

# DELAWARE’S FIDUCIARY IMAGINATION: GOING-PRIVATES AND LORD ELDON’S REPRISE

DAVID KERSHAW\*

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\* Professor of Law, London School of Economics and Political Science. I am very grateful for comments on the article from Amir Licht and Andrew Tuch and for comments from the participants at the Washington University in St. Louis Law School Conference on ‘Public Companies at Crossroads’.

## INTRODUCTION

What does it mean to be a fiduciary and does it really matter whether the law labels a person a fiduciary or not? Until the late twentieth century Delaware corporate law could have given a singular, coherent answer to these questions. Today, to its detriment, it is no longer able to do so.

In Delaware's original understanding of fiduciary relations, a fiduciary was merely a legal label applied to a person who is subject to legal obligations arising from her undertaking to perform a representative position or role and her empowerment to perform that role. This conception is referred to in this article as the "power/undertaking conception" of fiduciary relations. In this conception, the fiduciary duties she owes are not the product of her being designated "a fiduciary," rather they arise from or are implied in the undertaking and empowerment. Victor Morawetz, one of New York's leading late-nineteenth century corporate lawyers, referred to these obligations as the "implied condition[s]"<sup>1</sup> of delegated discretion. Earlier, and more foundationally, as Lord Holt put it in the 1703 case of *Coggs v. Barnard*: "[the] undertaking obliges the undertaker to a diligent management."<sup>2</sup> Accordingly, in this power/undertaking conception of fiduciary relations, the duty of good faith (which evolved into the business judgment rule)<sup>3</sup> and the duty of care are inherent in the agreement to perform and to be empowered to perform the representational role. Similarly, the duty to avoid a conflict of duty and personal interest, which evolved in the United States to provide for fairness review of self-dealing transactions,<sup>4</sup> is a corollary of the agreement to act in good faith to further the purpose for which the power was delegated—it ensures that the exercise of the delegated discretion is not infected with personal financial interest.<sup>5</sup> As Lord Eldon, the father of modern fiduciary law, put it in 1802, a fiduciary cannot "manage for the benefit and advantage of himself."<sup>6</sup>

These obligations orbit the fiduciary's exercise of delegated power. In the corporate context, as those powers are the corporation's powers and as the corporation appoints those who exercise those powers, necessarily these fiduciary duties are owed to and enforced by the corporation. Likewise, anyone who usurps corporate power, such as a majority shareholder who

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1. VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 483 (2d ed. 1886).

2. (1703) 92 Eng. Rep. 107, 113; 2 Ld. Raym. 909, 919 (QB).

3. See DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 68–92 (2018).

4. See *id.* at 329–41 and 361–68 (requiring a fair, arm's length price).

5. See MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 32–34, 61–62 (2010).

6. *Ex parte Lacey* (1802) 31 Eng. Rep. 1228, 1228; 6 Ves. 625, 626.

controls and directs the exercise of board power, owes the consequential duties to the corporation.

This power/undertaking conception of fiduciary relations was *the* conception of fiduciary relations in U.S. corporate law in the nineteenth and most of the twentieth century. It is a conception upon which most of the fiduciary law taught in a JD corporations course today was structured and built. However, commencing in the mid-twentieth century, and in the late twentieth century in Delaware corporate law, a different conception of the fiduciary was born; a conception also rooted in Lord Eldon's equity jurisprudence and the concern about the ability of one party to take advantage of and exercise undue influence over another in the context of transactions such as contracts and gifts. When applicable this *undue influence* doctrine required proof that the transaction was the product of a fair process, and in some instances, evidence that the agreed upon price was also fair. This doctrine, therefore, provided a separate legal pathway to entire fairness review.

Although this undue influence doctrine has nothing to do with traditional fiduciary obligation it was often applicable to power/undertaking fiduciaries who, in relation to certain transactions, were able to take advantage of their charge and exercise influence.<sup>7</sup> It was, however, equally applicable to persons in such a superior position, even where they were not power/undertaking fiduciaries. But although such relations of potential advantage and influence were never "fiduciary" relations, courts in several U.S. states (including Delaware) in the early- to mid-20th century began to designate such relations of superiority and inferiority as fiduciary. This article explores the foundations and infusion of this "influence conception" of fiduciary relations, with particular regard to its central and recent role in Delaware corporate law on going-private transactions.<sup>8</sup>

As a result of this influence infusion, Delaware courts began to deploy the designation of fiduciary and the idea of fiduciary duties in relation to two *wholly separate legal ideas*, generating within Delaware law two independent structures of "fiduciary" obligation. In one, the traditional power/undertaking conception, the existence of fiduciary duties is dependent on the transfer of power and the duties are the discrete, endogenous product of the undertaking to act and the empowerment to act. The term fiduciary in this conception merely labels someone who is subject to such obligation—it is *a product* not a source *of obligation*. In the other,

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7. The undue influence doctrine's application to directors provided a separate pathway to fairness review (price and process) of directorial self-dealing. See KERSHAW, *supra* note 3, at 341–69.

8. In this article "going-private transactions" and "going-privates" refer to transactions involving the purchase by the majority shareholder/parent company of the minority shares in the subsidiary company or the merger of parent and subsidiary.

the influence conception, duty is sourced in an abstract and broad loyalty obligation *which is the product of being designated a fiduciary*. And in this conception, there is no power limitation on who can be a fiduciary; the designation is a function of the extent of the superiority and domination, and a judicially imposed threshold for such extent. These two conceptions, therefore, offer profoundly different ideas about the nature and source of duty and obligation and provide for very different judicial roles in delineating fiduciary obligation.

Delaware corporate law, however, has no sight of how the conception of the fiduciary has been transformed in the past half century; it pays little attention to what is under the bonnet of the concepts of the fiduciary and fiduciary duty, and its standard bearers such as entire fairness. It has therefore no sight of how the influence conception has affected the way it thinks about fiduciary obligation. Today Delaware law is peppered with questions and problems which are the product of the structural changes that the introduction of the fiduciary influence conception has wrought. This article focuses only on the fiduciary duties of controlling shareholders and on the question of whether directors owe direct duties of care to creditors, but there are other problems—for example, Delaware's difficulty in distinguishing between direct and derivative actions. In several instances, these questions and problems would have made no sense and would have been given short shrift in the absence of this conceptual and structural change.

Moreover, policy debate and empirical inquiry evolve from these new questions, but often with no sense of why they became questions at all. Without close attention to the evolution and source of these legal ideas, concepts, and structures, our policy debates are flying blind. This is not to say, of course, that the legal questions and answers which are the product of these new structures, and the changes to the judicial role which they bring about, do not offer superior tools and methods for addressing corporate activity and relations; they may. But as a prerequisite to their effective evaluation, we should know where these questions come from. Attention to the conceptual evolution of the idea of the fiduciary set forth in this article allows us to see where they come from.

The article is structured as follows. Part I explores the different conceptions of fiduciary relations. It first explores the power/undertaking conception of fiduciary relations in relation to directors and majority shareholders and shows how statements in U.S. corporate law that appear inconsistent with it—because they suggest duties are owed outside of the corporation, such as directorial duties to stockholders or majority shareholder duties to minority shareholders—are often on closer inspection not inconsistent at all. Part I then turns to the nature and “fiduciarization”

of the undue influence doctrine, its importation into Delaware law, and its implications for the nature and structure of fiduciary obligation. Part II of the Article considers the application of these fiduciary conceptions to controlling shareholders, first highlighting the initial dominance in U.S. law generally, and Delaware law in particular, of the power/undertaking conception, and second, documenting the rise and impact of the influence conception in Delaware going-private law. Part III provides another example of the effects of the infusion of the fiduciary influence conception in the context of whether director's fiduciary duties are owed directly to creditors. The Conclusion concludes.

### I. HISTORICAL CONCEPTIONS OF THE FIDUCIARY RELATION

Much digital ink has been spilt over the nature and categorization of fiduciary relationships and obligations.<sup>9</sup> For example, for Professors De Mott and (now Mr. Justice) Finn, central to the determination of whether a person is a fiduciary is whether the relationship generates a legitimate or reasonable expectation of loyalty on the part of the beneficiary;<sup>10</sup> for Professors Frankel, Miller, Lionel Smith, Shepherd, and Weinrib the transfer or delegation of power to act on behalf of another is the defining characteristic or hallmark of fiduciary relations;<sup>11</sup> whereas for Professors Scott and (now Mr. Justice) Edelman, the fiduciary obligation and the label fiduciary is sourced in the undertaking to act on behalf of another given by the fiduciary;<sup>12</sup> and for Professor Gordon Smith, fiduciary and non-fiduciary relations are demarcated by what it is in relation to which the fiduciary or non-fiduciary acts—where critical resources exposed to opportunistic behaviour are subject to fiduciary protection.<sup>13</sup>

Two factors account for this theoretical variation and disagreement: conceptual emphasis and the jurisdictional variation in the legal ideas contained within fiduciary discourse. The first factor is straightforward.

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9. See generally Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE. L.J. 879, 908–15; see also CONAGLEN, *supra* note 5, at 245–54.

10. Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 936 (2006); see also *Grimaldi v Chameleon Mining NL [No. 2]* (2012) 287 ALR 22, 57–58 (Austl.).

11. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 808–09 (1983) (noting also the “substitution role of the fiduciary”); Paul B. Miller, *The Idea of Status in Fiduciary Law*, in CONTRACT, STATUS, AND FIDUCIARY LAW 25, 48 (Paul B. Miller & Andrew S. Gold eds., 2016); Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 L. Q. REV. 608, 610 (2014); J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* 96 (1981); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L. J. 1, 7 (1975).

12. Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 544 (1949); James Edelman, *When Do Fiduciary Duties Arise?*, 126 L. Q. REV. 302, 314 (2010).

13. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402 (2002).

Much of the theoretical literature has more in common than the theories often allow for. Gordon Smith, for example, focuses on critical resources, but his theory assumes an agreement to act and empowerment.<sup>14</sup> Tamar Frankel, Lionel Smith, and Jay Shepherd elevate power, but they necessarily make and acknowledge space for the consent and agreement to act, which is commonly referred to as a fiduciary's undertaking.<sup>15</sup> That is, for the student of fiduciary law there is more agreement than the number of articles and theories of fiduciary law might suggest. The second factor is more significant and drives theory proliferation and actual disagreement: courts in some jurisdictions, most notably in the United States, have come to use the idea of fiduciary relations to reflect what are, historically situated, *two* distinctive legal ideas. These ideas address distinctive problems and have distinctive, indeed wholly unrelated, understandings of the nature and scope of any duty applicable to the respective problems; that is, the fiduciary label and concept has mixed two immiscible legal ideas, but we keep shaking the bottle in the hope that there is a theoretical way of making a compound. In part we continue to shake the bottle because we operate without attention to the historical precursors of these ideas.

Part I of the article explores the distinctive legal ideas that are contained with the conception of the fiduciary in U.S. fiduciary and corporate law. The first, which reflects the traditional understanding of fiduciary relations, we label the “power/undertaking model” of fiduciary relations. The second, sourced in the doctrine of undue influence, is labelled the “influence conception” of fiduciary relations.

### *A. Power and Undertaking*

#### *1. The Source of Fiduciary Obligation*

In the traditional approach to fiduciary relations a person—agent, director, trustee, guardian—agrees to perform a representative function for or on behalf of another person—principal, corporation, beneficiary, child—and that person is empowered to perform that undertaken function. Fiduciary obligation regulates the use of the power in the performance of the undertaking; ensuring that it is used as it was agreed and intended to be

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14. *Id.* at 1402–03.

15. Lionel Smith, *Contract, Consent, and Fiduciary Relationships*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 117, 137 (Paul B. Miller & Andrew S. Gold eds., 2016) (“People don’t usually acquire powers unless they accept to do so, and this is why it is usually the case that a fiduciary has in some sense agreed, accepted, or undertaken to act.”); Shepherd, *supra* note 11, at 96 (“A fiduciary relationship exists whenever a person acquires a power of any type *on condition that he also receive with it a duty to utilize that power in the best interests of another . . .*”) (emphasis added); Frankel, *supra* note 11, at 829–30 (deploying the idea of undertaking).

used. The empowerment of the fiduciary involves the transfer of legal power or authority to legally act for or on behalf another in relation to the assets or rights of the other—to enable an agent to bind a principal, or the board of directors to make a decision *for* the company, or a guardian to decide where a child goes to school. Accordingly, in this conception a fiduciary relation does not arise when someone can merely act in ways that can affect others beneficially or detrimentally, but only where they have been legally empowered to act in ways that can alter another person's rights and obligations, or the assets in relation to which they have rights and obligations.

This conception flowed directly from early English judgments into U.S. law. In the House of Lords in *York Buildings Co. v. Mackenzie* in 1795, later referred to by the New York Court of Appeals in *Gardner v. Ogden*<sup>16</sup> as “the great case,” a solicitor charged with the sale of an insolvent's assets was prevented from buying those assets because:

He that is *entrusted* with the interests of others, cannot be allowed to make the business an object of interest to himself; because from the frailty of nature, *one who has the power*, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is entrusted.<sup>17</sup>

As Lord Eldon observed seven years later in *Ex parte Lacey*, “A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself.”<sup>18</sup> Note here that the notion of “entrustment” encapsulates both the act of trusting or being trusted and empowerment to act on behalf of another—“to confer a trust on.”<sup>19</sup>

This self-dealing rule was adopted in and affirmed by multiple U.S. cases in the nineteenth century. For example, in 1816 in *Davoue v. Fanning*,<sup>20</sup> the New York Chancery court extended the rule to a trustee empowered with a “power to sell . . . to raise money for the legacies” who used the power to sell the property to his wife. Chancellor Kent observed that “if a trustee, acting for others, sells an estate, and becomes himself interested in the purchase, the *cestui que trust* is entitled . . . [to] set aside that purchase.”<sup>21</sup>

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16. 22 N.Y. 327, 347 (1860).

17. (1795) 3 Eng. Rep. 432, 446 (emphasis added). Although commonly cited, this position is actually the position as stated by counsel.

18. (1802) 31 Eng. Rep. 1228, 1228; 6 Ves. 625, 626.

19. *Entrust*, MERRIAM WEBSTER, (<https://www.merriam-webster.com/dictionary/intrust> [https://perma.cc/LMW7-5EFW]) (defining “entrust” and “intrust”).

20. 2 Johns. Ch. 252, 254, 256 (N.Y. Ch. 1816). *Davoue* is a renowned case that has generated nearly 400 citations.

21. *Id.* at 257.

Accordingly, the transaction with his wife could not stand as “exercising the general powers of his trust for the benefit of his wife, was peculiarly calculated to touch and awaken the suggestions of self-interest.”<sup>22</sup> Commenting on Kent’s work in *Davoue*, the U.S. Supreme Court in *Michoud v. Girod* observed in 1846 that:

[I]t is not too much to say, that [*Davoue*] has secured the triumph of the rule over all qualifications and relaxations of it in the United States, to the same extent that had been achieved for it in England by that great chancellor, Lord Eldon.<sup>23</sup>

Central to this conception of fiduciary relations was that when a person was entrusted or “clothed with power”<sup>24</sup> over the assets or rights of others fiduciary obligation regulated and controlled the exercise of that power and ensured that it would be exercised to further the “beneficiary’s” interests. Necessarily, therefore, if there was no such transferred power there was nothing in relation to which a fiduciary obligation could act. Consider, for example, *Rogers v. Rogers* where the New York Chancery Court in 1825 refused to apply the self-dealing rule to an executor who was not “empowered by the will, to sell the real estate . . . [and] had no control over the real estate.”<sup>25</sup> The Chancery Court noted:

It is only where the purchaser stands in the *character of trustee*, that his purchase is declared void. This character is the reason of the rule; and when the reason does not apply, the rule fails.<sup>26</sup>

Consider also *Gay v. Gay*,<sup>27</sup> an 1862 Massachusetts Supreme Court case, where, as the administrator of an estate was not “clothed with any power” to purchase a property on behalf of the estate, she was free to purchase it for herself.<sup>28</sup> And similarly, it followed that if a pre-existing power over assets was removed by actions beyond the control of the fiduciary then there was no longer a power for fiduciary obligation to control and no fiduciary relation. Accordingly, where as a result of the enforcement of a debt a

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22. *Id.* at 256–57.

23. 45 U.S. 503, 556 (1846).

24. See, for example, *Bruck v. Broesigks*, 18 Iowa 393, 395 (1865) in which state municipal corporations were deemed to have a relationship of “a fiduciary nature” with the state that “*clothed [them] with power* to assess and collect a tax for [the] State . . .” (emphasis added). See also *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 464 (1860) (“Whether Sherman is to be regarded as trustee, in a technical sense, it is not important to determine. It is enough to know that he was acting for others; that he was *clothed with powers* which imposed upon him the duty to sell for the benefit of the stockholders of the company.”) (emphasis added).

25. 1 Hopk. Ch. 515, 517 (N.Y. Ch. 1825).

26. *Id.* (emphasis added).

27. 87 Mass. (5 Allen) 181 (1862).

28. *Id.* at 183.



fiduciary lost control over an asset, courts allowed the fiduciary to purchase it in a public auction in which the fiduciary played no role. For example, in *Fisk v. Sarber* the Pennsylvania Supreme Court in 1843 held that, although trustees would normally be restrained by fiduciary law from purchasing trust assets:

[I]t being taken out of his possession, as it were, and certainly *out of his power* . . . and placed in the hands of the officer of the law, to whom full power is given to sell and dispose of the same, it is perfectly manifest that he thereby becomes divested of his trusteeship in regard to it; *that all his power and control over it cease; so that he has no duty whatever to perform in respect to it in the slightest degree incompatible with his buying at the lowest price for which it may be obtained* . . . .<sup>29</sup>

This idea that fiduciary obligation ensured that the exercise of power was not infected by personal interest swiftly found its way into several of the leading nineteenth-century corporate-fiduciary cases. Consider, for example, *Cumberland Coal & Iron Co. v. Sherman*,<sup>30</sup> a New York corporate self-dealing case where, drawing on *Michoud v. Girod*, *Davoue v. Fanning*, and a range of leading cases from “Hardwicke, Thurlow, Loughborough, Eldon, Cranworth, Story and Kent,”<sup>31</sup> the court unequivocally extended the self-dealing rule to corporate directors who had “duties to discharge of a fiduciary nature.”<sup>32</sup> Consider also, *Wardell v. Railroad Co.*, where the U.S. Supreme Court held that:

Those directors, constituting the executive committee of the board, were *clothed with power* to manage the affairs of the company for the benefit of its stockholders and creditors. Their character as agents *forbade the exercise of their powers for their own personal ends against the interest of the company*. They were thereby *precluded from deriving any advantage from contracts, made by their authority as directors*, except through the company for which they acted. Their position was one of great trust, and to engage in any matter for their personal advantage inconsistent with it was to violate their duty and to commit a fraud upon the company.

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29. 6 Watts & Serg. 18, 23 (Pa. 1843) (emphasis added). *Fisk v. Sarber* is followed in several Pennsylvania cases thereafter. See, e.g., *In re Kelley's Estate*, 146 A. 260 (Pa. 1929); *Ellis v. Ellis*, 203 A.2d 547 (Pa. 1964). But where the assets were sold at auction which the fiduciary brought about or controlled—where he exercised power to make it happen—the self-dealing prohibition would continue to apply. See *MacDougall v. Citizens Nat'l Bank*, 108 A. 608, 609 (Pa. 1919) (applying where sale was “brought about or in any manner controlled by him”).

30. 30 Barb. 553 (N.Y. Gen. Term 1859).

31. *Id.* at 579.

32. *Id.* at 571.

. . . Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect.<sup>33</sup>

Power and its control were foregrounded in these early corporate and non-corporate fiduciary cases. As noted above, it is similarly central to several modern theories of fiduciary relations.<sup>34</sup> But empowerment is only one of two component parts of the fiduciary compact. The flipside of the entrustment and transfer of power to a person is the agreement of that person to exercise the power for the purposes for which it is conferred. By the mid-nineteenth century in both the United Kingdom and the United States the early cases' self-dealing prohibition on "making business" or "managing" for oneself came to be articulated as a prohibition on placing the fiduciary's duty in conflict with his personal interest. This "duty" with which fiduciary law prevented the personal interest from conflicting was the agreement or the undertaking to act in a particular way in relation to the transferred power and authority—only where the performance of the undertaking could conflict with personal interest did fiduciary restraint bite. Note in this regard Lord Eldon's words quoted above that served as the foundation of the no-conflict rule in the United Kingdom and the United States: he "undertakes in the same moment, in which he becomes a trustee, *not to manage* [not to perform the undertaking or duty to manage] for the benefit and advantage of himself."<sup>35</sup> In *Grover v. Hugell*,<sup>36</sup> the first English case to convert Eldon's no-advantage rule into the no-conflict rule, a rector was tasked (undertook/had a duty) to sell a property on behalf of his curate, which he purchased himself. The Master of the Rolls, John Leach, observed that:

The general rule in equity is, that a man cannot place himself in a situation in which his interest conflict with his duty. *The duty* [what he agreed or undertook to do] of the rector was, to obtain the best possible price for the land sold; and his interest as purchaser was, to pay the least possible price for it.<sup>37</sup>

U.S. cases articulated the rule as a prohibition on conflict between undertaken duty and personal interest earlier than the UK cases. For Chancellor Kent in *Davoue v. Fanning*, for example, the trustee's sale to his wife was prohibited because "[h]is interest here interfered with his duty": a

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33. 103 U.S. 651, 657–58 (1880) (emphasis added).

34. See *supra* notes 9–15.

35. *Ex parte Lacey* (1802) 31 Eng. Rep. 1228, 1228; 6 Ves. 625, 626.

36. (1827) 38 Eng. Rep. 636; 3 Russ. 428.

37. *Id.* at 638 (emphasis added).

“duty of the [trustee] executor” to “sell [property] to raise money for the legacies.”<sup>38</sup>

In this traditional understanding of fiduciary relations, although undertaking is often implicit and backgrounded, demarcating its nature and extent is necessarily central to determining the scope of application of fiduciary obligation. Determining, for example, the nature of the directorial role a director has agreed to perform would demarcate the extent to which a director could and could not act in his personal interests. In this regard consider, for example, the law of corporate opportunities. In several of the foundational corporate opportunity cases, the directorial role was only understood to involve a duty to act to acquire an opportunity where the corporation had a property-like expectancy in the opportunity. When it did not have one, no duty was owed, and, therefore, no conflict of duty and interest arose which could prevent the director taking the asset in his personal capacity.<sup>39</sup> Accordingly, in the nucleus of the *original idea* of a fiduciary relationship was a compound of undertaking/agreement/consent to act in a particular way and the legal empowerment to do so; in the absence of either component part there would be no fiduciary relationship or obligation.<sup>40</sup>

## 2. *The Structure of Fiduciary Duties*

In this power/undertaking understanding of fiduciary relations, defining the nature of a fiduciary relation or labelling a person a “fiduciary” is in important respects beside the point. This is because through this understanding the terms fiduciary and *fiduciary* duty merely have a categorization and labelling function. The trustee, agent, or director in this conception of a fiduciary relation does not owe obligations because she is a fiduciary. Rather, the obligations flow from the agent’s empowerment and

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38. *Davoue v. Fanning*, 2 Johns. Ch. 252, 255–56 (N.Y. Ch. 1816); *see also Michoud v. Girod*, 45 U.S. 503, 559 (1846) (“The rule as expressed embraces every relation in which there may arise a conflict between the duty [owed] . . . and his own individual interest.”).

39. *See, e.g., Lagarde v. Anniston Lime & Stone Co.*, 28 So. 199 (Ala. 1900); *De Bardeleben v. Bessemer Land & Improvement Co.*, 37 So. 511 (Ala. 1904); *Zeckendorf v. Steinfeld*, 100 P. 784 (Ariz. 1909).

40. This approach continues to dominate U.K. and commonwealth approaches to fiduciary relations today. As the English High Court in *Halton Int’l Inc. v. Guernroy Ltd.* observed, “A critical and usually determinative feature of any fiduciary relationship is the *agreement of the fiduciary to act in the interests of the principal* in the exercise of the power which is granted or in relation to the principal’s property or business affairs.” [2005] EWHC (Ch) 1968 [148] (emphasis added). *But see* Lehtimäki v. Cooper [2020] UKSC 33 [42]–[51] (suggesting a change of direction). The High Court of Australia’s judgment in *Hosp Prods Ltd v US Surgical Corp.* provided a similar, globally influential, summary of fiduciary relations: “The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person *in the exercise of a power* or discretion which will affect the interests of that other person in a legal or practical sense.” (1984) 156 CLR 41, 96–97 (emphasis added).

undertaking to perform the role: she must use the transferred power as she agreed to in accordance with the purposes for which it was transferred. That is, through the lens of this traditional approach, duties—including the duty to exercise powers in good faith, the no conflict rule and the obligation of care—can all be understood as endogenous to the agreement and empowerment to act. *Structurally*, they are not imposed by law and fashioned by courts to regulate the scope for abuse of power; rather, they are recognised and enforced by courts and reflect what the fiduciary agreed to do with the transferred authority: to use it as was agreed for another's benefit. Accordingly, one might say, as commenters and judges have, that it is because she owes such duties that she is a fiduciary.<sup>41</sup> But this commonly quoted claim does not dig deeply enough—she owes such duties because that it is what she undertook/agreed to do and was empowered to do.

The early cases and commentary evidence this endogenous understanding of duties. For Eldon, the no-conflict rule was immanent within the undertaking to manage the sale of the bankrupt's property. He observed, as we noted above, a trustee, agent, or an assignee in bankruptcy “*undertakes* in the same moment, in which he becomes a trustee, not to manage”—that is to perform the undertaking using the powers to manage transferred to him—“for the benefit and advantage of himself.”<sup>42</sup> In relation to the duty of care, Lord Holt in the foundational bailment case of *Coggs v Barnard* held that “*the undertaking obliges* the undertaker to a diligent management.”<sup>43</sup> Consider also in this regard, Victor Morawetz's—former Cravath partner and leading nineteenth-century corporate textbook writer—account of the director as agent-fiduciary:

Whenever an agent is invested *with authority to use any discretion in the exercise of the powers conferred upon him*, it is an *implied condition* that this discretion shall be used in good faith for the benefit of the principal, and in accordance with the true purpose of the agent's appointment. To this extent, every agency which is not a

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41. P.D. FINN, *FIDUCIARY OBLIGATIONS* 2 (1977). Finn states that “he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary,” which has been widely quoted following its reference in *Bristol & W. Bldg. Soc'y v. Mothew* [1996] 4 All ER 698, 712.

42. *Ex parte Lacey* (1802) 31 Eng. Rep. 1228, 1228; 6 Ves. 625, 626. In *Ex parte Bennett* (1805) 32 Eng. Rep. 893, 897; 10 Ves. 381, 394, three years later, he observed that “the ground” of/the “reason” for this no-advantage rule was that, as a bankruptcy commissioner, he would not be able to perform his undertaking: to exercise the delegated power “to sell to the best advantage.”

43. *Coggs v. Barnard* (1703) 92 Eng. Rep. 107, 113; 2 Ld. Raym. 909, 919 (QB) (emphasis added). On the influence of *Coggs* and bailment care standards on the directorial duty of care, see KERSHAW *supra* note 3, at 137–228.

purely ministerial one involves a fiduciary relation between the parties.

....

The directors or trustees of a corporation, in accepting their appointment to office, *impliedly undertake* to give the company the benefit of their best care and judgment . . . .<sup>44</sup>

As Morawetz explains, the core duties are inherent in the undertaking and empowerment—it is an “implied condition” of the “invest[ing] [of] authority” that the powers are used in “good faith” for the benefit of the transferor and for the purposes the empowerment; likewise, obligations of care and judgment review standards are “implicit” in the directorial undertaking.<sup>45</sup> For Morawetz, as they were for Eldon and Holt, these duties are the endogenous product of agreeing to perform and being empowered to perform the role.

Upon these endogenous and “implied obligations” modern corporate fiduciary obligations have been built. As I have argued elsewhere,<sup>46</sup> the business judgment rule is rooted in the implied condition “that this discretion shall be used in good faith for the benefit of the principal, and in accordance with the true purpose of the agent’s appointment.”<sup>47</sup> Fairness review, particularly fairness in relation to price, is the product of U.S. courts exploring the remedial consequences of breaching the obligation to avoid a conflict between undertaken duty and personal interest.<sup>48</sup> And whilst today fairness review and duties of good faith are enveloped in an overarching general duty of loyalty, it is important to note that within this power/undertaking understanding of fiduciary relations, the obligations owed by a fiduciary are not derived from an overarching loyalty obligation which applies to individuals who are deemed to be fiduciaries. Instead the undertaking and empowerment invoke a set of obligations designed to ensure the performance of the role/undertaking. Of course, all such duties are concerned with the loyal exercise of power because the relationship is based on the agreement to act on behalf of another. But in this legal idea there is no fiduciary duty of loyalty that serves as a source of other-regarding obligations as we meet a future of unforeseen fiduciary circumstance.

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44. MORAWETZ, *supra* note 1, at 483.

45. *Id.*

46. KERSHAW, *supra* note 3, at 68–92.

47. MORAWETZ, *supra* note 1, at 483.

48. *See supra* note 4 and *infra* notes 228–237.

### 3. *To Whom is the Duty Owed: Stockholders “Convening” the Corporation*

Through this power/undertaking understanding of fiduciary relations, fiduciary duties are owed to and *enforceable by* the person (legal or real) who the fiduciary undertakes to act for or on behalf of, which will either be the person who transfers power to the fiduciary or another person who the transferee instructs the fiduciary to act for or on behalf of. In the United States, directors are appointed by the shareholder meeting which is an organ of the corporation, although the state through the corporate statute, not the shareholder meeting, empowers the directors to act for the corporation. For Delaware today the directors are empowered to manage the “business and affairs of [the] corporation,”<sup>49</sup> just as in New Jersey’s foundational corporate statute of 1896 “the business of every corporation shall be managed by its directors . . . .”<sup>50</sup> Accordingly, through the power/undertaking lens, a director’s fiduciary duties are necessarily owed only to the corporation.

However, in the United States it is common for courts to observe that a directors’ fiduciary duties are owed both to the corporation *and* the shareholders. Less commonly, but not infrequently, courts observe that a director’s fiduciary duties are owed to the shareholders alone. As the California Appeals Court in *Remillard Brick Co. v. Remillard-Dandini Co.* in 1952 observed:

[Directors] owe a duty to all stockholders, including the minority stockholders, and must administer their duties for the common benefit. The concept that a corporation is an entity cannot operate so as to lessen the duties owed to all of the stockholders.<sup>51</sup>

This is a position that has deep roots in corporate law in the United States, and it is a position that seems to cast doubt on the power/undertaking framework set out in this Part I. Accordingly, these statements need to be carefully parsed.<sup>52</sup> In 1831 in *Verplanck v. Mercantile Ins. Co. of New York*, for example, the Vice Chancellor observed that:

But when a corporation aggregate is formed, and the *persons composing it*—either in virtue of their compact or by the express terms of the charter—*place the management and control of its affairs in the hands of a select few*, so that life and animation may be given

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49. DEL. CODE ANN. tit. 8, §141(a) (2020).

50. See General Corporation Act, 1896 N.J. Laws 281 § 12.

51. 241 P.2d 66, 74 (Cal. Dist. Ct. App. 1952).

52. See generally Julian Velasco, *Fiduciary Principles in Corporate Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 61 (Evan J. Criddle, Paul B. Miller, & Robert H. Sitkoff eds., 2019).

to the body, then *such directors become the agents and trustees of the corporators* and a relation is created, not between the stockholders and the body corporate, but between the stockholders and those directors who, in their character of trustees, become accountable for any wilful dereliction *of duty or violation of the trust reposed in them*. I see no objection to the exercise of an equity power over such persons in the same manner as it would be exercised over any other trustees.<sup>53</sup>

For the Vice Chancellor, consistent with the power/undertaking conception of fiduciary relations, a trusteeship relationship between the directors and shareholders is created as a result of the persons who “compos[e]” the company—the corporators—empowering the persons who have agreed to act as directors (“plac[ing] the management and control” in their hands).<sup>54</sup> However, although the Vice Chancellor’s words above suggest a bilateral (director-stockholder) and direct (to the stockholder) nature of this trusteeship, in fact he understood that these obligations fell within the corporate-entity umbrella. He observed:

The [corporation] is merely the creature of the law, a political not a natural body, made up of the compact entered into by the stockholders, each of whom becomes a corporator *identified with and forming a constituent part of the corporate body*: and therefore, when we speak of stockholders and the incorporated company *of which they are the components, we refer to one and the same collection of persons*.<sup>55</sup>

As the corporators and the stockholders “compos[e]” the corporation and were a “constituent part of the corporate body,” a relationship of trusteeship between directors and stockholders was a relationship of trusteeship between directors and stockholders as a component part of the corporate body.<sup>56</sup> Echoing this position, Angell and Ames, authors of the nineteenth century’s leading corporate law text, observed that “stockholders compose the company.”<sup>57</sup> Accordingly, for them, relying on *Verplanck*, it followed clearly that any breach of such “trusteeship” duty could only be enforced by the corporation or derivatively on its behalf where the corporation was incapable of prosecuting the action.<sup>58</sup>

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53. 1 Edw. Ch. 84, 87–88 (N.Y. Ch. 1831).

54. *Id.* at 87.

55. *Id.*

56. *Id.*

57. JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS 751 (7th ed. 1861).

58. *Id.* at 310.

*Verplanck* is the foundation for the more influential decision of the New York Supreme Court in *Cumberland Coal & Iron Co. v. Sherman*,<sup>59</sup> where the court affirmed this position in fiduciary rather than trusteeship terms. Citing *Verplanck*, as well as authorities and commentary that relied on *Verplanck*, the court observed that:

There can be no question . . . at the present time, that *a director of a corporation is the agent or trustee of the stockholders and as such has duties to discharge of a fiduciary nature, towards his principal, and is subject to the obligations and disabilities incidental to that relation.*<sup>60</sup>

But again as in *Verplanck*, the court understands “the stockholders” to be a constituent part of the body corporate and accordingly proceeded to quote the English case *Aberdeen Railway Co. v. Blaikie Brothers*<sup>61</sup> to the effect that “[a] corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting,”<sup>62</sup> as well as to (naturally) misquote the above quotation from *Verplanck* to the effect that “such directors become the agents and trustees *of the corporation.*”<sup>63</sup> For the court in *Cumberland*, a director owed fiduciary duties to the corporation<sup>64</sup> but more specifically to the shareholder body of the corporation, which in their former capacity of incorporators, formed the corporation. That is, in effect, a duty owed to the corporation to further the interests of the shareholder body/organ.

The earliest Delaware case that addressed the issue in brief was a Delaware Court of Errors and Appeals decision in *Todd v. The Diamond State Iron Company*.<sup>65</sup> Citing, inter alia, *Cumberland*, the court observed that: “the defendant . . . as secretary, officer and agent of the company, stood towards the company, its stockholders, and towards [the plaintiff] as a stockholder, in a fiduciary relation.”<sup>66</sup> This is a position that, without the context of *Verpanck* and *Cumberland*, could be misread as providing for a direct duty towards the plaintiff stockholder. Subsequent early Delaware

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59. 30 Barb. 553 (N.Y. Gen. Term 1859). This is a case that attracts 146 State and Federal citations (including *Coal Co. v. Sherman*), but only three in Delaware: *Cahall v. Lofland*, 114 A. 224 (Del. Ch. 1921), *Todd v. Diamond State Iron Co.*, 13 Del. (8 Houst.) 372 (1889), and *Diamond State Iron Co. v. Todd*, 14 A. 27 (Del. Ch. 1888).

60. *Cumberland Coal Co.*, 30 Barb. at 571 (emphasis added).

61. [1854] All ER Rep. 249, 252.

62. *Cumberland Coal Co.*, 30 Barb. at 572 (quoting *Aberdeen Rwy. Co. v. Blaikie Bros.*, [1854] All ER Rep. 249, 252).

63. *Cumberland Coal Co.*, 30 Barb. at 572 (emphasis added).

64. MORAWETZ, *supra* note 1, at 483 (citing *Cumberland*, 30 Barb. at 559–77) (observing that “[t]he relation between the directors of a corporation and the company itself is . . . in many respects, a fiduciary or trust relation”).

65. 13 Del. (8 Houst.) 372 (1889).

66. *Id.* at 382.



law cases addressing this issue clarified the corporate nature of a fiduciary obligation owed to the corporation and the stockholders, as set forth in the foundational cases. In *Du Pont v. Du Pont* the U.S. District Court for the District of Delaware observed that:

The duties of a director or other officer of a corporation in transactions where he is representing his company are governed by well-established and familiar rules of equity. A director of a corporation may freely purchase its stock, *and occupies no relation of trust to an individual stockholder . . .* [B]ut to the corporation, *the whole body of stockholders*, he stands in a fiduciary relation which requires him to exercise the utmost good faith in managing the business affairs of the company with a view to promote, not his own interests, but the common interests . . . .<sup>67</sup>

The position in *Du Pont* was described by the Delaware Supreme Court in its first self-dealing case, *Lofland v. Cahall*,<sup>68</sup> as “well stated” and reflects the modern position. As Vice Chancellor Laster explained recently in *In re Trados Inc. Shareholder Litigation*:

Judicial opinions therefore often refer to directors owing fiduciary duties “to the corporation and its shareholders” . . . . This formulation captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants. Nevertheless, “stockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end.”<sup>69</sup>

Moreover, statements about duties owed to the stockholders must be read not only with the corporate context provided by these cases but also within the context of the nature of the actions brought to enforce the director's fiduciary duties, which through the power/undertaking lens must be brought either by the corporation or derivatively *on behalf of the corporate right-holder/duty-recipient* and not directly in the individual name of a right-holding shareholder.<sup>70</sup> Such a shareholder has no cause of action because although her financial interests may have been detrimentally affected by the breach of duty owed to the corporation, such detriment does not infringe any fiduciary duty actually owed to her. In this regard note that *Verplanck* was an early derivative action with the corporation as nominal defendant, and in *Cumberland* the action was brought by the corporation.

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67. 242 F. 98, 136 (D. Del. 1917) (emphasis added).

68. 118 A. 1, 7 (Del. 1922).

69. 73 A.3d 17, 36–37 (Del. Ch. 2013) (internal citations omitted).

70. See *supra* notes 49–50.

*B. Influence and Superiority: The Fiduciary as “Economic Agent”*

*1. The Doctrines of Undue Influence and Fair Dealing*

A second conception of the fiduciary in U.S. fiduciary law arises out of the law’s regulation of contractual relations where the *pre-existing* relationship between two contracting parties has the potential to affect the formation of the intention and the volition of one of the contracting parties.<sup>71</sup> Here we see the intersection of what is often presented as two equitable doctrines which in fact address a singular legal idea: the fiduciary influence or fair dealing standard and the undue influence doctrine.<sup>72</sup> The former, which should be seen as an outcrop of the latter, is the product of cases in which a person, who was a fiduciary in accordance with the power/undertaking conception of fiduciary outlined above, entered into a transaction with his charge (principal/beneficiary/corporation). The foundation of the rule is found in *Gibson v. Jeyes*<sup>73</sup> where an attorney had acted as an agent in the sale of property for the deceased plaintiff (i.e., an empowered fiduciary) and then subsequently sold her an annuity. Lord Eldon observed that:

A trustee also may deal with his *Cestuy que trust*; but the relation must be in some way dissolved: or, if not, the parties must be put so much at arm’s length, that they agree to take the characters of purchaser and vendor; and you must examine, whether all the duties of those characters have been performed. . . .  
. . . [H]e, who bargains in a matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, *or anyone else*.<sup>74</sup>

Although *Gibson v Jeyes* provides the foundation of the fiduciary influence rule which requires fair dealing between a trustee and a beneficiary or agent and principal, for Lord Eldon this “great rule”<sup>75</sup> instantiated a broader position: “that where one person takes an unfair advantage of another, it is the peculiar province of equity to give relief.”<sup>76</sup> That is, the fiduciary influence standard is a clear application of a broader equitable rule which provides that where the relationship between two contracting parties excites

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71. Undue influence applies not only to contract but to other areas of legal life, most importantly in relation to testamentary dispositions.

72. See CONAGLEN, *supra* note 5, at 237–41.

73. (1801) 31 Eng. Rep. 1044.

74. *Id.* at 1049–50 (emphasis added).

75. *Id.* at 1050.

76. *Id.* at 1046 (quoting counsel in *Fox v. Mackreth*, (1788) 2 Bro. C.C. 400).

suspicion about the way in which the intention to enter contractual relations on the part of one of the parties was formed, equity will require evidence of fair dealing connected primarily to process but also to price.<sup>77</sup>

Central to this legal idea is determining what types of relationship—which provide for the possibility of influence and suggestion—excite suspicion as to voluntariness. As *Gibson* and its progeny<sup>78</sup> make clear, where one of the parties is a fiduciary—in the undertaking/empowerment sense of the term—then presumptively<sup>79</sup> this rule applies. But as Lord Eldon implied in *Gibson* (“applying to . . . any one else”<sup>80</sup>) and made clear in his subsequent jurisprudence, there are other non-fiduciary relationships where there are bonds of trust and confidence where the rule applies: including, but *not limited to*, advisor/attorney and client, husband and wife, member of a congregation and priest.<sup>81</sup> Indeed, Lord Eldon applied a very similar rule six years after *Gibson v. Jeyes* in *Huguenin v. Baseley*,<sup>82</sup> in relation to invalidation of a gift from the plaintiff to a clergyman, where there was no fiduciary relationship. *Huguenin* is viewed in England and the United States as the foundation of the undue influence rule. Lord Eldon observed that: “The question is not whether she knew what she was doing, had done, or proposed do, but how the intention was produced . . . .”<sup>83</sup> *Huguenin* and *Gibson* were rightly fused in the influential New York Court of Appeals case, *Cowee v. Cornell*<sup>84</sup> where the court observed:

Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not

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77. On fair price, see *Thomson v. Eastwood* (1877) 2 App. Cas. 215, 236; *Marquis of Clanricarde v. Henning* (1861) 54 Eng. Rep. 855, 859 (referring also to “full value”). More recently, see *Tito v. Wardell* [1977] Ch 106 at 225, where VC Megarry observed that the fair dealing rule required that “the beneficiary was fully informed and received fair value.” Many of the fair dealing and undue influence cases do not, however, engage with price, leading some commentators to view fair price as a subordinate consideration to fair process. See CONAGLEN, *supra* note 5, at 106–108. Conaglen is correct that price should be seen as one factor that may be indicative of whether influence has affected volition. It may, depending on the facts of each case, not be relevant where process factors clearly indicate that volition was or was not affected.

78. *Hunter v. Atkins* (1834) 47 Eng. Rep. 166; *Thompson v. Eastwood* (1877) 2 App. Cas. 215.

79. Although not necessarily as it depends on the scope to exercise influence. See *Smith v. Kay* (1859) 11 Eng. Rep. 299, 308 (“[I]f the principle is examined, it will be found most frequently applied [to fiduciaries] for the simple reason that the fiduciary relation gives a power of influence: but I could suggest fifty cases of fiduciary relation where the principle will not apply at all . . . [where the fiduciary has] no influence over him.”) (Lord Cranworth).

80. 31 Eng. Rep. at 1050.

81. 11 Eng. Rep. at 308 (“Now what does ‘any one else’ mean? It is contended that it applies only to persons who stand in a fiduciary relation. I believe, if the principle is examined, it will be most frequently applied in such cases . . . .”). On the relations which “infer the probability of such undue influence,” see *Houghton v. Houghton* (1852) 51 Eng. Rep. 545, 554.

82. (1807) 33 Eng. Rep. 526.

83. *Id.* at 536.

84. 75 N.Y. 91, 95 (1878) (Hand, J.) (citing *Huguinen* and other English cases relying on *Gibson* and *Huguinen*).

deal on terms of equality but that *either* on the one side from *superior knowledge* of the matter derived from a fiduciary relation, *or from overmastering influence*, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled. . . .

The principle referred to it must be remembered is distinct from that absolutely forbidding a purchase by a trustee or agent for his own benefit of the subject of a trust, and charging it when so purchased with the trust. That amounts to an incapacity in the fiduciary to purchase of himself. He cannot act for himself at all however fairly or innocently in any dealing as to which he has duties as trustee or agent. The reason of this rule is subjective. It removes from the trustee, *with the power*, all temptation to commit any breach of trust for his own benefit. But the principle with which we are now concerned does not absolutely forbid the dealing, but it presumes it unfair and fraudulent unless the contrary is affirmatively shown.<sup>85</sup>

*Cowee* and its progeny makes it clear that a fiduciary relationship is not required for the application of the rule, rather, merely a relationship between the contracting parties that could affect the voluntariness of the transaction—it refers to *either* a “fiduciary relation” or “superior knowledge” derived from “overmastering influence.”<sup>86</sup> In the 1891 New Jersey case of *Mott v. Mott*,<sup>87</sup> drawing on *Cowee*, *Gibson*, and *Huguenin*,<sup>88</sup> in a statement of the position that is still used today in New Jersey,<sup>89</sup> the court observed that “[t]he principle applies, and the rule of evidence is enforced, in all transactions between persons occupying relations, whether

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85. *Id.* at 99–100 (emphasis added). For an earlier New York broader articulation of the principle set forth in *Gibson v. Jeyes*, the Chancellor in *Howell v. Ransom*, 11 Paige Ch. 538, 540–41 (N.Y. Ch. 1845) cites *Gibson* for the proposition that “[t]he attorney, therefore, can never sustain a purchase of this kind, without showing that he communicated to his clients everything which was necessary to enable them to form a correct judgment of the actual value of the subject of the purchase, and as to the propriety of selling at the price offered. And his neglect to ascertain the true state of the facts himself will not sustain his purchase.”

86. *Cowee*, 75 N.Y. at 99–100. *See also* *Fisher v. Bishop*, 15 N.E. 331, 332 (N.Y. 1888), where the New York Court of Appeals, quoting *Pomeroy’s Equity Jurisprudence* § 951, observed: “Where an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted. Where there is no such fiduciary relation, the confidence and influence must be proved by satisfactory extrinsic evidence.” For earlier cases articulating this position, see *McCormick v. Malin*, 5 Blackf. 509, 523 (Ind. 1841); *Graham v. Little*, 56 N.C. (3 Jones Eq.) 152, 164 (1857).

87. 22 A. 997 (N.J. Ch. 1891).

88. *Id.* at 999–1000, 1002.

89. *See, e.g., Pascale v. Pascale*, 549 A.2d 782 (N.J. 1988).

legal, natural, or conventional in their origin, in which confidence is naturally inspired, is presumed, or in fact reasonable exists.”<sup>90</sup>

## 2. *Influence and Fiduciary Relations*

This fiduciary influence/undue influence standard applies in relation to a transaction between parties where the pre-existing relationship between the parties is such that the voluntariness of the transaction and its terms are brought into question and requires evidence of fair dealing from the “superior” party in order to be able to enforce the transaction. In this doctrine, the superior party is not under any general obligation or duty to act in the interest of the weaker party but must demonstrate only that she has not abused her position and capacity to influence the weaker person *in entering into a contract with her*.<sup>91</sup> That is, the doctrine only provides transaction-specific protection. And, as noted, anyone who is, *separately*, in a (power/undertaking) fiduciary capacity with that person is presumed to be in such a relationship of influence. But it does not follow therefrom that anyone who is subject to this transaction specific regulation—because of their relationship with the other party—is a fiduciary.<sup>92</sup> If we elected to call such persons “fiduciaries” we would be using the concept in a completely different way to the way in which it is used in the power/undertaking relationships considered above—the former categorizes and labels legal obligations arising from a delegation of power and the undertaking to use the power in a particular way; the latter regulates potential influence by a person who exercises no delegated power in the context of a specific transaction.<sup>93</sup> To craft a conception of “fiduciary” in this way would be to craft a conception of “fiduciary” that has no connection to empowerment or undertaking to act on another’s behalf: it would suggest that you are a fiduciary if you are merely in a position to affect another’s interests, similar to the economic (not the legal) idea of an agent and principal.<sup>94</sup> Although clearly, given the ubiquity of such influence-effects, the attribution of this

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90. *Mott*, 22 A. at 999.

91. *See supra* note 85.

92. *See* Frankel, *supra* note 11, at 825 n.100 (noting confusion between fiduciary relations and confidence and the fact that they respond to different problems).

93. The point here is *not* that it is inappropriate to use the concept of fiduciary in relation to the influence doctrine. Indeed, it might seem apposite given “that the word ‘fiduciary’ derives from the Latin *fiducia*, which means trust or confidence.” Edelman, *supra* note 12, at 306. There is no inherent legal idea contained in the word fiduciary. The point is that to use it in relation to both the power/undertaking conception and the undue influence conception is to use it in relation to two independent legal ideas that have very different sources and logics in relation to the concept of duty.

94. *See* generally REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA, MARIANA PARGENDLER, WOLF GEORG RINGE, & EDWARD ROCK, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (3d ed. 2017) on the economic agency problem.

type of fiduciary label is likely to require a significant potential influence (as the New York Court of Appeals in *Cowee* put it, an “overmastering influence”).<sup>95</sup> Note also, that in such a conception, necessarily the recipient of the duty (and therefore the person entitled to enforce the duty) would be the person who may be detrimentally affected by the actions of such a “fiduciary.”

Moreover, labelling persons who fall within the ambit of the transactional undue influence rule “fiduciaries” not only transforms the idea of the fiduciary, it also threatens<sup>96</sup> to transform the structure of fiduciary duties. Doing so *makes available* a legal structure whereby obligations relating to fair process and fair price are owed to the recipient of the duties *because* the superior party is deemed to be a “fiduciary” not simply because that person is in a position to affect the volition of the counterparty in the context of a transaction with that person. This structure in turn readily *makes available* the idea that once categorized as this type of “fiduciary” a set of other-regarding/loyalty obligations are owed by this fiduciary of which the fair dealing rules are merely one component part. This in turn generates a risk of duty overspill into this influence-loyalty obligation from the power/undertaking conception. That is, the shared nomenclature encourages analogical learning between two wholly distinct legal phenomena.

In this second influence-conception of the fiduciary any such identified duties operate in a structurally different way than in the power/undertaking conception. In the power/undertaking conception, loyalty obligations—to exercise power in good faith to further the delegated purpose and to avoid conflicts of interest with the exercise of that power—serve the undertaking given to exercise the transferred power on behalf of or for another; that is, they are second order obligations which regulate, and are derived from,<sup>97</sup> the first order obligation to perform the undertaking. But in the influence conception of fiduciary relations there is no such undertaken duty to perform or transferred power around which the fiduciary loyalty duties orbit. Any claim, therefore, that (influence) fiduciaries are subject to similar loyalty obligations as power fiduciaries necessarily must find the source of obligation in the attribution of the label “fiduciary” itself. The attribution of the label “fiduciary” thereby becomes a source of obligation as opposed to a label for obligation sourced elsewhere (in undertaking and empowerment).

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95. *Cowee v. Cornell*, 75 N.Y. 91, 100 (1878).

96. The point here that while the labelling of all such actors as fiduciaries threatens the legal developments outlined in the remainder of this paragraph, it does not follow that they occur. Courts could use the term fiduciary in influence contexts but restrictively apply it to transaction contexts only thereby using the term as a label for actors that are caught by the undue influence rule in a transactional context. *See, e.g.*, *Top of Iowa Coop. v. Schewe*, 149 F. Supp. 2d 709, 719 (N.D. Iowa 2001) (using the term fiduciary duty but applying the undue influence standard only).

97. *See supra* text accompanying notes 41–48.

In this conception, it is not the case that you are a fiduciary because you owe fiduciary duties, rather *you owe fiduciary duties because you are a fiduciary*. And the duty of loyalty of such a fiduciary thereby becomes a first-order obligation, providing a deep well of unexplored obligation.

### 3. *The Infiltration of Fiduciary Influence*

Given these potential effects, early U.S. courts sensibly resisted<sup>98</sup> this conflagration. For these courts the undue influence doctrine was applicable where “special, confidential, *or* fiduciary relations between all the parties” afforded the “means of taking undue advantage . . . .”<sup>99</sup> Although courts would often refer to the application of the rule to “fiduciary and confidential” relations,<sup>100</sup> in nineteenth-century U.S. law, these were not legal synonyms; a person was not a fiduciary merely because she was in a relation of confidence.<sup>101</sup> Consider in this regard the U.S. Supreme Court’s 1909 decision in *Strong v. Repide*,<sup>102</sup> relating to a purchase of a stockholder’s shares by a director, controlling shareholder, and “general administrator.” For the Supreme Court there was no direct relationship of a “fiduciary nature” between the director and the stockholders.<sup>103</sup> But consistent with the broader application of the undue influence doctrine, by reason of “special facts”<sup>104</sup> which, echoing *Cowee*, led to an “overwhelming influence”<sup>105</sup> over the seller of the shares, the defendant owed a “duty”<sup>106</sup> in relation to the sale transaction to “state the facts before making the purchase” and “to disclose to a shareholder the general knowledge which he may possess regarding the value of the shares of the company before he

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98. See, for example, *Wood v. Rabe*, 96 N.Y. 414 (1884) an undue influence case in relation to a mother’s influence over her son in which the court observed “[i]t was a transaction between parent and child, a relation which, if not fiduciary in the strict sense, was nevertheless one ordinarily involving the greatest confidence on one side, and the greatest influence on the other.” *Id.* at 426.

99. See *Wilson v. Watts*, 9 Md. 356, 388 (1856) (emphasis added).

100. *Id.* at 396.

101. *Id.* at 388; see also *Uhlich v. Muhlke*, 61 Ill. 499, 534 (1871); *Ranken v. Patton*, 65 Mo. 378, 388 (1877); *Thompson v. Lee*, 31 Ala. 292, 304 (1857); *Miskey’s Appeal*, 3 Pennyp. 408, 426–27 (Pa. 1883). All of these cases base their holding on *Gibson v. Jeyes*, as well as, in several instances, *Huguenin v. Baseley*.

102. 213 U.S. 419 (1909) (case appealed from the Supreme Court of the Philippines).

103. *Id.* at 431; see *id.* (“It is here sought to make defendant responsible for his actions, not alone and simply in his character as a director, but because, in consideration of all the existing circumstances above detailed, it became the duty of the defendant, acting in good faith, to state the facts before making the purchase.”) (emphasis added). The Court also cites *Board of Commissioners v. Reynolds*, “where it was held . . . that no relationship of a fiduciary nature exists between a director and a shareholder in a business corporation.” *Id.*

104. The “special facts” were the position of influence the defendant held as a director, controlling shareholder, and “administrator general.” *Id.*

105. *Id.* at 433.

106. *Id.* at 431.

purchases any from a shareholder"<sup>107</sup>—a position rooted in cases which in turn were rooted in *Gibson v Jeyes*.<sup>108</sup> It is worth emphasizing that for the Supreme Court when those “special facts” were present a fair dealing requirement (“duty”) was owed, but such special facts did not render the director a fiduciary in relation to the shareholder, and such a “duty” was not owed as a director but arose from the influence generated by the fact, *inter alia*, that he was a director.<sup>109</sup>

However, later U.S. courts, including Delaware courts, were less careful with the concept of fiduciary in undue influence contexts and gradually adopted the influence conception as a fiduciary standard; first in non-corporate but then in corporate contexts. Consider, for example, developments in the New York courts. In the 1901 New York Court of Appeals case of *Doheny v. Lacy*, the court destabilized the relationship between fiduciary and confidential by providing that only where a fiduciary relation exists was the undue influence rule applicable and implying that a fiduciary relationship arose where the law recognised that certain “confidential” and “unequal” relations created scope for dominance.<sup>110</sup> For subsequent cases, following “the rule referred to in *Doheny v. Lacy*,” relations of influence were considered to have “created what the law regards as a fiduciary relation . . . .”<sup>111</sup> In *Von Au v. Magenheimer*, another New York influence case relating to the purchase of shares by corporate officers, the court observed “[i]f their relation was not strictly of [a] fiduciary character . . . it was in a sense fiduciary . . . .”<sup>112</sup> Some New York courts even cited *Strong v. Repide* as standing for this fiduciary designation.<sup>113</sup>

A possible driver for this fusing of legal ideas in the concept of the fiduciary is an early tendency to refer to power/undertaking fiduciary

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107. *Id.*

108. *See e.g.*, *Bd. of Comm’rs v. Reynolds*, 44 Ind. 509, 516 (1873) (citing *Carpenter v. Danworth*, 52 Barb. 581, 583 (1868) (setting forth the undue influence proposition and citing *Gibson*)).

109. *See also* *Steinfeld v. Nielsen*, 139 P. 879 (Ariz. 1913) (following *Strong v. Repide*).

110. *Doheny v. Lacy*, 61 N.E. 255, 258 (N.Y. 1901) (“That rule, within the cases, requires as a basis for its application that a fiduciary relation exist between the parties, which will give to the one, in legal presumption, a controlling influence over the other. Such would be the relation of parent and child, guardian and ward, trustee and cestui que trust, physician and patient, and attorney and client. In these confidential relations the situation of the parties is regarded as unequal, and as conferring upon one a certain control or domination over the will, conduct, and interests of the other. Transactions between them are, therefore, scrutinized closely, and presumptions arise of their impropriety, which must be met where an advantage is derived by the presumably dominant party.”).

111. *In re Weber’s Estate*, 194 N.Y.S. 336, 341 (Sur. Ct. 1922); *see also In re Van Den Heuvel’s Will*, 136 N.Y.S. 1109, 1126 (Sur. Ct. 1912).

112. *Von Au v. Magenheimer*, 110 N.Y.S. 629, 636 (N.Y. App. Div. 1908); *see also* *Fischer v. Guar. Trust Co.*, 18 N.Y.S.2d 328, 333 (N.Y. App. Div. 1940) (following *Von Au*); *Lesnik v. Pub. Indus. Corp.*, 144 F.2d 968 (2d Cir. 1944) (same).

113. *See* *Rogers v. Am. Tobacco Co.*, 257 N.Y.S. 321, 323 (Sup. Ct. 1931) and *Farmers’ Loan & Trust Co. v. Pierson*, 222 N.Y.S. 532, 545 (Sup. Ct. 1927) citing *Strong v. Repide* for the proposition: “The directors occupy a very real and broad fiduciary relation to the stockholders.”



relations as “technical” fiduciary relations.<sup>114</sup> In *Worrall’s Appeal*,<sup>115</sup> for example, the Pennsylvania Supreme Court in applying the undue influence rule referred to its application to “technical fiduciary relations.”<sup>116</sup> In *Coghill v Kennedy*, the Supreme Court of Alabama observed that the influence rule “embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another.”<sup>117</sup> Summarizing this position, Charles Beach observed in 1897 that relations of trust and confidence extend beyond “where there exists a formal and technical fiduciary relation . . . .”<sup>118</sup> For both Beach and these cases a relationship of confidence which did not involve a power/undertaking technical fiduciary relation, was not labelled a fiduciary relation. However, the adjective “technical” implied that there were other non-technical, informal relations which could be designated “fiduciary”; a designation that also accords with the literal meaning of the term fiduciary reflecting relations of trust and confidence.<sup>119</sup> Subsequent courts followed this inference where relations of confidence that allowed for influence became “informal fiduciary relationship[s].”<sup>120</sup> The New York case *In re Van Den Heuvel’s Will* was a first mover in this regard providing that a relation of influence arising from a caring/nursing function created “an actual, if not a technical, fiduciary relation . . . .”<sup>121</sup> For *Beach v. Wilton*, in the Supreme Court of Illinois in 1910, relying on the technical/informal distinction, the term “‘fiduciary’ or ‘confidential’ relation . . . is a very broad one” which is applicable where “influence has been acquired and abused—

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114. See CONTRACT, STATUS, AND FIDUCIARY LAW 1412–13 (Paul B. Miller & Andrew S. Gold eds., 2016), which considers this distinction but attributes it to established fiduciary categories and relationship-based fiduciary relations.

115. 1 A. 380, 388 (Pa. 1885) (followed in *Samson v. Samson*, 25 N.W. 233 (Iowa 1885)).

116. *Id.* at 388.

117. 24 So. 459, 469 (Ala. 1898). This case is followed widely in the U.S., invariably without citation. See, for example, Illinois (*Thomas v. Whitney*, 57 N.E. 808, 810 (Ill. 1900); *Irwin v. Sample*, 72 N.E. 687, 690 (Ill. 1904)); Missouri (*Bracken v. Milner*, 104 F. 522, 525 (C.C.W.D. Mo. 1900)); California (*Hemenway v. Abbott*, 97 P. 190, 196 (Cal. Dist. Ct. App. 1908)); Oklahoma (*Ewing v. Ewing*, 126 P. 811, 815 (Okla. 1912)); Maryland (*Anderson v. Watson*, 118 A. 569, 575 (Md. 1922)); Florida (*Dale v. Jennings*, 107 So. 175, 178 (Fla. 1925)); Hawaii (*Meheula v. Hausten*, 29 Haw. 304, 314 (1926)); Utah (*Omega Inv. Co. v. Woolley*, 271 P. 797, 801 (Utah 1928)); Maine (*Eldridge v. May*, 150 A. 378, 379 (Me. 1930)).

118. CHARLES FISK BEACH, JR., A TREATISE ON THE MODERN LAW OF CONTRACTS 1014 (1897).

119. Edelman, *supra* note 12, at 304 (considering “the Latin *fiducia* which means trust or confidence”).

120. See, e.g., *In re Munsell’s Guardianship*, 31 N.W.2d 360, 365 (Iowa 1948). More recently see *Apple Recs., Inc. v. Capital Recs. Inc.*, 529 N.Y.S.2d 279, 281 (N.Y. App. Div. 1988).

121. *In re Van Den Heuvel’s Will*, 136 N.Y.S. 1109, 1126 (Sur. Ct. 1912).

in which confidence has been reposed and betrayed.”<sup>122</sup> Here “fiduciary” and “confidential” are not distinct legal ideas but become legal synonyms.<sup>123</sup>

Of particular importance for the investigation in this article is the Delaware Supreme Court case of *Peyton v. William C. Peyton Corp.*<sup>124</sup> In an action to challenge contracts entered into by a wife as a result of the alleged undue influence of her deceased husband, the Delaware Supreme Court offers a clear account of the fiduciary influence/undue influence standard drawing on several New Jersey cases<sup>125</sup> that rely heavily on *Mott v. Mott*<sup>126</sup> and the background English jurisprudence including *Gibson v. Jeyes* and *Huguenin v. Baseley*. The court observed:

Application of the principle is not restricted to cases where, by evil design or contrivance to injure another, a benefit has been gained by a fiduciary at the expense of his principal; for even though a fiduciary has no purpose or intention to take an unfair advantage, equity will not lend its aid to the enforcement of the transaction and the fiduciary will not be permitted to retain advantage acquired as a consequence of it, if the transaction results in inequality and injustice. The purpose of the rule is not so much to protect the cestui against the consequences of undue influence as it is to safeguard him against the results of his own voluntary acts induced by the confidential relation between him and his fiduciary the effect of which with respect to his own interests he may not fully comprehend.<sup>127</sup>

Importantly, in this case the husband was deemed to be a fiduciary,<sup>128</sup> not because he had undertaken and had been empowered to act on her behalf,

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122. *Beach v. Wilton*, 91 N.E. 492, 495 (Ill. 1910) (citing *Mayrand v. Mayrand*, 61 N.E. 1040, 1041 (Ill. 1901)). For the modern imprint of these cases see *Mobil Oil Corp. v. Rubenfeld*, 339 N.Y.S.2d 623 (Civ. Ct. 1973) (setting forth the law through unattributed direct borrowing of the position in *Coghill v. Kennedy and Beach*), *rev'd* 370 N.Y.S.2d 943 (App. Div. 1975).

123. In this regard the Appellate Division of the New York Supreme Court observed in 1913 that “[i]t is said in Anderson’s Dictionary of Law . . . that the words ‘fiduciary’ and ‘confidential’ are commonly used by courts and law writers as convertible expressions . . . .” *Glover v. Nat’l Bank of Com.*, 156 A.D. 247, 254 (N.Y. App. Div. 1913); *see also* *Konsuvo v. Netze*, 220 A.2d 424, 433 (N.J. Super Ct. Ch. Div. 1966) (quoting 8 WILLISTON ON CONTRACTS § 947B (3d ed. 1964)) (“Such fiduciary relation is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, or other recognized legal relations, but it exists in all cases where confidence is reposed on the one side and a resulting superiority and influence on the other side arises therefrom.”); *Eldridge v. May*, 150 A. 378, 379 (Me. 1930).

124. 7 A.2d 737 (Del. 1939).

125. *See e.g.*, *Slack v. Rees*, 59 A. 466, 467 (N.J. 1904); *Pattberg v. Gott*, 140 A. 795 (N.J. Ch. 1928); *Hall v. Otterson*, 28 A. 907 (N.J. Ch. 1894).

126. 22 A. 997 (N.J. Ch. 1891); *see also supra* text accompanying notes 87–90.

127. *Peyton*, 7 A.2d at 747 (emphasis added).

128. *Id.* at 745.

but because “[c]onfidential and fiduciary relations have the same meaning in law,”<sup>129</sup> and:

*[A]s every fiduciary relation implies a condition of superiority of one of the parties over the other, equity raises a presumption against the validity of a transaction by which the superior obtains a possible benefit at the expense of the inferior, and casts upon him the burden of showing affirmatively his compliance with all equitable requisites. So, the principle is well established that a person standing in a confidential relation towards another may not retain benefits conferred by his principal in a transaction as to which competent independent advice is considered necessary, except upon a satisfactory showing that the principal had such advice in conferring the benefits.*<sup>130</sup>

Of particular note in this regard is that this statement of the law is taken, largely verbatim, from the 1892 edition of *Pomeroy on Equity Jurisprudence*,<sup>131</sup> which *Peyton* merely cites.<sup>132</sup> Pomeroy also observed, consistent with the influence understanding of fiduciary relations that:

It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists *as a fact, in which* there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.<sup>133</sup>

Pomeroy also provided, consistent with this conception,<sup>134</sup> that as regards dealings in shares directors owe fiduciary duties to the shareholders directly:

On the other hand, the directors and managing officers occupy the position of *quasi* trustees towards the stockholders alone, and not at all towards the corporation, with respect to their shares of stock. Since the stockholders own these shares, and since the value thereof and all their rights connected *therewith are affected by the conduct of*

129. *Id.* at 747 (emphasis added).

130. *Id.* (emphasis added).

131. 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 956 (2d ed. 1892) (citing multiple English influence cases including *Huguenin v. Baseley* and *Tate v. Williamson* (1866) 2 Ch. App. 55).

132. *Peyton*, 7 A.2d at 747 (citing POMEROY, *supra* note 131).

133. POMEROY, *supra* note 131, at § 956 (second emphasis added). Note this quote was influential on the treatment of confidential relations as fiduciary relations, including in *Beach v. Wilton*, 91 N.E. 492 (Ill. 1910). See *supra* note 122 and accompanying text.

134. *But see id.* § 1090 n.1 (citing contrary decisions and acknowledging that “no single decision, so far as I am aware, attempts to give the complete analysis or to formulate the entire results”).

*the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with and confined to the shares of stock held by the stockholders; from it arise the fiduciary duties of the directors towards the stockholders in dealings which may affect the stock and the rights of the stockholders therein, and their equitable remedies for a violation of those duties. To sum up: directors and managing officers, in addition to their functions as mere agents, occupy a double position of partial trust; they are quasi or sub modo trustees for the corporation with respect to the corporate property, and they are quasi or sub modo trustees for the stockholders with respect to their shares of the stock.*<sup>135</sup>

Accordingly, paraphrasing *Mott v. Mott*, for Pomeroy and, therefore, for *Peyton*, a fiduciary is a person in whom “whether by legal, natural or conventional means . . . confidence is naturally inspired, is presumed or in fact reasonable exists.”<sup>136</sup> If the circumstances render it reasonable for A to rely on B to consider A’s interests a fiduciary relation and concomitant fiduciary duties exist.

Delaware corporate law initially resisted the conflation of the fiduciary relation and equity’s regulation of undue influence which we see in *Peyton*. In the important takeover defence case of *Kors v. Carey*,<sup>137</sup> the Chancery Court followed *Strong v. Repide* in observing that “directors generally do not occupy a fiduciary position vis à vis individual stockholders in direct personal dealings . . . .”<sup>138</sup> Yet, consistently with *Strong* and the undue influence standard, *Kors* acknowledged that relief was available “where advantage is taken of inside information and the like. . . .”<sup>139</sup> Six years later in *Lank v. Steiner*,<sup>140</sup> a case dealing with the validity of options to buy stock granted by a shareholder to directors, the Delaware Supreme Court approved *Kors* while at the same time implying that the existence of special facts and circumstances<sup>141</sup> produce a fiduciary relation; a position set forth in counsel’s submission that “under special circumstances a director of corporation acts in a fiduciary capacity when dealing with a stockholder for the purchase of his stock.”<sup>142</sup> The majority found that there was no such

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135. *Id.* at § 1090 (emphasis added). In *Strong v. Repide*, 213 U.S. 419 (1909), although the court cites *Stewart v. Harris*, 77 P. 277 (Kan. 1904), which draws on this position in Pomeroy, the court does not follow Pomeroy’s lead in relation to the fiduciary conclusion.

136. This is my, not *Peyton*’s, paraphrasing.

137. 158 A.2d 136 (Del. Ch. 1960).

138. *Id.* at 143.

139. *Id.* at 143.

140. 224 A.2d 242 (Del. 1966).

141. *Id.* at 244; *see id.* at 266 (summarizing *Kors*). *But see id.* at 266 (citing *Peyton* and Pomeroy that the undue influence doctrine could apply to a non-fiduciary).

142. *Id.* at 265.

relationship of confidence and reliance between the director and stockholder-vendor. Justice Herrmann dissented, asking: “does not the fiduciary relation arise from the confidence and trust which put the Steiners in a position to exert influence over the Lanks . . . ?”<sup>143</sup>

Subsequent cases readily fiduciarized the holding in *Lank*. For example, in *Cheese Shop International, Inc. v. Steele*,<sup>144</sup> the Chancery Court relied on *Lank* and *Peyton* for the proposition that:

A fiduciary relationship is a situation where one person reposes special trust in and reliance on the judgment of another *or where a special duty exists on the part of one person to protect the interests of another. The relationship connotes a dependence. A fiduciary relation implies a condition of superiority of one of the parties over the other.*<sup>145</sup>

A more recent example of the fiduciarization of the holding in *Lank* is *In re Wayport Inc. Litigation*, where the Chancery Court observed:

The fourth scenario arises when a corporate fiduciary buys shares directly from or sells shares directly to an existing outside stockholder. Under the “special facts doctrine” adopted by the Delaware Supreme Court in *Lank v. Steiner*, a director *has a fiduciary duty* to disclose information in the context of a private stock sale “only when a director is possessed of special knowledge . . . .”<sup>146</sup>

Note also that such a fiduciary duty is treated as a component part of her “director’s” fiduciary duties, rather than as an additional and distinct obligation incurred as a result of the fact that the purchaser, who happens to be a director, has acquired information in her role as a director which generates a condition of superiority.

## II. CONTROLLING SHAREHOLDERS AS FIDUCIARIES

### A. *Regulating Going-Privates Lord Eldon Style*

In Part II, this article explores the infusion of the influence conception of fiduciary relations outlined in Section I into modern Delaware law through the case law on going-private transactions. More broadly, it explores the structural effects of this conception on Delaware corporate fiduciary law. But before doing so, it is helpful to this analysis to be able to

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143. *Id.* at 271 n.2 (Herrmann, J., dissenting).

144. 303 A.2d 689 (Del. Ch. 1973), *rev'd*, 311 A.2d 870 (Del. 1973).

145. *Id.* at 690 (emphasis added) (citations omitted).

146. 76 A.3d 296, 315 (Del. Ch. 2013) (emphasis added) (citations omitted) (quoting *Lank*, 224 A.2d at 244).

locate it in an understanding of how going-privates would be regulated where courts only understood fiduciary relations through the power/undertaking understanding of the fiduciary, which rests on Lord Eldon's foundational jurisprudence and, as we explore in Part II.B below, was how Delaware's corporate law courts understood fiduciary relations prior to the 1970s.

For a controlling shareholder to be treated as power/undertaking fiduciary, the shareholder would have to exercise corporate power.<sup>147</sup> In relation to board power the first question we need to answer is what type of controller activity is sufficient to be deemed to exercise power and be deemed to have undertaken to exercise it on behalf of the corporation. Is it, for example, sufficient to have appointed the board members, or for board members to be affiliated with the controller; or does there need to be evidence of more active intervention to further the controller's position? As a controller is not a fiduciary merely because she is capable of undertaking to perform a role and capable of exercising power/being empowered, one would expect that a high level of intervention would be required for fiduciary obligation to be triggered. Once triggered, the second question which then arises is which duties apply to such a fiduciary? As the traditional conception of the fiduciary obligation flows from undertaking and empowerment, it is clear that the controller's exercise of power would be subject to the business judgment rule and fairness review.<sup>148</sup> Accordingly, a going-private merger where the controlling parent is a fiduciary in relation to the subsidiary company—an archetypal self-dealing contract—would be subject to fairness review. As these duties arise from the parent's usurpation of subsidiary board power they are owed to and must be enforced by, or derivatively on behalf of, the subsidiary.<sup>149</sup> But where the controller has not intervened in the operation of the board and the subsidiary operates as an independent entity, then in relation to the exercise of board power the parent is not a power/undertaking fiduciary and fairness review as the product of fiduciary obligation would not be triggered.

But before leaving the domain of fiduciary obligation we need to consider the effect of the parent controlling the subsidiary's shareholder meeting approval of the merger: an exercise of corporate power in relation to the merger. Would this alone result in the controller being deemed to be a fiduciary in this transaction? Corporate law has long recognised that general meeting power is subject to a good faith corporate interest restriction, generating a form of rationality review of the exercise of meeting

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147. *See supra* text accompanying notes 16–40.

148. *See supra* text accompanying notes 46–48.

149. *See supra* text accompanying notes 49–50.

power.<sup>150</sup> However, this alone would not have deemed a majority shareholder exercising her votes to be a fiduciary.<sup>151</sup> Although the general meeting does exercise power on behalf of the corporation, it is difficult to view the collective body as having undertaken a representative role to act for or on behalf of the corporation, as opposed to merely exercising corporate power when it is asked to do so. Although clearly, if the majority shareholder's actions can be understood to involve such an undertaking then it would be a fiduciary in exercising that power unless it took steps to neutralise its power in that vote, by not voting or, to the same effect, by providing for a majority of the minority approval requirement.<sup>152</sup>

Of course, through a traditional, non-fiduciary understanding of the undue influence doctrine, as articulated in *Gibson, Huguinen, and Cowee*, given the “overmastering” influence of the parent over the subsidiary, as well as legitimate concerns of the subsidiary's minority shareholders about abuse of that influence to their detriment, in most going-private mergers *even where the parent is not a power/undertaking fiduciary*, fairness review would be applicable. This would require fair dealing but also, in the traditional reading of the doctrine, may require fair price. To neutralize the scope for such undue influence intervention, the parent would have to neuter its potential influence. It could do this by providing an effective special committee of independent directors and a majority of the minority condition, as well as by ensuring that no threats of abuse of influence were made or implied. Even then, as evidenced by the traditional undue influence doctrine, fairness review as to price may still take place where courts are unconvinced that the influence has been defused. Importantly, through this traditional lens, such conditions would not be the product of fiduciary obligation.<sup>153</sup>

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150. An early New York Court of Appeals case, *Gamble v. Queens Cnty. Water Co.*, 25 N.E. 201, 202 (N.Y. 1890) serves to make this point:

Their action resulting from such votes must not be so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of *and in opposition to the interests of the corporation, and of the minority of the shareholders, and that their action is a wanton or a fraudulent destruction of the rights of such minority*. In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders.

*See id.* (emphasis added) (noting that “[t]hese views are exemplified in the comparatively recent English case” *Nw. Transp. Co. v. Beatty* (1887) 12 App. Cas. 589 (PC)). For the Court of Appeals in *Gamble*, judicial intervention was only possible in relation to egregious exercises of power which “*plainly show[]*” that the action was “*so far* opposed to the true interests of the corporation” that it could not be made sense of as action which furthered the corporate interest. *Id.* (emphasis added).

151. Note in this regard that corporate law has long recognised that shareholders can vote the shares in their own interests (*Gamble v. Queens Cnty. Water Co.*, 25 N.E. 201, 202 (N.Y. 1890)).

152. For an interesting modern UK case in this regard, see *Lehtimäki v. Cooper* [2020] UKSC 33.

153. *See supra* notes 72–91.

Where the parent makes an offer to buy the shares of the minority position rather than merging with the subsidiary, *even if it is a fiduciary because it has usurped subsidiary board power* this is not a self-dealing contract because the parent does not exercise subsidiary board power<sup>154</sup> when making the offer, nor does it exercise decision making power on behalf of the minority shareholders. However, following *Gibson, Hueguenin*, and their American progeny, it is also clear given the scope of the controlling shareholder's ability to influence the minority shareholder's decision—through, inter alia, any exercise of subsidiary board power, fear of retribution, or an intended back-end squeeze out through a short-form merger—that the undue influence rule would apply regardless of whether or not the controlling shareholder is a fiduciary.<sup>155</sup> As noted this would require fair dealing but may also, in the traditional reading of the doctrine, require fair price. Fair dealing could entail disclosure of information not available to the minority, the isolation of the parent from any exercise of subsidiary board power that relates to the offer, care not to threaten any form of retribution, and a mandatory extended offering period<sup>156</sup> to enable exit for those shareholders who initially say “no” (a much more effective pressure-release than a majority of the minority tender requirement). And again, fair price could be deployed by the courts when not satisfied that the process protections have enabled truly voluntary decision making. Moreover, any such action would be brought in the shareholder's individual capacity as the party contracting with the controlling shareholder-offeror, subject to its “overmastering influence” which may have infected the formation of such minority shareholder's intention to agree to enter into contractual relations with the controller.<sup>157</sup>

### *B. Controllers' Fiduciary Power in the Supreme Court*

The idea that controlling shareholders owe a fiduciary obligation to minority shareholders has a long pedigree in the United States. Until the late twentieth century, considered in Part C below, this idea was firmly rooted in the power/undertaking lens. However, as in the case of a director's fiduciary duties, which the earliest corporate cases provided were owed to

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154. Although clearly if it exercises subsidiary board power such an exercise is subject to fiduciary obligation.

155. See *supra* text to notes 86–91.

156. Pursuant to Rule 14d-11 of Regulation 14D, any extended offering period is at the bidder's election. 17 C.F.R. § 240.14d-11 (2020).

157. See *supra* text accompanying notes 94–96.



both the corporation and the shareholders, the actual nature and recipients of these obligations needs to be carefully parsed.<sup>158</sup>

Justice Brandeis's decision in *Southern Pacific Co. v. Bogert*<sup>159</sup> is viewed as a foundational case in this regard. For Brandeis, "the majority has a right to control; *but when it does so*, it occupies a fiduciary position toward the minority" and "majority stockholders exercising control"—and "dominat[ing] its affairs"—"are deemed trustees for the minority" because of "the fact of control of the common property held and exercised."<sup>160</sup>

The majority's "exercis[e] [of] control" and "the dominat[ion] of [the corporation's] affairs" are central to the Court's conclusion about fiduciary position—reflecting a power/undertaking fiduciary lens. However, the focus on trusteeship and common property appears to disregard the corporation as a separate legal entity and treats the corporation, in effect, as a general partnership. Brandeis's language and position are, however, more comprehensible in the light of the facts of this case, which involved an allegation that the defendant former-controlling shareholders had effectively embezzled all the corporation's assets, and a claim by the minority for its share in the "common property" now held on trust by the former-controlling shareholder.<sup>161</sup> That is, the unlawful transfer of the corporation's assets to the controller alone meant that the controller was both in breach of its fiduciary obligation and was now a constructive trustee for the minority in relation to its share of the assets. Notably, the District Court at first instance simply held that "the minority stockholders had rights which they could enforce against the property *in the hands of* the majority stockholders."<sup>162</sup> The Supreme Court noted similarly that "the minority may not be excluded from a fair participation in the fruits of the sale."<sup>163</sup> In doing so it cited *Menier v. Hooper's Telegraph Works*,<sup>164</sup> a nineteenth-century English case in which a controlling shareholder effectively received side payments to ensure that the board of the company elected not to enforce a claim against a former director, which was the company's only asset.<sup>165</sup> The English Court of Appeal in *Meiner* observed that "the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share."<sup>166</sup> The

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158. Considered in Part I above, showing that duties "owed to the stockholders" were owed to the corporation. See text accompanying notes 49–71.

159. 250 U.S. 483 (1919) ("*Southern Pacific*").

160. *Id.* at 487–88, 491, 492 (emphasis added).

161. *Id.* at 487, 491.

162. *Bogert v. S. Pac. Co.*, 226 F. 500, 512 (E.D.N.Y. 1915) (emphasis added).

163. *S. Pac. Co.*, 250 U.S. at 488.

164. (1874) 9 Ch. App. 350, 354.

165. *Id.*

166. *Id.* at 354.

judgment in *Menier* did not elaborate on the legal basis for the claim nor did it label the controller a fiduciary, but importantly the claim was brought derivatively and the court considered the basis for it being brought derivatively, evidencing that any duty was owed to, or any right was held by, the company (the “proper Plaintiff”), not to or by the minority shareholders directly.<sup>167</sup>

*Southern Pacific* also drew on several similarly situated cases where controlling shareholders acted to obtain the company’s assets below value. As in *Southern Pacific*, in setting forth the duties of the controllers, the corporate identity of the subject company often appears to be ignored. *Ervin v. Oregon Railway & Navigation Co.*, an 1884 case which also relied on *Menier v. Hooper’s Telegraph Works*, involved the exercise of the power to wind-up the company by the shareholder meeting and a sale at an alleged undervalue of the company’s property to the majority shareholder.<sup>168</sup> The United States Circuit Court for the Southern District of New York identified the fiduciary relation of “quasi trustees” between the majority and minority shareholders as “equitable joint-owners of the [corporate] property . . . .”<sup>169</sup> But importantly, the court recognised that the rights that were infringed by the controllers taking of that property were the company’s rights, and that the plaintiff shareholders were only allowed to bring the action themselves because the decision to dissolve the corporation “terminated the conventional relations between the corporation and its stockholders”<sup>170</sup> and, accordingly, the company was “so far extinct that it cannot stand in the way of the enforcement by its former stockholders . . . .”<sup>171</sup> Again, ostensibly direct fiduciary relations between the controlling shareholder and the minority, which regulate the exercise of a power (the power to dissolve the corporation),<sup>172</sup> are placed within the umbrella of corporate rights to be enforced by the corporation.

Shortly after *Ervin*, in *Farmers’ Loan & Trust Co. v. New York & Northern Railway Company*<sup>173</sup>—another case cited in *Southern Pacific* involving allegations of controlling shareholder expropriation of corporate assets—the Court of Appeals of New York held that:

Where . . . a majority of the stock is owned by a corporation or a combination of individuals, and *it assumes the control* of another

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167. *Id.* at 353–54.

168. 20 F. 577 (C.C.S.D.N.Y. 1884).

169. *Id.* at 582.

170. *Id.* at 581.

171. *Id.*

172. *Id.* at 580 (“A majority have no right to exercise the control over the corporate management which legitimately belongs to them for the purpose of appropriating the corporate property or its avails to themselves . . . .”).

173. 44 N.E. 1043 (N.Y. 1896).

company's business and affairs *through its control of the officers and directors of the corporation*, it would seem that, for *all practical purposes*, it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders, and therefore, under such circumstances, the rule stated in the Sage Case<sup>174</sup> and other similar cases applies to majority stockholders *who control the affairs of the company*, as well as to its directors or officers.<sup>175</sup>

What is meant by this claim that majority shareholders who assume control of the company's business "become the corporation" and thereby become trustees of the minority shareholders? Here the court is referring to the effect of exercising corporate power. When the board of directors of a corporation make a decision, we can understand that decision as the decision *of* the company, as distinct from a decision made on behalf of the company.<sup>176</sup> That is, the board embodies corporate power and the corporation. It is in this same sense that in usurping or exercising corporate power the majority shareholders embody or "become" the corporation: they substitute themselves for the board. Note also in this regard the discussion in Part I above, where we showed that statements about directorial duties to the stockholders should be understood as duties owed to the stockholders as a component part of the corporation; that is, duties owed to the corporation (the stockholders "compose" the corporation).<sup>177</sup> *Farmers'* statement about trustee relations with minority shareholders (or any statement about duties owed to minority shareholder) should be similarly understood. The New York Court of Appeals affirmed this reading of *Farmers* when, in the same year as the *Southern Pacific* judgment, in *Kavanaugh v. Kavanaugh Knitting Co.* it observed that *Farmers* and *Ervin* stood for the proposition that:

When a number of stockholders constitute themselves, or are by the law constituted [by in this case and in *Ervin* through the power to dissolve the company], the managers of corporate affairs or interests, they stand in much the same attitude towards the other or minority

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174. 41 N.E. 513 (N.Y. 1895) (one of the foundational fairness review self-dealing cases) (emphases added); see also KERSHAW, *supra* note 3, at 356–61.

175. *Farmers' Loan*, 44 N.E. at 1048–49.

176. *Id.*

177. See *supra* text accompanying notes 49–58.

stockholders that the directors sustain, generally, towards all the stockholders . . . .<sup>178</sup>

Subsequent U.S. Supreme Court cases had clearer sight of the legal and descriptively functional components of these cases. *Pepper v. Litton*<sup>179</sup> in 1939, for example, which relies on *Southern Pacific*,<sup>180</sup> is often cited for the proposition that controlling shareholders are fiduciaries.<sup>181</sup> The Supreme Court clearly adopts a power/undertaking lens in providing that controllers only become fiduciaries when they directly or indirectly exercise corporate power through their “domination and control” of the board.<sup>182</sup> Moreover, the fiduciary obligations they owe are to the corporation, whose powers they exercise, and are not owed directly to the minority shareholders. We see this as these obligations “are enforce[ed] directly by the corporation, or through a stockholder’s derivative action.”<sup>183</sup> To this point the court cited the Massachusetts’ Supreme Judicial Court decision in *Converse v. United Shoe Machinery Co.* that “[t]he wrong, if any, was done not to the plaintiffs as individual stockholders but to the corporation, and the remedy must be sought by or on behalf of the corporation.”<sup>184</sup>

### C. Fiduciary Conceptions in Delaware’s Going-Private Law

#### 1. Power/undertaking in Delaware’s going-privates

The earliest of Delaware cases addressing controlling shareholder fiduciaries drew on, inter alia, several of the cases discussed above to apply a power focused understanding of when controlling shareholders could become corporate fiduciaries. In *Allied Chemical & Dye Corporation v.*

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178. 123 N.E. 148, 151 (N.Y. 1919). On directors’ duties to the stockholders see *supra* Section I.A.3.

179. 308 U.S. 295 (1939).

180. *Id.* at 306.

181. See, e.g., *Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464, 471 (Cal. 1969); *Westgor v. Grimm*, 318 N.W.2d 56, 58 (Minn. 1982); cf. *Frieler v. Rueping Inc.*, No. 84-602, 1985 WL 188178, at \*6 n.4 (Wis. Ct. App. Aug. 21, 1985).

182. *Pepper*, 308 U.S. at 306 (“A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders. Their powers are powers in trust.”) (citations omitted).

183. *Id.* at 307 (observing further in this regard that the “standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation”). Fiduciary obligations can also be enforced in bankruptcy trustee acting for the corporation.

184. 95 N.E. 929, 929 (Mass. 1911). It is noteworthy that in the footnote to the statement by the Supreme Court in *Pepper* (after the cite to *Converse*), the court also observes that “[i]t is also clear that breach of that fiduciary duty may also give rise to direct actions by stockholders in their own right.” *Pepper*, 308 U.S. at 307 n.15. The cases cited in this footnote, however, evidence not that a director’s fiduciary duties can be enforced directly, but only that directors may take on other roles vis a vis the shareholders that are fiduciary in nature, and, necessarily, therefore directly enforced. See, e.g., *Strong v. Repide*, 213 U.S. 419, 423 (1909) (referring to an agency role for the shareholders). The Court also refers to *Green v. Victor Talking Machine Co.*, 24 F.2d 378 (2d Cir. 1928), which affirms this point.

*Steel & Tube Co. of America*,<sup>185</sup> the plaintiffs challenged a shareholder resolution to approve the sale of the corporation's assets as required by the Delaware corporate code. For the Chancery Court, fiduciary relations were inextricably tied to the exercise of corporate power:

When, in the conduct of the corporate business, a majority of the voting power in the corporation join hands *in imposing its policy upon all*, it is beyond all reason and contrary, it seems to me, to the plainest dictates of what is just and right, to take any view other than that they are to be regarded as having placed upon themselves the same sort of fiduciary character *which the law impresses upon the directors in their relation to all the stockholders*. Ordinarily the directors speak for and determine the policy of the corporation. When the majority of stockholders do this, they are, for the moment, the corporation. Unless the majority in such case are to be regarded as owing a duty to the minority *such as is owed by the directors to all*, then the minority are in a situation that exposes them to the grossest frauds and subjects them to most outrageous wrongs.<sup>186</sup>

The Court in *Allied* bears the imprint of *Farmers*.<sup>187</sup> Note in particular that in an exercise of corporate power the majority shareholders “are . . . the corporation”; that is, they become or embody the corporation, thereby generating fiduciary obligations akin to those the directors owe stockholders.<sup>188</sup> But as discussed above, references to directorial duties to stockholders in Delaware and elsewhere was one means of articulating the position that directors owe their duties to the corporation whose powers they exercise, where the stockholders “convene” the company.<sup>189</sup> Majority stockholder duties to the minority shareholders should be similarly construed: when they exercise corporate power they assume a duty to the corporation to exercise power to further the interests of *all shareholders*.

A half century later in *Harriman v. E.I. DuPont De Nemours & Co.*,<sup>190</sup> which involved a challenge to a merger between a major shareholder and Du Pont, the U.S. District Court for the District of Delaware provided an impeccable summary of the position on the incurrence and nature of controlling shareholder duties articulated in *Allied*, a position wholly

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185. 120 A. 486, 491–95 (Del. Ch. 1923) (first citing and strongly influenced by *Farmers' Loan*, then discussing *Ervin*, and then discussing *Kavanaugh*).

186. *Id.* at 491.

187. *See supra* text accompanying notes 3–177.

188. *Allied*, 120 A. 486 at 491 (“The same considerations of fundamental justice which impose a fiduciary character upon the relationship of the directors to the stockholders will also impose, in a proper case, a like character upon the relationship which the majority of the stockholders bear to the minority.”).

189. *See* discussion *supra* Section I.A.3.

190. 372 F. Supp. 101 (D. Del. 1974).

congruent with the power/undertaking understanding of the fiduciary relation articulated above:

Under Delaware law a stockholder who in fact controls the management of a Delaware corporation owes a fiduciary duty to that corporation and its shareholders. Presumably, a nonstockholder who *usurps* the function of the Board of Directors of a Delaware corporation or otherwise directs its activities *assumes the same fiduciary duty as its directors have*. . . .

Under the Delaware cases which speak of fiduciary duty to a corporation or its stockholders in contexts like those described above, *that duty arises from the exercise of power with respect to that corporation*. It is only when a person affirmatively *undertakes* to dictate the destiny of the corporation that he assumes such a fiduciary duty . . . to protect the interests of the DuPont stockholders.<sup>191</sup>

Note first that through this power/undertaking fiduciary lens, it is “only” where the controller “affirmatively undertakes to dictate” and “usurp” corporate power that it becomes subject to fiduciary obligation. Moreover, in relation to a controlling shareholder, or another person who exercises corporate power, through this fiduciary lens fiduciary duties are owed only when power is actually exercised and not when it is not—even when it has been usurped on a prior occasion; unless such prior usurpation can be deemed to maintain control over corporate power and policy.<sup>192</sup>

There are multiple other mid-to-late-twentieth-century reference points in Delaware jurisprudence for the position that controlling shareholder duties arise when the controllers exercise corporate power and that the duties they owe are coextensive with the duties owed by directors and relate to the exercise of that power. And, as with directorial fiduciary duties and the prior controlling shareholder case law, reference to duties to minority shareholders do not refer to a direct fiduciary duty to the minority shareholders, but rather to such shareholders as part of the corporation. Consider, for example, *David J. Greene & Co. v. Dunhill International, Inc.*, which involved both a motion for a preliminary injunction to challenge the fairness of a going-private merger with Spalding, which did not benefit from an independent board committee or minority of the majority approval conditionality, and a claim that Dunhill had taken corporate opportunities belonging to Spalding which were not taken account of in the merger price.<sup>193</sup> The court accepted that Dunhill owed fiduciary duties “to [the corporation] and the minority shareholders” as it “dominate[d] and

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191. *Id.* at 105–06 (emphases added).

192. *See supra* text accompanying notes 24–29.

193. 249 A.2d 427 (Del. Ch. 1968).

controll[ed]" Spalding.<sup>194</sup> The Chancery Court relied upon and quoted *Allied* to the effect that when the majority "determine the policy of the corporation" it owes "a duty to the minority *such as is owed by the directors to all . . .*"<sup>195</sup> Also following *Allied* and echoing *Farmers*, the court observed that "[o]rdinarily the directors speak for and determine the policy of the corporation. When the majority of the stockholders do this, they are, for the moment, the corporation."<sup>196</sup> Accordingly, the merger was subject to fairness review as it was a self-dealing transaction and Dunhill was subject to the corporate opportunity doctrine set forth in *Guth v. Loft, Inc.*,<sup>197</sup> requiring a determination of whether the opportunity "belonged to [the company]," evidencing unequivocally that the duty in this regard was owed to the corporation.<sup>198</sup>

Relying, *inter alia*, on *Dunhill*, the Delaware Supreme Court in *Sinclair Oil Corp. v. Levien*<sup>199</sup> similarly considered the application of the corporate opportunity doctrine to a controlling shareholder who "dominated" the corporation (an action that was brought derivatively to enforce the corporation's rights).<sup>200</sup> Later going-private mergers also fit within this power-focused lens. In *Singer v. Magnavox Co.*,<sup>201</sup> for example, the Delaware Supreme Court refers to the "settled rule of law in Delaware" that the majority shareholder/"dominant corporation" owed the minority "a fiduciary obligation *in dealing with the* [corporation's] property" and that "those who control the corporate machinery owe a fiduciary duty to the minority in the exercise thereof over corporate powers and property."<sup>202</sup> This duty tracked the directorial obligations of "loyalty, good faith and fairness" in the exercise of that power.<sup>203</sup> Here the subsidiary board was controlled by or incentivised to act in accordance with the parent's wishes.<sup>204</sup> Summarizing *Singer*, the Delaware Supreme Court in *Roland International Corp. v. Najjar* referred to the majority shareholders "who

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194. *Id.* at 429.

195. *Id.* at 434 (quoting *Allied*, 120 A. at 491) (emphasis added).

196. *Id.* at 434 (quoting *Allied*, 120 A. at 491).

197. 5 A.2d 503 (Del. 1939).

198. *Dunhill*, 249 A.2d at 434 (citing *Guth*, 5 A.2d at 513–15).

199. 280 A.2d 717 (Del. 1971).

200. *Id.* at 719 ("By reason of Sinclair's domination, it is clear that Sinclair owed Sinven a fiduciary duty.")

201. 380 A.2d 969 (Del. 1977), *overruled by* *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

202. *Id.* at 976 and 979 (emphasis added); *see also* *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 109–10 (Del. 1952) (referring to "the settled rule of law that . . . [the] majority stockholder . . . occup[ies], in relation to the minority, a fiduciary position in dealing with [the corporation's] property"). *Sterling* also refers to *Allied* and fits within the usurping corporate power lens. *Id.* at 112, 116.

203. *Singer*, 380 A.2d at 977.

204. In *Singer* the question was not addressed in detail as the defendant shareholder conceded the existence of fiduciary relation. *Id.* at 977. Note that the power/undertaking framework itself does not tell us about the forms of intervention that amount to "domination" or "usurpation".

have the power to control corporate property and,” echoing *Harriman*, “corporate destiny.”<sup>205</sup>

*Singer* and *Harriman*, along with *Allied*, also direct us to the question of whether the parent’s exercise of power in general meeting—which does not involve the usurpation of board power or the domination of the company or the board, but rather the exercise of powers which the statute provides are to be exercised by the general meeting—renders the controller a power/undertaking fiduciary. As noted above when considering going-privates “Lord Eldon style,”<sup>206</sup> without more there is no undertaking given by the controller to exercise such powers for the corporation, which is why corporate law has long recognised that shares could be voted in the shareholders own interests.<sup>207</sup> In the context of going-privates, several Delaware courts have side-stepped this and, focusing on the exercise of power alone, have treated such majority shareholders as fiduciaries. In *Harriman*, for example, the court held: “[W]e may assume for present purposes that a fiduciary duty may arise from the exercise of a stockholder power by a majority stockholder in his capacity as such, absent any intrusion in the affairs of the board of directors.”<sup>208</sup> In *Allied*, although clearly the court contemplates different ways in which the majority imposes its will on the corporation, the case did not focus on a usurpation of board power but on the exercise of general meeting power in relation to the sale of the company’s assets.<sup>209</sup> Similarly, in *Singer*, the focus of the court’s fiduciary analysis is on the exercise of the merger vote.<sup>210</sup>

## 2. *The Infusion of Fiduciary Influence in Going-Private Mergers*

Congruent in time with Delaware corporate law’s acceptance of the fiduciary influence conception through *Lank v. Steiner*<sup>211</sup> and *Cheese Shop*,<sup>212</sup> the going-private case law started to co-mingle the fiduciary influence conception with the power/undertaking conception, which, as we have seen above, dominated Delaware’s treatment of controller fiduciary duties through to the 1970s. This section and the following section tracks and explores the effects of this influence infusion in the going-private case law, first in relation to mergers, and then tender offers.

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205. 407 A.2d 1032, 1034 (Del. 1979), *overruled by* *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

206. *See supra* Section II.A.

207. *Gamble v. Queens Cnty. Water Co.*, 25 N.E. 201, 202 (N.Y. 1890).

208. 372 F. Supp. 101, 106 (D. Del. 1974).

209. 120 A. 486, 490–93 (Del. Ch. 1923).

210. 380 A.2d. 972 (Del. 1977), *overruled by* *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

211. 224 A.2d 242 (Del. 1966).

212. 303 A.2d 689 (Del. Ch. 1973), *rev’d*, 311 A.2d 870 (Del. 1973); *see supra* text accompanying notes 140–146.



*Weinberger v. UOP, Inc.*, one of Delaware's leading cases on going-private mergers, involved a direct class action brought to challenge a going-private merger between UOP and its parent, Signal Companies, Inc.<sup>213</sup> *Weinberger* stands, inter alia, for the position that going-private mergers are subject to entire fairness review and states clearly that fairness includes fairness in relation to both process and price.<sup>214</sup> On one reading of *Weinberger*, it has little to say about the status of the controlling parent as a fiduciary because the court based its fairness holding on the conflicts faced by the directors who sat on both boards and participated in the subsidiary board's decision, although abstained from voting.<sup>215</sup> However, the case is generally understood to require entire fairness review even in the absence of cross directorships where a fiduciary controller "stands on both sides of [the] transaction . . . ."<sup>216</sup>

For the Delaware Supreme Court in *Weinberger*, "Signal owed a fiduciary responsibility . . . to UOP's minority"<sup>217</sup> and was held to be in breach of its "fiduciary duty."<sup>218</sup> The court does not provide an account of why it reaches this conclusion about Signal's fiduciary status, allowing a reading of the parent as fiduciary through both the power/undertaking and the influence lenses. On the one hand, although it exercised no power through the general meeting's approval of the merger because of a majority of the minority requirement, at the time of the merger seven of the directors were affiliated with, worked for, or were on the board of Signal and the facts evidenced a significant degree of intervention in UOP's board-approval process.<sup>219</sup> Through this lens, the position that fairness review applied when "one stands on both sides of the transaction"<sup>220</sup> can be understood to reflect the traditional self-dealing position that fairness review applies when a fiduciary exercises power when faced with a conflicting interest or a conflicting duty on the other side of the transaction.<sup>221</sup> On the other hand

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213. 457 A.2d 701 (Del. 1983).

214. *Id.* at 711.

215. *Id.* at 708. See discussion of the obligations of dual directors, *id.* at 710–711. Note that as they did not exercise power in the vote, the influence lens is also arguably the natural lens for understanding directorial obligations and fairness review of the transactions. See KERSHAW, *supra* note 3, at 341–65. Of course, the boundary line between exercising power and abstention is blurred in cases such as *Weinberger* where the directors actively participated in board deliberation. *Weinberger*, 457 A.2d at 707.

216. *Weinberger*, 457 A.2d at 710. See, e.g., Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards*, in *THE CORPORATE CONTRACT IN CHANGING TIMES* (Steven Davidoff Solomon & Randall S. Thomas eds., 2019) at 34–35.

217. *Weinberger*, 457 A.2d at 705.

218. *Id.* at 703.

219. *Id.* at 704–07. The court cites several of the key power/undertaking cases discussed above in Section II.C.1. See *id.* at 710 (citing, for example, *Dunhill*).

220. *Id.* at 710.

221. *Id.* ("Signal cannot escape the effects of the conflicts it faced, particularly when its designees on UOP's board did not totally abstain from participation in the matter.").

there is a strong reading of the case that Signal had a fiduciary responsibility simply because it was a majority shareholder; that is, as Vice Chancellor Short put it in *Cheese Shop*: “A fiduciary relation implies a condition of superiority of one of the parties [the majority shareholder] over the other [the minority shareholders].”<sup>222</sup> The Court in *Weinberger* cites *Lank v. Steiner*<sup>223</sup> and refers to the earlier tender-offer going-privates which also draw on *Lank*,<sup>224</sup> and its consideration of the absence of an effective independent board is concerned with process not power.<sup>225</sup> Through this lens the statement that fairness review is required when “one stands on both sides of [the] transaction”<sup>226</sup> must be parsed differently. It is the capacity of the parent, as majority shareholder in the subsidiary, to influence, cajole, and threaten the minority to say “yes” which generates its fiduciary responsibility and requires fairness review. And it is the concern about influence that drives *Weinberger*’s holding that entire fairness review is concerned with process as well as price.<sup>227</sup>

Fairness review going to price in the history of corporate law in the United States is the product of the power/undertaking fiduciary conception and the remedial effects of the no-conflict rule, which provided for a prohibition of self-dealing contracts—which necessarily involve a conflict between undertaken duty and the director’s personal interests.<sup>228</sup> In relation to executed contracts where the director breached the duty, early courts—first in New Jersey<sup>229</sup> and subsequently in *Cahall v. Lofland*<sup>230</sup> in Delaware—provided that “it would be manifestly inequitable to deny the [director] a fair equivalent” for what she had contractually delivered.<sup>231</sup> That

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222. *Cheese Shop Int’l v. Steel*, 303 A.2d 689 (Del. Ch. 1973), *rev’d*, 311 A.2d 870 (Del. 1973) (citing *Peyton v. William C. Peyton Corp.*, 7 A.2d 737, 747 (Del. 1939)); *see also supra* text accompanying notes 124–146.

223. 224 A.2d 242 (Del. 1966).

224. *See Weinberger*, 457 A.2d at 711–12, referring to *Lynch v. Vickers Energy Corp.*, 429 A.2d 497 (Del. 1981), *overruled by Weinberger v. UOP, Inc.*, 457 A.2d 701, 703–704 (Del. 1983) (*overruled in relation to the calculation of monetary relief*).

225. *See Weinberger*, 457 A.2d at 710 (“*Given the absence of any attempt to structure this transaction on an arm’s length basis*, Signal cannot escape the effects of the conflicts it faced, particularly when its designees on UOP’s board did not totally abstain from participation in the matter.”) (emphasis added); *id.* at 709 n.7 (“[F]airness in this context can be equated to conduct by a theoretical, wholly independent, board of directors acting upon the matter before them . . . .”). Note, however, that it is very difficult to identify the lens which structures the decision solely by the focus on the independent committee which goes *both* to power and to fair process.

226. *Id.* at 710.

227. *Id.* at 710–11.

228. *See KERSHAW, supra* note 3, at 322–68. On fairness review, *see generally* Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware’s Entire Fairness Review*, 44 DEL. J. CORP L. 1 (2020); Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939 (2019).

229. *Gardner v. Butler* 30 N.J. Eq. 702 (1879).

230. 114 A. 224 (Del. Ch. 1921).

231. *Id.* at 232 (quoting *Gardner v. Butler*, 30 N.J. Eq. 702, 724 (1879)).

is, a no-conflict prohibition became remedial fairness as to price, which amounted *functionally* to a fairness standard. Through this strand, fairness as to process was irrelevant because the remedial question was: what were the financial consequences of a breach of duty?<sup>232</sup> Indeed, if fiduciary power is exercised in a self-dealing transaction how could the process ever be fair or at arms-length?

The early formation of Delaware's directorial fairness review was an opaque combination of State corporate laws, some of which deployed remedial fairness as to price, and others which developed fairness review in relation to process and price through the fiduciary/undue influence standard as applied to a director-fiduciary.<sup>233</sup> But in Delaware's pre-*Weinberger* opaque combination of these legal ideas, we find a bias toward fair price in both the foundational self-dealing case, *Cahall v. Lofland*,<sup>234</sup> and in the leading fairness case of *Gottlieb v. Heydn Chemical Corp.*,<sup>235</sup> which was cited by *Weinberger*.<sup>236</sup> *Gottlieb*, which involved directors resolving to grant to themselves stock options in the company, provided only for fairness as to price, requiring the directors to demonstrate that the transaction was "at least as favorable to the corporation" as if "the deal had been made with strangers . . . ."<sup>237</sup> It is *Weinberger's* concern with influence which leads naturally to the incorporation of fair process ("fair dealing") alongside fair price. Fair price for *Weinberger* is "the preponderant consideration," which aligns remedial fairness's exclusive focus on price with the influence standard, which focuses primarily on fair process but deploys fairness as to price as a means of ensuring actual voluntariness where process features are deemed unlikely to neutralise the influence.<sup>238</sup>

As noted at several junctures in this article, the longstanding undue influence rule provided for fairness review in the context of relations of superiority and influence. *Weinberger's* holding can be understood, therefore, as a straightforward application of an idea formed at the turn of the nineteenth century. What this traditional rule did not do, however, was deem the dominant party, here the majority shareholder, to be a fiduciary or

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232. *Gardener*, 30 N.J. Eq. at 725 ("The case resolves itself, then, into this question: Have the directors, whose action is the subject of controversy, retained for their services more than they are justly and reasonably entitled to? The burden is on them to show what they reasonably deserve to have, and no unjust exaction will be permitted."); see KERSHAW, *supra* note 3, at 332–37.

233. See KERSHAW, *supra* note 3, at 341–68.

234. 114 A. 224 (Del. Ch. 1921).

235. 90 A.2d 660 (Del. 1952).

236. See 457 A.2d 701, 710 (Del. 1983).

237. *Gottlieb*, 90 A.2d at 663. Note that both of these cases involved the exercise of corporate power by participating directors.

238. *Weinberger*, 457 A.2d at 711. On undue influence and fair price, see *supra* note 77.

consider fairness review to be a component part of such fiduciary's duties.<sup>239</sup> In contrast, in *Weinberger* if fairness review arises from the regulation of influence, not power, then this is understood as a product of the parent company's "fiduciary responsibility" and fairness review determines whether it has complied with its fiduciary duty. We see this much more clearly in *Citron v. E.I. Du Pont de Nemours & Co.*,<sup>240</sup> where an impeccably independent board committee<sup>241</sup> and majority of the minority provision meant clearly that the majority shareholder, Du Pont, did not exercise direct power, dominate the board, or usurp board power.<sup>242</sup> Yet, Du Pont was still understood to be a fiduciary and fairness review followed as "the majority stockholder stand[s] on both sides of the transaction . . . ."<sup>243</sup> For the Chancery Court, Du Pont was a fiduciary merely because it was a majority shareholder who was presumptively in a position of superiority; and, following the complainant's position, as majority shareholder its fiduciary duty of loyalty to the minority shareholders<sup>244</sup> required entire fairness review of the transaction.<sup>245</sup> In *Citron* it is exclusively the concern with influence<sup>246</sup> and coercion<sup>247</sup> in the process of the minority's formulation of its voting decision that supports the application of entire fairness in relation to process and price.<sup>248</sup> In this regard, the court provides an account of the

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239. See *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929 (Del. 1985) (applying fairness review to a parent-subidiary merger without referring at all to the concept of fiduciary).

240. 584 A.2d 490 (Del. Ch. 1990).

241. *Id.* at 494 (discussing how the committee was independent both in theory and practice); see also *id.* at 496 (noting that the independent committee almost ended the negotiations due to a "logjam").

242. *Id.* at 504–05.

243. *Id.* at 500.

244. *Id.* at 498.

245. *Id.* at 502. The Court independently observed that: "It is correct, as plaintiff argues, that DuPont, as a fiduciary, had a duty to treat the Remington minority fairly. But that fiduciary duty did not require that fairness be measured or determined by any specific valuation method or procedure." *Id.* at 508.

246. *Id.* at 502 (referring to "the inherent potential to influence").

247. See *id.* (discussing the existence of "coercion" where none is intended).

248. *Id.* In subsequent Delaware case law, courts have held that process protections are sufficient to bring fairness review to a close and subject the transaction to business judgment review. See *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (2014). Scholars have lamented this decision as representing the deterioration of fiduciary standards as compared to *Weinberger*, one that is explained by a jurisprudential shift enabled by the substitution of other governance mechanisms such as institutional shareholder monitoring. See Solomon & Thomas, *supra* note 216. But note that when seen from the vantage point of Lord Eldon's jurisprudence, which provides the unseen foundation for these decisions, the position taken in *M & F* is both defensible and consistent with the prior case law. Where there is an effective independent committee and a majority of the minority provision, no power is exercised and influence is the only concern. As we have seen, the undue influence concern is with the volition of the inferior party; fairness as to price is an option that can be deployed when, in spite of procedural protections, the court remains doubtful about fairness in practice. See *supra* note 77. Where the court is confident about the effectiveness of the procedural protections then there is no need to inquire further. If *Weinberger* is seen through the power/undertaking lens, then its entire fairness position is distinct from the position in *M&F*, which involved no exercise of power by the controlling shareholder; if it is seen through the lens of the

effect of influence on the voluntariness of the transaction of which Lord Eldon would be proud.<sup>249</sup> But again, what would have been unrecognisable for Eldon is *Citron's* fusion of law's concern to regulate undue or overmastering influence and the idea of the fiduciary.<sup>250</sup>

Where there is no such fiduciary-influence status, namely where the shareholder is not a majority shareholder, Delaware law continues to deploy the power/undertaking conception of fiduciary relations. So in *Kahn v. Lynch Communications Systems*,<sup>251</sup> for example, to determine whether or not a 43% shareholder (Alcatel) was a fiduciary depended on whether it exercised "actual control of corporation conduct"<sup>252</sup>—that is, exercised actual board power.<sup>253</sup> The Chancery Court concluded that even though Alcatel exercised power in other contexts—and therefore was a fiduciary<sup>254</sup>—in this going-private transaction the special committee neutralised the exercise of this power, so in effect, Alcatel was not acting in

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influence conception, then *Weinberger* simply did not fully explore the process conditions that would satisfy the concern about influence. This deterioration claim (the answer to which is found in exogenous drivers such as alternative governance mechanisms) arises from our failure to pay attention to the different legal ideas that underpin different entire fairness holdings. If we consider the standard divorced from those legal ideas then we will see change when there is none. Note also that this position in *M & F* is consistent with the application of fair process review in other contexts. See *Solomon v. Pathe Communications* 672 A.2d 35 (Del. 1996); *infra* text accompanying notes 287–296. What matters is not the structure (merger versus tender offer) to which the doctrine applies but the rules and principles that determine how the doctrine is applied.

249. *Citron*, 584 A.2d at 502.

250. Or more broadly for Eldon, the trustee.

251. 638 A.2d 1110 (Del. 1994). In more recent cases, a shareholder is a fiduciary owing a duty of loyalty if it is a controller and (combining fiduciary influence and fiduciary power) it is a controller either where, as in *Weinberger* it is a majority shareholder or, where it is not, it exercises corporate power. So, for example, in *In re GGP, in stockholder litigation* C.A. No. 2018-0267 (2021), the plaintiff asserted "breach of fiduciary duty against [the defendant] in its capacity as controlling shareholder" and "under Delaware law, a stockholder will be deemed a controlling stockholder where he "(1) owns more than 50% of the voting power of a corporation or (2) owns less than 50% of the voting power of the corporation but exercises control over the business affairs of the corporation" (at 36 citing *In re KKR Financial Holdings LLC Shareholder Litigation* 101 A.3d 980 (2015)), requiring domination and control (at 37).

252. *Id.* at 1114 (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)).

253. *Kahn*, 638 A.2d at 1114. In *Khan*, the Delaware Supreme Court cites *Ivanhoe Partners v. Newmont Mining Corp.* as follows: "a shareholder owes a fiduciary duty only if it owns a majority interests in or exercises control over the business affairs of the corporation." *Id.* at 1113–14 (quoting *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987)) (emphasis original). The Chancery Court in *Kahn* observed that: "It is settled law in Delaware that a stockholder owning less than 50% of the outstanding stock, 'does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status.'" *Kahn v. Lynch Commc'ns Sys., Inc.*, No. 8748, 1993 WL 290193, at \*2 (Del. Ch. July 9, 1993) (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)), *rev'd*, 638 A.2d 1110 (Del. 1994). The Chancery Court went on to specify that "a minority stockholder that exercises control over the business affairs of a corporation is accountable as a fiduciary." *Kahn*, 1993 WL 290193, at \*2 (citing *Ivanhoe*, 535 A.2d at 1344).

254. *Kahn*, 1993 WL 290193, at \*5 ("I find Alcatel to be a fiduciary because of its actual control over Lynch's Board . . .").

a fiduciary capacity *in relation to the merger*.<sup>255</sup> Accordingly it was not required to “*satisfy* the standard of entire fairness . . . .”<sup>256</sup> The Chancery Court was uncertain what to do thereafter: was the subsidiary’s merger merely subject to business judgment review or did fairness review remain applicable with the burden shifted to the plaintiff?<sup>257</sup> The latter is consistent with the undue influence lens, presumptively requiring fairness review in a transaction between the fiduciary (Alcatel) and its charge (the company); although only exploring fair price where the court harbours doubt about the ostensible fairness of the process.<sup>258</sup> The Chancery Court proceeded to analyze fair price.<sup>259</sup>

For the Delaware Supreme Court, Alcatel was also a power/undertaking fiduciary, although it disagreed with the Chancery Court’s factual finding that the special committee neutralized Alcatel’s usurpation of power in relation to the merger.<sup>260</sup> The Supreme Court, in contrast to the Chancery Court, is unequivocal about the application of entire fairness review,<sup>261</sup> requiring, following *Weinberger*, fair process and price.<sup>262</sup> However, the reason for this is not clear from the case; the conclusion is consistent with a power/undertaking; fiduciary influence or undue influence conceptual sub-structure. Is it because Alcatel usurped board power (fairness through a power/undertaking lens) by directly coercing the board to do its bidding, and thereby exercising power on both sides of the transaction?<sup>263</sup> Is it because, as in *Citron*, once designated as a fiduciary,<sup>264</sup> regardless of whether power was exercised in relation to this transaction, it owed a duty

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255. *Id.* at \*4 (“Although I am satisfied from the evidence that Alcatel did exercise control over Lynch . . . it does not necessarily follow that Alcatel also controlled the terms of the merger and its approval.”).

256. *Id.* at \*5 (emphasis added).

257. *Id.* at \*5.

258. The understanding is analogous to the situation where a director is not involved in the exercise of corporate power in relation to a self-dealing transaction with her. As in *Citron*, this influence-induced fairness analysis looks to price, having concluded that the independent board was effective. *Id.* at \*5–8.

259. *See id.* The Chancery court did not make a legal determination as to review standard as even under the more stringent standard the court found the defendants were not in breach. *Id.* at \*5.

260. *Kahn v. Lynch Commc’ns Sys., Inc.*, 638 A.2d 1110, 1118 (Del. 1994) (observing that the independence of the committee was “suspect from the outset”).

261. *Id.* at 1115 (“A controlling or dominating shareholder standing on both sides of the transaction, as in a parent-subsidary [merger], bears the burden of proving its entire fairness.”) (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)).

262. *Weinberger*, 457 A.2d at 711.

263. Note the plaintiffs deployed “coercion” in relation to the board, not the minority shareholder’s decision: “[Alcatel] violated [its fiduciary] duties by coercing the Lynch board of directors into approving the merger at an unfair price.” *Kahn*, 1993 WL 290193, at \*2.

264. Although note that the basis for it being a fiduciary is because it exercised power separately, not as in *Citron*, because the controller was an influence fiduciary. In both cases the duties not to abuse influence and coerce the decision become fiduciary duties. One way of reading *Kahn* is that once you are separately deemed to be a power/undertaking fiduciary you have (alongside being a majority shareholder) fiduciary influence status.

to ensure that it did not indirectly coerce and influence the minority shareholders' decision?<sup>265</sup> Or is it simply because in a transaction between a power/undertaking fiduciary and its charge (the corporation) fairness review polices voluntariness. The court's rejections of the defendant's claim that it did not "*dictate*[]" the terms of the merger or *preclude*[]" the Independent Committee from exercising real bargaining power"<sup>266</sup> and its concern with whether Alcatel exhibited a "pattern of domination"<sup>267</sup> over the committee suggest the first interpretation,<sup>268</sup> while its focus on "subtle"<sup>269</sup> influence over the shareholders and a fiduciary duty owed to "the other Lynch shareholders,"<sup>270</sup> suggests the second interpretation.<sup>271</sup>

The final point to highlight from these cases relates to the nature of the claim. A power/undertaking controlling shareholder-fiduciary usurps board power (the corporation's power) and therefore necessarily, as with directors, owes its fiduciary obligation to the corporation.<sup>272</sup> Thus, the duty should only be enforced derivatively on behalf of the corporation. In this conception of controller fiduciaries, there is no basis for a direct action by other shareholders. But in the influence conception of a controller-fiduciary, the duty is necessarily owed to persons who can be affected by the fiduciary's influential or superior position, which in the going-private merger are the voting minority shareholders.<sup>273</sup> Such a fiduciary duty is therefore enforced directly by the shareholders, individually or in a class. It is noteworthy that both *Weinberger* and *Kahn* were direct actions, supporting the fiduciary-influence reading of these cases.<sup>274</sup>

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265. *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490 (Del. Ch. 1990).

266. *Kahn*, 638 A.2d at 1120 (emphasis added).

267. *Id.* at 1118.

268. *Id.*

269. *See id.* (quoting *Weinberger v. UOP, Inc.* 457 A.2d 701, 710 (Del. 1983)) (explaining a controlling shareholder can "subtly" influence the minority shareholders).

270. *Kahn*, 638 A.2d at 1115–16.

271. In understanding Delaware's idea of the fiduciary, "coercion" needs to be carefully parsed as it may be relevant to both fiduciary power or influence over voluntariness. Note here in particular the ambivalent role of the term "coercion" in *Kahn*, which operates both in relation to the potential for coercion of the minority shareholder's decision which requires entire fairness review of the transaction (fiduciary influence/undue influence), *id.* at 1116, and also in relation to the coercion of the board members in the usurpation of their power (power/undertaking), *id.* at 1120).

272. *See supra* text accompanying notes 49–50.

273. *See supra* text accompanying notes 94–95.

274. There is no space to explore this question in this article, but see *Agostino v. Hicks*, 845 A.2d 1110, 1121 (Del. Ch. 2004) (observing in relation to the law on direct and derivative actions that it offered a "state of affairs . . . conducive to expensive litigation . . . [and fell] woefully short of providing coherent guidance to this Court's constituents").

### 3. *Fiduciary Influence Interference in Going-Private Tender Offers*

The starting point in exploring the influence conception of fiduciary relations in going-private tender offers is *Lynch v. Vickers Energy Corp.*<sup>275</sup> This case involved a damages claim by a plaintiff who sold his shares in a going-private tender offer by a 53.5% majority shareholder.<sup>276</sup> Vice Chancellor Marvel's starting point was that:

[T]here is no doubt but that in situations in which the holder of a majority of the voting shares of a corporation, as here, seeks to impose its will upon minority stockholders, the conduct of such majority must be tested by those same standards of fiduciary duty which directors must observe in their relations with all their stockholders.<sup>277</sup>

And, accordingly, for VC Marvel the majority shareholder owed the minority shareholders a fiduciary "duty to exercise complete candor . . ."<sup>278</sup> Although the court refers to *Allied Chemical* to support this proposition,<sup>279</sup> power is missing in action from this case. The court's concern about the imposition of the majority's will on the minority is concerned with influence only.<sup>280</sup> The court does not consider at all the extent to which this majority shareholder controlled and dominated the board of the target subsidiary, nor, even if it had done so, whether the tender offer transaction involved any actual exercise of subsidiary board power. In the traditional approach outlined in Section I, this would merely be a case of possible undue influence by a non-fiduciary.<sup>281</sup> But here that doctrine becomes a fiduciary doctrine and the scope to exert such influence renders the majority shareholder a fiduciary. This was affirmed on appeal by the Delaware Supreme Court which, in contrast to the Chancery Court, drew explicitly on *Lank v. Steiner*<sup>282</sup> to support its summary of the Vice Chancellor's position that "*as the majority shareholder* of [the corporation,

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275. 351 A.2d 570 (Del. Ch. 1976), *rev'd*, 383 A.2d 278 (Del. 1977).

276. *Id.* at 571.

277. *Id.* at 573 (citing *Allied Chem. & Dye Corp. v. Steel & Tube Co.*, 120 A. 486 (Del. Ch. 1923)).

278. *Lynch*, 351 A.2d at 573.

279. *Id.*

280. *Id.* The court summarizes the plaintiff's complaint as follows: "[S]he did not have a free and meaningful choice of a course of action to take compatible with the advancement of her own best interests in response to the offer here in issue and was thereby coerced along with other members of her class into electing to embrace one of two alternatives . . ." *Id.*

281. *See supra* text accompanying notes 72-91.

282. *See Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 279 (Del. 1977).



it] owed a fiduciary duty to plaintiff [minority shareholder] which required complete candor . . . .<sup>283</sup>

*Lynch v. Vickers Energy Corp.* also enables us also to observe, however, that even though it deploys a different influence conception of “the fiduciary,” provided that such fiduciaries are only subject to “voluntariness” investigation in transactions with the duty recipients (as they are in *Lynch*), then the disturbance generated by the fiduciarization of the influence doctrine is trivial. It is only when this idea of the fiduciary is transplanted into non-transactional settings or when the duties relevant to power fiduciaries are deemed to apply to these new influence fiduciaries—*because they are both “fiduciaries”*—that the transformative potential of this conceptual development is realised.

A thread of subsequent going-private cases builds on *Lynch*. For example, in *Eisenberg v. Chicago Milwaukee Corp.*,<sup>284</sup> the Chancery Court observed that “a tender offer—particularly one made by a corporation for its own shares—may be voluntary in appearance and form but involuntary as a matter of reality and substance,”<sup>285</sup> with involuntariness dependent on material disclosure failings or evidence of coercion.<sup>286</sup> For *Eisenberg*, following *Lynch*, such failings amounted to a breach of fiduciary duty by the parent-offeror and, as in *Lynch*, there is no consideration of power or usurpation.<sup>287</sup> More prominently, in *Solomon v. Pathe Communications*,<sup>288</sup> the Delaware Supreme Court followed *Eisenberg* but without the fiduciary wrapping,<sup>289</sup> a judgment which, standing alone, fits squarely in the legal idea articulated in *Gibson v. Jeyes*<sup>290</sup> and *Huguenin v. Baseley*<sup>291</sup> and its English and American progeny: voluntariness alone regulates the tender offer transaction. In this going-private<sup>292</sup> tender offer context, the plaintiff asserted that the tender offer was coercive and, as such, was a breach of the duty of “loyalty [owed by the bidder] as controlling shareholder.”<sup>293</sup> The Delaware Supreme Court, however, did not take the fiduciary/duty of loyalty bait, and addressed the issue purely through the question of

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283. *Lynch*, 383 A.2d at 279 (internal quotation omitted) (emphasis added).

284. 537 A.2d 1051 (Del. Ch. 1987).

285. *Id.* at 1056.

286. *Id.*

287. *Id.* at 1057. (“Where a corporation tenders for its own shares, the exacting duty of disclosure imposed upon corporate fiduciaries is even ‘more onerous’ than in a contested offer.”); *see also id.* at 1059–60.

288. 672 A.2d 35 (Del. 1996).

289. *Id.* at 39–40.

290. (1801) 31 Eng. Rep. 1044.

291. (1807) 33 Eng. Rep. 526.

292. Strictly speaking the offeror had a security claim in relation to a controlling interest that it was in the process of enforcing. *Solomon*, 672 A.2d at 37.

293. *Id.*

voluntariness, disclosure, and coercion.<sup>294</sup> In applying this standard, the court observed that “in the case of totally voluntary tender offers . . . courts do not impose any right of the shareholders to receive a particular price.”<sup>295</sup> For the Delaware Supreme Court, “*in the absence of coercion or disclosure violations*, the adequacy of the price in a voluntary tender offer cannot be an issue.”<sup>296</sup> For *Solomon* an evidently fair process pre-empts fair price review.<sup>297</sup>

The missing fiduciary wrapping in *Solomon* returns clearly in the important case of *In re Pure Resources, Inc., Shareholders Litigation*,<sup>298</sup> which involved a tender offer by Pure Resources Inc.’s parent company, Unocal Corporation, which owned 65% of the shares in Pure. The case tackled the perceived doctrinal anomaly that, following *Kahn*, mergers were subject to entire fairness review (both fair process and fair price review) and tender offers, following *Solomon*, were subject only to fair process requirements. In *Pure Resources* we start to see more clearly the destabilizing effects of the singular idea of the “fiduciary” standing for two very separate legal ideas.

As in *Lynch* and *Citron*, in *Pure Resources* the majority shareholder is deemed to be an influence-fiduciary from which fiduciary obligation flows, regardless of power.<sup>299</sup> As noted, necessarily in a going-private tender offer there is no exercise of subsidiary corporate power as a component part of the tender offer transaction. It could be exercised to indirectly block the transaction, by deploying a poison pill for example, but in relation to the transaction between parent-offeror and individual offeree-shareholders, there is no exercise of subsidiary corporate power nor, clearly, any empowerment of the majority shareholders by the minority. Naturally, therefore, it follows that if a majority shareholder is deemed to be a fiduciary

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294. *Id.* at 39–40.

295. *Id.* at 39 (citing *Lynch v. Vickers Energy Corp.*, 351 A.2d 570, 576 (Del. Ch. 1976), *rev’d on other grounds*, 383 A.2d 278 (Del. 1977)).

296. *Solomon*, 672 A.2d at 40 (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983) (emphasis added). *See also* *In re Siliconix Incorporated Shareholders Litigation*, WL 716787 (Del. 2001) at 9, applying *Solomon* but also referring to the majority shareholders as fiduciaries.

297. It is worth recalling, however, that the undue influence standard, which *Solomon* applies even though it does not label it as such, has long accepted that fairness review as to price is a means of testing voluntariness where, even in the presence of process protections and the absence of formal coercion or threats, there remains concern about how the intention to enter legal relations was formed. That is, pursuant to the original legal idea which *Solomon* applies, fairness review in relation to price is a back-stop option; an option which (as noted above) was taken in *Citron* but not in *M & F*, and remains available in both mergers and tender offers where courts harbour any doubts about an ostensibly fair process. *See also supra* note 77 and text accompanying notes 248–249.

298. 808 A.2d 421 (Del. Ch. 2002).

299. *Id.* at 444 (referring to *Solomon* and the “fiduciary duties of controlling stockholders”). The court previously defines the issue, asking “what equitable standard of fiduciary conduct applies when a controlling shareholder seeks to acquire the rest of the company’s shares,” and mentions, in its inquiry, holding controllers to “strict . . . standards of fiduciary conduct.” *Id.* at 434.

in a going-private tender offer then that designation can only be a product of the influence conception of fiduciary relations; and such fiduciary obligation is owed directly to the minority shareholders in receipt of the offer.<sup>300</sup>

*Pure Resources* does not analyze this influence-fiduciary designation; it presumes it. This presumption generates a fiduciary power-myopia which strips the decision in *Kahn v. Lynch Communications Systems, Inc.*,<sup>301</sup> which is central to Strine's analysis, of its fiduciary power context. Vice Chancellor Strine observes that it was "*inherent coercion that motivated the [Delaware] Supreme Court in [Kahn] . . . to impose the entire fairness standard of review . . . even when the merger was approved by an independent board majority, negotiated by an independent special committee, and subject to a majority of the minority vote condition.*"<sup>302</sup> As noted above, the Delaware Supreme Court in *Kahn* is equivocal in this regard.<sup>303</sup> On one reading of the case, fair price review (and therefore entire fairness) was applicable because the parent exercised corporate power by coercing the board and "dictated the terms of the merger,"<sup>304</sup> so that it exercised power on both sides of the transaction. But there is no equivocation for VC Strine, who reads the case solely through the influence fiduciary lens: it is the "inherent coercion" (the scope for influence) contained in the relationship between controller ("800-pound gorilla"<sup>305</sup>) and minority shareholder which underpins *Kahn's* application of entire fairness review.<sup>306</sup>

Reading *Kahn* through an influence-only lens leaves "coercion" as the primary source of fiduciary obligation in all controlling shareholder contexts. Fiduciary obligation, including fairness review, thereby becomes "judicial carpentry"<sup>307</sup> working with materials consisting of the nature and extent of coercion as well as judicial policy analysis which attempts to assess the effects of different review standards on corporate and market behaviour.<sup>308</sup> This reading of *Kahn* collapses power/undertaking fiduciary

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300. Of course, if the majority shareholder usurps board power to prevent to board deploying defenses then *in relation to that decision* the shareholder would be subject to fiduciary duties through the power/undertaking conception.

301. 638 A.2d 1110 (Del. 1994).

302. *Pure Resources*, 808 A.2d at 433. The court in *Pure Resources* also observes that "[t]he [Delaware] Supreme Court [in *Kahn*] concluded that even a gauntlet of protective barriers like those would be insufficient protection because of (what I will term) the 'inherent coercion' that exists when a controlling stockholder announces its desire to buy the minority's shares." *Id.* at 436.

303. *See supra* text accompanying notes 250–274.

304. *Kahn*, 638 A.2d at 1120–21; *see also supra* notes 261–271.

305. *Pure Resources*, 808 A.2d at 436.

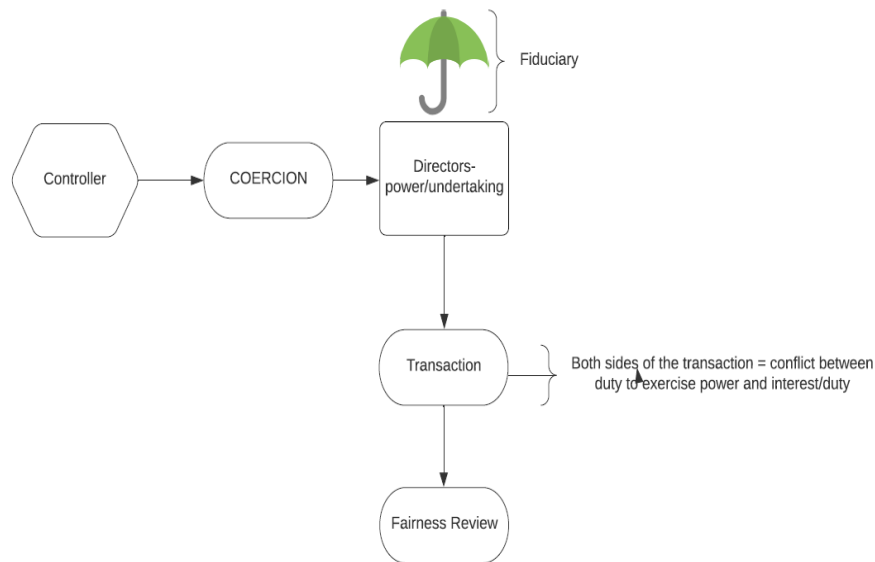
306. *Id.*

307. *Id.* at 434.

308. *Id.* at 434–35 (considering strong capital markets and wealth generation); *see also id.* at 437 (referring to a "policy balance").

relations into the influence conception and we end up in a place in which fiduciary relations, *which traditionally have nothing to do with influence*, end up being all about influence.<sup>309</sup>

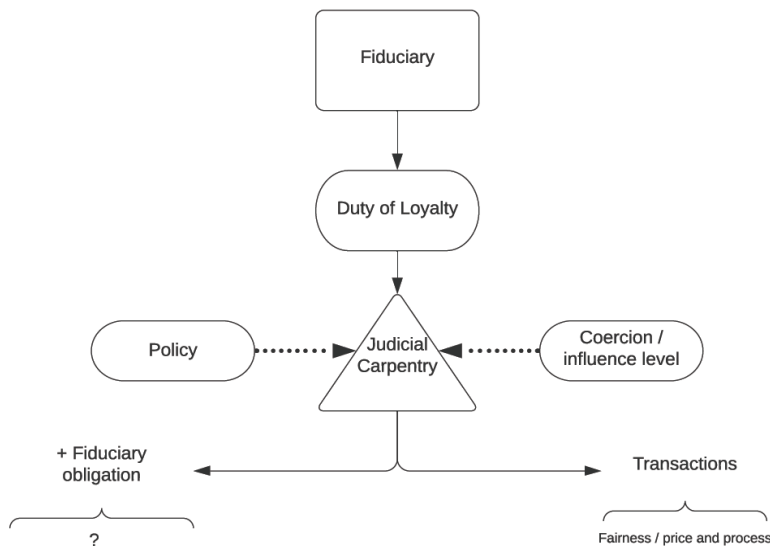
Figure 1. Kahn through the power/undertaking lens<sup>310</sup>



309. For a more recent example of the hegemony of fiduciary influence see *In re GGP, Inc Stockholder Litigation*, C.A. No. 2018-0267, at 34–35 (Del. Ch. May 25, 2021), where the question of whether the defendant was a fiduciary depended on the exercise of power (see *supra* note 251) but the fiduciary obligation itself, if triggered, addressed “the concern . . . that fear of controller retribution in the face of a thwarted transaction may overbear a determination of the best corporate interest by the unaffiliated majority.”

310. In Figure 1, corporate power is usurped through coercive action.

Figure 2. Kahn through *Pure Resources*' influence lens



As the nature and extent of coercion becomes the determinant of the nature of the review required to regulate the fiduciary's loyalty—in this case whether there is a “duty to pay a fair price”<sup>311</sup>—the key issue for the court becomes transaction-structure comparison: *which structure is more coercive?*<sup>312</sup> The logic works as follows in both mergers and tender offers: the majority shareholder *is* an influence fiduciary; fiduciary obligation is molded by courts to prevent coercion of shareholder decision making; the standard of review for a tender offer depends, therefore, on the comparative nature and extent of coercion in different going-private transaction structures. It follows that if a going-private tender offer is in certain respects as or more coercive than a merger, and yet it is subject to less onerous review (fair process only), then this is a doctrinal anomaly that needs correcting. As VC Strine observed, “[t]his disparity creates a possible

311. See, e.g., *In re Cox Commc'ns S'holders Litig.*, 879 A.2d 604, 624 (Del. Ch. 2005) (“In the later case of *Pure Resources*, this Court held that the mere fact that the controller had taken the *Siliconix* route did not relieve it of fiduciary duties. Although those duties did not include a duty to pay a fair price . . .”).

312. *Pure Resources*, 808 A.2d at 441–42 (“The problem is that nothing about the tender offer method of corporate acquisition makes the 800-pound gorilla's retributive capabilities less daunting to minority stockholders. Indeed, many commentators would argue that the tender offer form is more coercive than a merger vote.”).

incoherence in our law”<sup>313</sup> between the approach in *Kahn* and in *Solomon*. However, in ignoring the power-based fiduciary structure, which arguably undergirds *Kahn*, Strine does not have sight of the precise nature of the doctrinal differences and possible incoherence.<sup>314</sup>

Following a traditional fiduciary position—a position reflected in Delaware law prior to the 1970s<sup>315</sup>—if on the facts of *Kahn* or *Weinberger* the controlling shareholder exercises corporate power, then fairness review as to price follows as the product of exercising corporate power on both sides of the transaction, generating conflicts of interest and duty or of duty and duty. And although *Weinberger* tells us that entire fairness is fairness as to process and price, necessarily, if power is exercised, there is no fair process. And necessarily, if fair price review arose from an exercise of power by a power/undertaking fiduciary, there is no incoherence between that position and the failure to apply fair price review to a problem involving only influence and not power. If no power is exercised, as in *Citron*, then fairness review is the product of the potential to influence and undermine the voluntariness of the vote. In *Citron*, affirmed in *Kahn*, this may include fairness as to price, where the court is of the view that the inherent or structural coercion present in the deal cannot be neutralised by process protections. If at the time *Pure Resources* was decided<sup>316</sup> such (influence induced) back-stop fair-price review was applicable in mergers but not applicable to tender offers, then here was the nature of a possible inconsistency.

In *Pure Resources*, VC Strine’s transaction-coercion comparison results in going-private tender offers requiring the standard process protections— independent board committees, minority of the majority thresholds, and the policing of parental threats<sup>317</sup>—without fair price review.<sup>318</sup> He does not, as the reader of the judgment is led to expect,<sup>319</sup> impose fairness review as to

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313. *Id.* at 435. See also Ronald J. Gilson and Jeffrey N. Gordon, *Controlling Shareholders* U. of Pa. L. Rev. 785, 825 (2003) referring to the “judicial disconnect between conflicting lines of doctrine” and “the doctrinal anomalies”.

314. See also the discussion at *supra* note 248. Note also that VC Strine holds that the court in *Solomon* has a different understanding of coercion which is not cognisant of inherent or informal coercion as opposed to direct coercive threats (*Pure Resources*, 808 A.2d at 438). It is, however, difficult to apply such a reading of coercion to *Solomon* that does not explore the issue of coercion in depth, in part because of the unusual nature of the offer which related to the enforcement of a security interest in 89% of the shares in the target. In *Solomon* there was a special board committee but no majority of the minority requirement, which given the enforcement context would make little sense: the shareholders had two options—participation in the offer and foreclosure. Situated in the undue influence doctrine, it is clear that as of the time of the *Solomon* judgment, and long before it, coercive interference in voluntariness could take many case- and relationship-specific forms.

315. See *supra* text accompanying notes 185–210.

316. See *supra* note 247.

317. *Pure Resources*, 808 A.2d at 445.

318. *Id.* at 445–46.

319. *Id.* at 442.

price, but holds out its threat in the absence of such process protections;<sup>320</sup> a position which is, as noted, wholly consistent with the stand-alone undue influence doctrine.<sup>321</sup> The paradox of *Pure Resources*, and the development of Delaware law that enables it, is that it offers and affirms a remaking of the fiduciary relation and of the structure of fiduciary obligation,<sup>322</sup> and yet, after all its conceptual and substantive demolition and rebuilding, it ends up, *in relation to outcome*, in exactly the same place that the ghost of Lord Eldon and his American progeny would have ended up in.<sup>323</sup> As “judicial carpentry,”<sup>324</sup> it is analogous to breaking apart a wooden bench, remaking it in exactly the same form and then asserting that the bench is your creation. In some respects that is, of course, true, but the claim seems to omit something fundamental about the story of the bench.

But the decision’s congruence with foundational English and U.S. jurisprudence, does not mean the decision, its reasoning, and its conceptual apparatus, are without consequence. The decision’s prominence has crystalized Delaware’s remaking of the nature of the fiduciary relation since the 1970s.<sup>325</sup> Through the influence-fiduciary lens, fiduciary obligation has been transformed in Delaware corporate law, realizing the risks of fiduciarizing the transactional regulation of influence outlined in Section I.B.2 above.<sup>326</sup> Delaware has moved from an understanding of fiduciary duty that involved endogenous and discrete obligations which regulate the exercise of delegated power and are the product of the undertaking to use that power in a specified way, to exogenous judicially crafted obligations which are the product of being designated with fiduciary influence status. Figures 1 and 2 graphically represent this transformation using *Kahn*.<sup>327</sup>

In the former, duty is the product of the undertaking to use transferred power for a particular purpose on behalf of or for another, and a person is a fiduciary because she has given that undertaking and owes these duties.<sup>328</sup> These endogenous duties—the duties to exercise power in good faith and to avoid conflicts of duty and interest—are not the deductive and non-exhaustive product of a person being designated a fiduciary or of a more elemental duty of loyalty, although clearly both enforce the loyal exercise of power. But when the influence conception of fiduciary relations

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320. *Id.* at 445–46.

321. *See supra* note 77 and 297.

322. *See supra* text accompanying notes 91–97.

323. *See supra* text accompanying notes 72–90 and 147–157 and *infra* note 352.

324. *Pure Resources*, 808 A.2d at 434.

325. *See, e.g., In re Cox Commc’ns S’holders Litig.*, 879 A.2d 604, 624 (Del. Ch. 2005); *In re CNX Gas Corp. S’holders Litig.*, 4 A.3d 397, 407 (Del. Ch. 2010).

326. *See supra* Section II.B.2.

327. *See supra* Figures 1 and 2.

328. *See supra* Figure 1.

colonizes and replaces the power/undertaking framework, duties necessarily can no longer be rooted in power, as they can be owed, just as they were in *Pure Resources* or in *Citron*, in the absence of the transfer or usurpation of power. Fiduciary duties are thereby detached from their source and must be grafted on to a distinct conception; a conception that has no means of explaining fiduciary obligation apart from attributing it to the imposition of a broad other-regarding loyalty obligation in relation to the dominated, the inferior, and the vulnerable.<sup>329</sup> Fiduciary duties thereby become, inevitably, *the product of being a fiduciary*—a person once designated as an influence-fiduciary becomes subject to a duty of loyalty, of which fairness review (the original and *only* product of the undue influence doctrine)<sup>330</sup> is merely one component part of an incomplete and unspecified duty-whole.<sup>331</sup> In this regard, although one has to be wary of drawing causal conclusions from descriptive statistics,<sup>332</sup> it is noteworthy at least that the use of the corporate “duty of loyalty” in the context of fiduciary relations tracks the introduction and subsequent dominance of the influence conception in Delaware law, from 1 use of the term prior to 1960, 4 prior to 1980, 64 prior to 1990, and 996 prior to 2020.<sup>333</sup>

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329. See *supra* text accompanying notes 96–97.

330. See *supra* text accompanying notes 71–90.

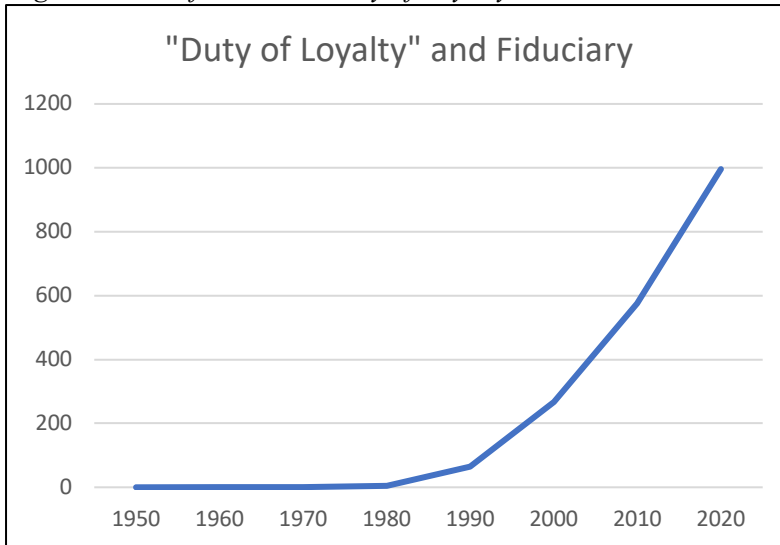
331. See, e.g., *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 498 (Del. Ch. 1990) (applying the influence conception). In *Citron*, plaintiff argued that the defendant as “majority shareholder, breached its fiduciary duty of loyalty to [the] minority shareholders.” *Id.* at 498.

332. Clearly there are multiple other drivers, including case load. See generally: John Armour, Bernard S. Black, and Brian R. Cheffins, *Delaware’s Balancing Act*, 87 IND. L.J. 134 (2012), and KERSHAW note 3 at 198–200 and 451 noting the paucity of Delaware case law as of the mid-twentieth century in relation to several duties.

333. Based on Westlaw search term (“duty of loyalty” and fiduciary) in the Delaware cases database prior to 1950, 1960, 1970, 1980, 1990, 2000, 2010, and 2020.



Figure 3. Use of the term "Duty of Loyalty" in Delaware case law



Moreover, this conceptual colonization not only disrupts the nature and structure of fiduciary relations and transforms what it means to be a fiduciary, it also necessarily transforms in a corporate context the possible recipients of such duties. Through this conception, fiduciary duties no longer exclusively relate to the corporate person and the exercise of *its* power, but they may be owed to and enforced directly by those corporate constituents who find themselves in relations of inferiority, domination, and vulnerability with other constituents. Duties owed from majority to minority shareholders provide the most embedded example of this, but there are others to which the article turns in Part III below.<sup>334</sup>

### III. THE COLONIZING EFFECT OF FIDUCIARY INFLUENCE: *FIDUCIARY DUTIES TO CREDITORS*

Whether and to what extent the interest of creditors must be furthered by directors when they exercise corporate power and whether, when a corporation is insolvent or approaching insolvency, directors owe a direct duty of care to creditors, are questions that have been addressed in multiple

334. In Section III, we explore one of the non-transactional implications of the effect of the fiduciary influence standard. There are several others, but space constraints mean that they cannot be addressed here. Consider, for example, Delaware law's chaotic position on the difference between direct and derivative actions. In this regard, in *Agostino v. Hicks*, 845 A.2d 1110 (Del. Ch. 2004), Chancellor Chandler observed in relation to the law on direct and derivative actions that it offered a "state of affairs . . . conducive to expensive litigation . . . and [fell] woefully short of providing coherent guidance to this Court's constituents." *Id.* at 1121.

jurisdictions in recent years, including Delaware.<sup>335</sup> Most recently in the United Kingdom, the Court of Appeal held uncontroversially that directors did not owe a direct duty to creditors, but rather owed their duties to the company,<sup>336</sup> which in certain instances could involve treating as paramount the interests of creditors.<sup>337</sup> This position firmly reflects the power/undertaking lens.<sup>338</sup> Through this lens a director could only be a fiduciary for an individual creditor or group of creditors if she had separately undertaken to act on the creditors' behalf and had been empowered by the creditors to do so. But, necessarily, in relation to the directorial fiduciary position she is appointed by the corporation and exercises corporate power. The fiduciary duty she owes as a director is, therefore, owed only to the corporation.

Modern Delaware courts, however, have found this question much more difficult to answer. The driver of this difficulty is the infusion of the influence conception of the fiduciary. Where fiduciary relations can arise merely because of “a condition of superiority of one of the parties over the other,”<sup>339</sup> corporate relations can be fiduciarized when the court deems the superiority one constituent has over another—an “overmastering” influence<sup>340</sup>—to be significant enough to justify the fiduciary designation. When it does so, the superior party *as a fiduciary* owes fiduciary duties—duties of loyalty—to the person who is, or is capable of being, detrimentally affected.

Creditors are exposed in insolvent and approaching-insolvency companies to actions by directors that could detrimentally affect them. Directors are clearly in a position of superiority over them in relation to their interests.<sup>341</sup> Accordingly, within the influence-fiduciary conception it is arguable that directors and majority shareholders owe fiduciary duties to creditors. Indeed, the logic of the idea of superiority provides a strong bias in favour of such a finding, requiring good policy reasons to resist instantiating such a new fiduciary status. Any such duty would be owed to the creditors directly and not enforced derivatively (because these duties are not owed to the corporation).

This is precisely the conversational path that we have seen in the Delaware courts; importantly it is a conversation that would never have

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335. See Amir Licht, *My Creditor's Keeper: Escalation of Commitment and Custodial Fiduciary Duties in the Vicinity of Insolvency*, 98 WASH. U. L. REV. 1732 (2021).

336. BTI 2014 LLC v. Sequana S.A. [2019] EWCA Civ 112, [149].

337. *Id.* at [219]-[220].

338. Although, for a recent and important departure, see Lehtimäki v. Cooper [2020] UKSC 33.

339. Peyton v. William C. Peyton Corp., 7 A.2d 737, 747 (Del. 1939).

340. See *supra* note 86 and accompanying text.

341. On the risk profile of decision making and expropriation of value from creditors, see Hayne E. Leland, *Agency Costs, Risk Management and Capital Structure* 80 J. FINANCE 1213 (1998).

happened without the importation of the fiduciary influence conception. Consider first *Production Resources Group, L.L.C. v. NCT Group, Inc.*,<sup>342</sup> also a judgment given by Vice Chancellor Strine, delivered two years after *Pure Resources*. VC Strine provides a superb deconstruction of the effects of creditor-regarding duties in the zone of insolvency and affirms the mainstream understanding of the relationship of creditors<sup>343</sup> to directorial fiduciary duties when the company is insolvent—that they remain owed to the corporation, but the interests furthered in acting on behalf of the corporation shift from shareholders to creditors. He observed, for example, that “the fact of insolvency does not change the primary object of the director’s duties, which is the firm itself.”<sup>344</sup> Yet alongside this standard account he entertains the idea that directly enforceable fiduciary duties could be owed to particular “injured creditor[s].”<sup>345</sup> He similarly entertains the idea that where board action is “not injurious to the firm as a whole but injurious to particular stockholders,”<sup>346</sup> that a fiduciary duty could be owed to those minority shareholders who could assert a “direct duty of loyalty claim[] . . . .”<sup>347</sup> However, aware of the considerable practical and policy difficulties arising from parallel directorial duties owed to the corporation and separately to particular creditors or shareholders, Strine declined to provide a definitive answer as to whether such direct duties could be owed.

Taking seriously the idea of direct fiduciary obligation to creditors bears the firm imprint of the fiduciary influence conception which underpinned Strine’s judgment in *Pure Resources*: a director owes fiduciary duties to another constituency where her superior position enables her to act in ways that detrimentally affect that constituency. Moreover, we see here the realization of the risks, highlighted above, associated with fiduciarizing the undue influence doctrine—the generation of loyalty obligations which are unconnected to transactions between the fiduciary and the effected person, which are a corollary of fiduciary designation, and whose content is dependent only on judicial carpentry.<sup>348</sup>

This question of direct fiduciary obligation was revisited and rejected by the Delaware Supreme Court in *North American Catholic Educational Programming Foundation v. Gheewalla*.<sup>349</sup> The manner of rejection is important, as it assumes the legitimacy of a direct fiduciary claim, whilst rejecting it for pragmatic and policy reasons. For the Delaware Supreme

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342. 863 A.2d 772 (Del. Ch. 2004).

343. *Id.* at 791.

344. *Id.* at 792.

345. *Id.* at 797.

346. *Id.*

347. *Id.*

348. *See supra* note 307.

349. 930 A.2d 92 (Del. 2007).

Court, it is the “uncertainty” and the conflict of duties (to the corporation and the creditors) that such a duty would create,<sup>350</sup> which are the reasons for the court’s conclusion that creditors cannot assert direct claims for breach of duty.<sup>351</sup> In the Supreme Court’s decision we see the deep uncertainty contained within the application of the influence conception: *it has no limit*. Everywhere in corporate and non-corporate life there are situations in which one person is in a position to detrimentally affect another. The economic agency framework similarly teaches us that there are economic agency problems everywhere. But what are the circumstances in which such an “agent” is to be subject to fiduciary relations? As in *Gheewalla*, recourse can be had to pragmatic and policy considerations in order to delineate the concept’s boundaries, but this form of analysis rarely provides uncontentious clarity and closure, and readily serves as cover for personal judicial preference. Of course, the non-fiduciary version of the undue influence doctrine faces a similar difficulty, but the uncertainty is significantly curtailed by the transaction-only context in which it applies.

#### CONCLUSION

Readers will be tired by now of this article’s reminder that the different guises of fairness review we find in modern Delaware law are, on closer inspection, very old legal wine in very new Delaware bottles. Delaware law merely reprises Lord Eldon’s fiduciary and undue influence jurisprudence, which can account for *every aspect* of Delaware’s doctrine of entire fairness review in relation to both price and process.<sup>352</sup> This is a subsidiary insight of the article whose primary focus is on the evolution of the concept of the fiduciary, but it is of some importance for understanding the nature of

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350. *Id.* at 103.

351. *Id.*

352. See *supra* text accompanying notes 147–157. Of course, for the purpose of clarification in relation the English law position, when it comes to exercise of power (not influence) in situations of conflict, English law regularly asserts, as did Eldon himself, that it is not interested in fairness, suggesting a profound disconnect between this claim and such anti-fairness judicial sentiment (most famously, in *Aberdeen Railway Co. v. Blaikie Brothers* [1854] All ER Rep. 249). However, due to the flexibility of governance rules in UK companies, English law has never to date explored in depth the implications of being in breach of the duty and the remedial consequences thereof. See KERSHAW, *supra* note 3, at 309–21. As noted above and explored elsewhere, see *supra* notes 228–238 and accompanying text, remedial fairness arose not from deploying fairness in the determination of whether there was conflict but from determining the remedial consequences of their being a conflict. In the foundational case of *Gardner v. Butler*, 30 N.J. Eq. 702 (N.J. 1879), the New Jersey Court of Errors and Appeals held that in such circumstances the breaching director would be entitled to the “reasonabl[e] worth” of or “just compensation” for what he provided. *Id.* at 709–11. Of interest for the UK position is that *Gardner v. Butler* cites the English case of *Great Luxembourg Railway Co. v. Magnay*, where Romilly MR held that “when it is said that he cannot make any profit by the transaction, it is not meant that he is not to have the proper value of the property which is actually taken . . . by the company . . . .” *Great Luxembourg Railway Co. v. Magnay* (1858) 53 Eng. Rep. 761, 765.

Delaware law and for theories that explain corporate legal change. The modern theoretical reflex is to explain corporate legal change by reference to either extra-legal pressures—whether arising from, *inter alia*, charter competition,<sup>353</sup> repeat-player litigation,<sup>354</sup> or the role of institutional shareholders<sup>355</sup>—or to judicial activism that carves rules from policy concerns and market needs and expectations.<sup>356</sup> But if Delaware law, as it is in the case of going-privates, is actually embedded in a deep legal path dependency—or at least a continued commitment to a solutional “common sense” generated by the early cases—then the above accounts of legal change have little to work with, because so little has changed.

The primary contribution of the article is that it reveals the late-twentieth-century change in Delaware's conception of the fiduciary and the structural alteration to fiduciary obligation which it portends. The triumph of the influence conception of fiduciary relations transforms fiduciary obligation. In its traditional conception, fiduciary obligation is wedded to a delegation of power, is born of the undertaking related to the use of that power and regulates the exercise of that power through discrete and limited loyalty-focused obligations. By contrast, the influence conception generates fiduciary obligation without a transfer of power, threatening fiduciary obligation when one corporate constituency is in a position of superiority in relation to another. In this conception, fiduciary obligation becomes the product of fiduciary designation and is sourced from a broad and unspecified duty of loyalty, located in the workshop of the judicial carpenter. This transforms what it means to be a fiduciary and who can become a fiduciary. It transforms the source and potential extent of fiduciary obligation. And it transforms the structural relationship between fiduciary duties and fiduciary status. It is this surreptitious conceptual and structural shift which drives legal connections in Delaware corporate fiduciary law that did not exist before and enables legal arguments that made no sense before. All of which has enabled a dramatic empowerment of the Delaware judiciary as lawmaker.

In practice, as *Gheewalla* evidences, the risks of extending the reach of fiduciary designation or expanding the breadth of fiduciary obligation often will not be realized as sophisticated judges—aware of the implications for

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353. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663 (1974); Ralph Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HAR. L. REV. 1442 (1992).

354. See Davidoff Solomon & Thomas, *supra* note 216.

355. John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727 (2007).

356. *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 434 (Del. Ch. 2002); Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* (1985).

managers, judicial legitimacy, corporate development, and Delaware's corporate law leadership-role—recoil from such extension and expansion. However, the possibilities generated by the fiduciary influence conception will continue to serve the plaintiff bar and the bench in generating a plethora of legal claims, and some of the time these claims may slip through the cracks. When they do, we need to be aware of why they became claims in the first place. Attention to Delaware's fiduciary imagination would serve us well when that happens.