law by reference to Delaware case law. Thus, he demonstrates that errors in Delaware's exculpatory corporate law, relative to fiduciary duties, can insinuate themselves into its unincorporated business entity law. This is especially true of the duty of care, which Bishop notes is not—precisely—a "fiduciary" one. That misnomer notwithstanding, Bishop explicates his thesis by revisiting the evolution—or, perhaps more accurately, devolution—of Delaware's "triad" of corporate fiduciary duties: loyalty, care, and the recently minted "duty of good faith," which—Bishop hastens to add—is not separately actionable. His robust, succinct, and precise rendition of that chronology culminates in the 2006 *In re Walt Disney Co. Derivative Litigation*[17] decision which concluded that any negligence in the Board's decisions failed to indicate bad faith, failed to prove self-benefit, and, thereby, exonerated the directors of liability premised upon breach of fiduciary duties. Analyzing the dangers inherent in the rationale of the court in *Disney*, along with that of its predecessor, *Cede & Co. v. Technicolor, Inc.*,[18] Bishop argues for an approach that would revive both the duty of care—employing a bad faith standard to eviscerate exculpatory norms under an ordinary negligence test—and the fiduciary duty of loyalty by eliminating proof of self-benefit and replacing it with a more proactive duty of "positive devotion and attention to the best interests of the entity."[19]

In sum, the reader will find that, from a shared body of knowledge, the authors have gleaned very different insights, each of which will serve to enrich our understanding of the nature and efficacy of fiduciary duties in business governance law.

---

14. *Id.*
15. Dibadj, *supra* n. 10, at 476.
16. 41 Tulsa L. Rev. 479 (2006).
17. 2006 WL 1562466 (Del. June 8, 2006).
18. 634 A.2d 345 (Del. 1993).
19. Bishop, *supra* n. 16, at 511.

III. CAPITAL LOCK-IN/ASSET PARTITIONING

While the dispute over the efficacy of mandatory fiduciary duties is longstanding, the second topic has only recently been identified as one that can enhance our ability properly to assess the singular nature of the corporate business entity.

Professor Margaret Blair, a path-breaking scholar on the topic, guides us through this portion of the symposium with her article, *On Models, Metaphors, Rhetoric, and the Law*,[20] commenting on two pieces that dispute some of her own work in the area,[21] as well as her assessment of Hillman's article,[22] which acts as an interesting bridge between the two topics in this law review symposium by suggesting an interplay, as Blair points out, between the two.

The recognition of the "lock-in" characteristic of the corporate entity is one that is rich in providing important insights into corporate governance. In a larger sense, the identification of the lock-in characteristic is strikingly reminiscent of Professor Steven L. Winter's perspective in his monumental work on law and cognitive theory, appearing first in a series of law review articles and then culminating in his book, *A Clearing in the Forest: Law, Life, and Mind.*[23] In that body of work, Winter shows how legal analysis follows patterns of cognition or critical thinking by, in the first instance, breaking entities down into conceptual categories and then employing metaphors that enlighten understanding of the new categories by reference to their similarities with more familiar categories or models.

Here, having identified the category of lock-in for interrogation, scholarly metaphors are introduced to expand our understanding of the category. Indeed, in accordance with the title of Blair's article, she has identified and critiqued the metaphors (or models) introduced by the other three scholars in their attempt to shed light on the nature of the corporation and, expressly or inferentially, on the category (or corporate characteristic) of lock-in. At the outset, Blair cautions, and Winter would certainly concur, that while metaphors and models can aid in understanding conceptual categories, they are, by their very nature, incomplete descriptions and can, therefore, be misleading. Or, as Winter might put it, the answer to the ineluctably incomplete nature of a particular metaphor or model is more (admittedly) incomplete metaphors or models. Each sheds light on different aspects of the subject category under interrogation. Framing the topic in terms of the utility of metaphors employed, as Blair does, is an effective way of addressing the specific corporate characteristics of lock-in.[24]

The dominant model and metaphor for corporate entities is the "nexus of contracts" model espoused by the contractarians, on the one hand, and the "legal person" metaphor espoused by other scholars, like fiduciarians. It would seem that the lock-in characteristic, because it is a mandate of the state, fits more comfortably within the legal

---

20. 41 Tulsa L. Rev. 515 (2006).

21. *See* Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law beyond Asset Partitioning and Legal Personality*, 41 Tulsa L. Rev. 543 (2006); Larry E. Ribstein, *Should History Lock in Lock-in?* 41 Tulsa L. Rev. 525 (2006).

22. *Supra* n. 7.

23. Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (U. Chi. Press 2001).

24. Blair, *supra* n. 20.

person metaphor for the corporation. Indeed, even contractarians like Professor Larry E. Ribstein concede that lock-in is a characteristic that may not fit a nexus of contracts model intuitively.[25] But, he hastens to add that, at the same time, there is no impediment to freely contracting lock-in, and, on that point, he challenges Blair's historical view that the corporate form inevitably became the preferred business model because of its unique lock-in feature. Moreover, he argues that lock-in is not an unqualified blessing and he notes various costs associated with it. In response, Blair acknowledges that the corporate form was not historically inevitable, but she also questions whether the contractarian metaphor that Ribstein employs is not descriptively incomplete. Furthermore, she suggests that its utility to contractarians is not descriptive but rather normative: to further the anti-regulatory, freedom of contract policies scholars like Ribstein espouse.

Professor Larry Catá Backer's view of the corporate form utilizes both the nexus of contract metaphor and the legal person metaphor.[26] He synthesizes the two metaphors by demonstrating the nexus of contracts that corporations envelop require the imprimatur and infrastructure of the state to enforce these corporate bargains. However, he acknowledges the limitations of the legal person model in describing multi-national corporations because their ability to reach beyond the authority of any particular state affords them a degree of "enterprise autonomy."[27]

Hillman offers a fourth perspective on the dominant corporate metaphors. As discussed above, he revisits the trend in business association statutory law toward a contractarian approach that allows business entities to contract around previously mandatory fiduciary duties. But, as an empirical matter, he demonstrates the enduring strength of those mandatory norms in contemporary case law, which he posits as some evidence that the legal person metaphor continues to resonate within the legal culture.[28]

Taken together, these four articles interact in interesting ways as a dialogic that helps to inform our understanding of the corporate characteristic of capital lock-in and, in the larger sense, the nature of the corporation.

---

25. *See* Ribstein, *supra* n. 21.
26. *See* Backer, *supra* n. 21.
27. *Id.*
28. Hillman, *supra* n. 7.