ESSAY

FIDUCIARY LAW IN THE TWENTY-FIRST CENTURY

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INTRODUCTION

How does one embrace the riches of the knowledge presented in this Conference? This Conference's participants have presented the fiduciary relationship from so many points of view: interdisciplinary perspectives, current issues, and particular fascinating narrower topics. Does this event suggest that critics are correct, and that fiduciary law as a category is incoherent?[1] Arguably, fiduciary relationships and the rules that govern them

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[1] With regard to "thought and mental phenomena," the *Oxford English Dictionary* defines "incoherent" as "without logical connection or natural sequence of ideas; inconsistent, rambling, disjointed." 7 OXFORD ENGLISH DICTIONARY 804 (2d ed. 1989). In the physics of waves, the term means having "no definite or stable phase relationship." *Id.* In contrast, I assert that one can view fiduciary law as both comprehensible and as clear as any other recognized area of the law.

are too varied. Yet I maintain that the variety presented in this Conference leads to the opposite conclusion, and that the papers in this Conference provide support for my claim: that fiduciary law should be viewed and understood as one legal category.

In this closing Essay I defend the recognition of fiduciary law as a crucial and powerful branch of the law. Viewing this area of the law as a whole, one discovers a structure.[2] Its variable rules are linked to, and can be explained by, a few distinct conditions. In fact, this area of the law has existed for centuries *because* it is open ended. It has not shriveled and died because it is anchored in few important conditions. Fiduciary law can accommodate new situations and changes in social morals and norms, yet maintain its core values and norms, without which no society can survive, let alone flourish.[3] Its definitions of duties may adjust to the magnitude of the problems fiduciary relationships pose when social mores change.[4] It highlights the "difficulties that face a legal ethic of service to others . . . in a culture that celebrates personal wealth, achievement and consumption."[5] Yet the imposition of fiduciary duties continues. In fact, the argument is not about whether such fiduciary relationships and the resultant duties exist, but about how, and under what legal system, these relationships and duties should be enforced.[6]

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[2] See Rafael Chodos, *Fiduciary Law: Why* Now? *Amending the Law School Curriculum*, 91 B.U. L. REV. 837 (2011), for the suggestion that law schools should offer a separate course in fiduciary law.

[3] See, for example, Arthur B. Laby, SEC v. Capital Gains Research Bureau *and the Investment Advisors Act of 1940*, 91 B.U. L. REV. 1051 (2011), for a discussion of the common law source of fiduciary rules in federal fiduciary law and the confusion that the common law application has imposed. This confusing development, however, will result in the application of fiduciary law principles to broker dealers through the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (2006), which prohibits advisers from defrauding clients or prospective clients. Laby, *supra*, at 1052-54. See David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011 (2011), for a discussion of the role of fiduciary common law in England in the Twelfth through Sixteenth Centuries.

[4] *See, e.g.*, Frederick Tung, *The Puzzle of Independent Directors*, 91 B.U. L. REV. 1175, 1175-77 (2011) (discussing varying attitudes toward independent directors); Charles K. Whitehead, *Why Not a CEO Term Limit?*, 91 B.U. L. REV. 1263, 1269-71 (2011) (examining increasing federal regulation of directors and CEOs and decreasing deference to managing boards). For issues concerning executive pay, see David I. Walker, *Executive Pay Lessons from Private Equity*, 91 B.U. L. REV. 1209 (2011), comparing executive pay in publicly held and private equity corporations and concluding that the differences between the two CEO pay-stubs are "consistent with differences in capital structure, monitoring, and other intrinsic differences in the two organizational forms." *Id.* at 1221.

[5] Donald C. Langevoort, *Psychological Perspectives on the Fiduciary Business*, 91 B.U. L. REV. 995, 995 (2011).

[6] *See* Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1110 (2011) (presenting various standards under which fiduciary relationships are enforced).

Fiduciary law regulates relationships that are based on reasonable trust. Trust is crucial in any society.[7] Few relationships can exist or survive without some degree of trust. Trusting can be defined as "believing that others tell the truth and will keep their promises."[8]

> *With few exceptions, trust is essential to economic prosperity.* Thousands of people contribute to the sustenance and comfort of each of us, our dress and lodging, transportation and communications, education and entertainment. If we could not rely on the wholesomeness of the food we buy, the expertise of our physicians and lawyers, the honesty of our banks and mutual funds, or, as Sweeney Todd noted, the trustworthiness of the barber with his sharp shaving razor, our lives would be far more primitive. . . . Trust saves time and money. It allows people to believe other persons' statements without checking their truth, and to rely on other persons' promises, without demanding guarantees. It allows people to use the talents of strangers.[9]

However, trusting, like any human relationship, becomes "as complicated as humans and their society."[10]

The benefits of trusting are accompanied by the risks of abuse of trust and the costs of self-protection from such abuse. Therefore, trust is rarely complete. Infants must trust without reservation.[11] But as people grow up, they trust a bit and verify a bit. "When the cost of verifying the truth and honesty of the other party is negligible, and the potential losses from the transaction are relatively low, there is no need to trust."[12] But when the cost of verifying are very high, people refrain from interacting, even in relationships that are beneficial to them and society.

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[7] *See* James E. Post, *Governance, Accountability, and Trust: A Comment on the Work of Tamar Frankel*, 91 B.U. L. REV. 1165, 1173 (2011).

[8] TAMAR FRANKEL, TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD 49 (2006) (internal quotation marks omitted); *see also* Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 937-945 (2011) (reviewing judicial and academic attempts to define fiduciary law). For a critical and detailed discussion of trust that does not view trusting and verifying as contradictory, see Richard Holton, *Fiduciary Relations and the Nature of Trust*, 91 B.U. L. REV. 991, 991-92 (2011).

[9] FRANKEL, *supra* note 8, at 49. For an analysis of fiduciary relationships in the context of the recent economic downturn, see Cheryl L. Wade, *Fiduciary Duty and the Public Interest*, 91 B.U. L. REV. 1191 (2011). For a discussion of the psychological aspects of the security industry, see Langevoort, *supra* note 5, at 998-99.

[10] FRANKEL, *supra* note 8, at 49.

[11] *See* Margaret F. Brinig, *Parents: Trusted but not Trustees or (Foster) Parents as Fiduciaries*, 91 B.U. L. REV. 1231, 1234 (2011) (discussing trust within family and community relationships).

[12] FRANKEL, *supra* note 8, at 52.

Fiduciary law is aimed at allowing people to use the talents of strangers and reduce their cost of verification. The cost of self-protection can be driven not only by the cost in dollars and cents but also, as Ramon Casadesus-Masanell and Daniel F. Spulber suggest, by "*social norms, legal duties,* and *market standards*."[13] Thus, this cost of verifying trustworthiness is measured by the ability of the other party to self-protect, by the desirability of reliance when the other party is unable to self-protect, and by the society's benefit from his or her protection.

How does the law distinguish between the different fiduciary relationships? All fiduciary relationships involve two main components that provide benefits to the parties and to society.[14] Yet, these benefits pose two serious problems as well.[15] The differences between all fiduciary relationships derive from the different degrees of these problems.

The starting point of fiduciary law is the definition of these problems, and its aim is to solve or ameliorate them.[16] The focus and strictness of fiduciary rules reflect the severity that these problems pose both to the entrustors and to society. Social norms are the leading norms that guide these rules.

Below, I outline the structure of fiduciary relationships and the law that governs them as follows: first, I list the benefits that fiduciary relationships bestow on the parties and on society, and the problems that these relationships pose. Second, I link the different types of fiduciary relationships, and the problems they pose, to the rules that govern them. Stricter rules apply to fiduciary relationships that pose the most risk to entrustors. The risk, however, is not measured only by the magnitude and expertise of the fiduciary, but also by the ability of the entrustor to protect himself and any other controls over the fiduciary's performance of his services.

This Conference demonstrates the coherence and the riches of fiduciary law. While all laws reflect the society's changing environment, values, and norms, fiduciary law reflects them with great clarity. The Conference papers help to predict the possible expanding application of fiduciary law to new situations as well as its reduced interference in other relationships.

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[13] Ramon Casadesus-Masanell & Daniel F. Spulber, *Trust and Incentives in Agency*, 15 S. CAL. INTERDISC. L.J. 45, 47 (2005). Economists note that fiduciary relationships have existed for 250 years, yet have not achieved a precise definition. *Id.* at 48. Some scholars question whether fiduciary relationships "should be part of the legal definition. Organization theorists view legal duties themselves as ineffective or even as destroying trust. This sociological approach tends to emphasize the social context to the exclusion of legal rules and contract incentives." *Id.* at 48-49 (citations omitted).

[14] *See infra* Part I.A.

[15] *See infra* Parts I.B. and I.C.

[16] *See* Seipp, *supra* note 3, at 1011-12 (defining fiduciary duties generally and describing the evolution of the fiduciary system throughout the common law).

I. THE NATURE AND COMPONENTS OF FIDUCIARY RELATIONSHIPS AND THE RISKS THE RELATIONSHIPS POSE TO BOTH PARTIES

A. *Components of Fiduciary Relationships*

First, fiduciaries offer services that are socially important. They are generally costly to acquire, drawing on significant ability and investment of time and money.[17] Therefore, it is in the interest of society that non-experts use fiduciaries' services and avoid wasteful duplication of these services. For example, it makes no sense for every investor to become an expert in finance, real estate, or other types of investments. It makes no sense for every person to become a medical doctor, a lawyer, or the manager of a large enterprise. It is desirable for investors, patients, and clients to rely on people who command the expertise.

Second, fiduciary relationships involve a crucial component of entrustment. I name the parties to fiduciary relationships "entrustors."[18] Fiduciaries cannot perform their services unless they are entrusted with property or power. No money manager can effectively manage clients' money unless he has some control over it. No doctor can operate on a patient without acquiring full control of the patient's body. No adviser or lawyer can provide advice without exercising discretion. Experts have the power of greater information and understanding as compared to the client. These entrustors may be principals in an agency relationship, clients to lawyers, patients of doctors, beneficiaries of trusts managed by trustees, and investors whose money is managed by investment advisers. There are also cases in which individual entrustors are hard to specify except to note that they are the public, as in the case of a charitable organization.[19]

B. *While Fiduciaries' Services Provide Benefits to Entrustors, the Services Involve Risks as Well*

Entrustment of property poses for entrustors the risk that the fiduciaries will misuse the entrusted property. Property and power are entrusted to fiduciaries for the sole purpose of facilitating the fiduciaries' services to entrustors. None of the property or power is entrusted for the benefit of the fiduciaries for any other use. Yet, fiduciaries may be tempted to violate their duties.

Therefore, entrustment poses for entrustors the risk that fiduciaries will use the entrusted property and power for purposes other than in the service of the entrustors. In addition, entrustment poses for entrustors the risk that the fiduciaries will not possess the expertise they purport to posses, or, even if they do, that the fiduciaries will not exercise their expertise well, or fail to exercise

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[17] *See* TAMAR FRANKEL, FIDUCIARY LAW 6-7 (2011).

[18] *Id.* at 7-8.

[19] Alan L. Feld, *Who Are the Beneficiaries of Fisk University's Stieglitz Collection?*, 91 B.U. L. REV. 873, 873-74 (2011).

their expertise at all. These risks are serious, and the harm they might cause can be significant; they are very difficult to uncover and prevent.

C. *Fiduciary Relationships Pose Risks to Fiduciaries as Well*

To some extent, the fiduciaries' risks are similar to the risks of any person who offers services for pay or sells products for a price. These risks involve competition among fiduciaries that offer the same or similar services and entrustors that might not have sufficient trust in the fiduciaries' honesty and capabilities. Fiduciaries must convince entrustors that their entrusted property and power are used for the entrustors' sole benefit. That may be costly to do.

D. *Fiduciary Relationships Involve Combined Entrustment and Entitlement for the Fiduciaries*

First, fiduciaries are entitled to compensation for their services. After all, they must make a living. Therefore, part of the assets entrusted to the fiduciaries may be deemed, rightfully or mistakenly, to be payment to which the fiduciaries are entitled.

Second, people may combine their assets, abilities, or expertise to establish or acquire a business. They can divide among themselves the authority to represent the business. This representation constitutes the fiduciary relationship of agency. The relationship vests in the representatives the power to bind both the business as a whole and each of the partners. Yet, part of the business belongs to the representing agents, and part belongs to others, to which the agents are fiduciaries. Therefore, in such cases the fiduciaries are part-owners and part-fiduciaries. Each bears a risk that the other party will misappropriate not only what is its own but also what belongs to the others. In the case of a joint business, the risk is that a partner may misappropriate the power to act for the entire partnership.

Third, long-term fiduciary relationships may expose the parties to the risks that their counterparties may change, the business in which they are involved may change, and the environment in which the fiduciaries function may change. Therefore, the assumptions that entrustors and fiduciaries make when they enter the relationships may no longer hold true, and breed disagreements. Disagreements can provide justifications for abuse of entrustment.

Fourth, evidence of misappropriation and poor performance of expert services may emerge many years after the fiduciary services were rendered. For example, evidence of a poorly drafted will can appear after the client died. Evidence of a patient's maltreatment is not necessarily easily identified. Evidence of entrusted property misappropriation can take years to uncover, especially, for example, in Ponzi schemes, as con artist fiduciaries always pay immediately on demand with money from another victim until they cease payment altogether.

Fifth, some fiduciary duties can be waived by entrustors. Waivers provide a fertile ground for later disagreements. Some waivers cover the very nature of the relationship and raise a question of whether the parties should be allowed

to determine the legal status and consequences of their relationship. Some waivers raise the question of whether the entrustors gave the waivers both freely and with understanding of the consequences. Did the waiving entrustors know, and could they have known, all the facts that would lead to a waiver, even if they were capable of making it? Waivers may suggest that contract law rather than fiduciary law would apply to the relationships. The difference between the two branches of law is important when remedies are considered. While a breach of contract entitles the harmed party mainly to damages, a breach of fiduciary relationship entitles the damaged entrustor to punitive damages, sometimes in the absence of any injury. After all, abuse of entrustment constitutes stealing and misappropriation without the consent of the owner. Thus, gray areas require the separation of entrusted property and power, subject to fiduciary law, from payments and power given to the fiduciaries for their own use.

II. HOW ARE THE ENTRUSTORS' RISKS FROM FIDUCIARY RELATIONSHIPS REDUCED OR ELIMINATED?

A number of possible mechanisms have been used to reduce the entrustors' risks from the fiduciary relationship.

A. *Entrustors' Verification and Self-Help*

Depending on their expertise, entrustors can attempt to identify the risks posed by fiduciaries, verify in advance the possible risks, and remove some of the risks. For example, an entrustor who is an expert, devoted education and time to the entrustment process, or examined the fiduciaries' particular services may ask the fiduciary questions or glean information. This process might help the entrustor choose a trustworthy expert and reduce the probability of risk from abuse of entrustment and lack of expertise.

Risk-reduction by verification involves the cost of time and money concerning the inquiry. Verifying the quality of the fiduciaries' services requires duplicating the fiduciaries' investments in their expertise. Verifying abuse of entrusted property is even more costly. Not only does the entrustor have to be an expert, but, in addition, he must collect the information the fiduciary possessed as well as information about the activities in which the fiduciary has engaged. Hiring an expert to verify the reliability and the risk of another fiduciary's service is not only costly but raises the same issues raised by the employment of fiduciaries themselves. After all, the expert is a fiduciary as well. The risk of one expert evaluating another may be just as serious. And regardless of costs, inquiry reduces the probability of abuse, but does not eliminate the risk. Consulting an expert may verify past trustworthy behavior and expertise but does not ensure a fiduciary's future behavior.

B. *Specifying the Fiduciary's Services and Performance Often Does Not Reduce Risk*

Entrustors may instruct the fiduciary on how to perform the services and thereby control the risk of abuse. However, many of the fiduciary's services depend on changing environments or other unanticipated events. Entrustors can tell some fiduciaries, such as brokers, who are agents, to achieve a certain goal (sell or buy products), but cannot tell the fiduciaries how to negotiate with another party or how to determine the quality of the goods to be bought. Rather, the fiduciaries in these situations must use their expertise for making these decisions depending on the circumstances. Thus, specifying the manner in which the fiduciary services are to be performed is often ineffective.

C. *Controlling Fiduciaries' Performance by Demanding Guarantees Is Costly to Fiduciaries*

Entrustors may attempt to reduce the risks from fiduciaries' abuse by demanding guarantees. However, guarantees increase the fiduciaries' costs. Entrustors may organize and demand supervision or other mechanisms of ensuring prevention of abuse. However, organization also involves costs. Supervision without intervention may not be effective; intervention may result in costly reduction of expert performance.

D. *Imposing Contractual Remedies on Fiduciaries*

The parties may impose contractual penalties on fiduciaries. A movement in academia and some courts, during the past thirty years, has sought to limit the applicability of fiduciary law and encourage entrustors' self-defense by contract.[20] Only a few extremists deny the need for fiduciary law and express a devout belief in the "market" – whatever that means.[21] This approach, however, may not effectively prevent abuse of entrustment. First, misuse of entrusted property may not necessarily harm the entrustor. A trustee who sells trust property for a market price, or even higher than the market price, does not damage the entrustors. However, such a sale is, in effect, misappropriating someone else's property without permission. Perhaps the entrustor does not wish to sell the property because it is his parents' home and has a sentimental value for him. Perhaps he does not wish to sell the house at the current market price, and is waiting for the price to rise. A practice of violating the duty to avoid conflicts of interest can become a habit.[22] While the first transaction may not result in monetary loss for entrustors, the second and third and fourth

[20] *See, e.g.*, Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 903-04 (2011).

[21] *See* Jones v. Harris Assocs. L.P., 527 F.3d 627, 632 (7th Cir. 2008), *vacated*, 130 S.Ct. 1418, 1431 (2010).

[22] *See* Joshua Getzler, *"As if." Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 973-74 (2011).

transactions might. Thus, the penalties for dealing with and having control of other people's property requires a higher degree of deterrence – such as punitive damages, accounting for the fiduciary's profits, and injunction.

III. MEASURING THE LAW'S INTERVENTION BY COST

A number of reasons may justify strict fiduciary rules imposed on the different species of fiduciaries. These reasons are apparent in the rules that are actually imposed on different fiduciaries.

First, the higher the risk of fiduciaries' abuse, the lower the ability and cost of controlling and limiting the fiduciaries' entrusted property and power, and the stricter the rules and remedies would be. In contrast, the lower the entrustment and the risk of fiduciaries' abuse, the less strict the rules and remedies should be. For example, trust law imposes strict duties on trustees. In the trust arrangement the trustees have significant power. The beneficiaries cannot direct the trustees nor remove them without judicial proceedings. In contrast, a principal can direct an agent in the performance of his duties and terminate the agency even in violation of a contract. Consequently, trust law imposes on trustees far stricter rules than agency law imposes on agents.[23]

Second, the larger the number of entrustors, regardless of how extensive each entrustment is, the stricter the rules and remedies for violations should be. The lower the number of entrustors, the more relaxed the rules and remedies should be. There are two reasons for this observation. As the amounts of entrustment – whether from the few or the many – increases, so does the risk. The assumption is that the higher the entrusted amounts and the greater the entrusted power, the greater the temptation to misappropriate and abuse may become. In addition, the smaller the entrustment by each individual, the higher the costs for each individual to monitor and attempt to control a fiduciary's abuse. In such a case "exit" is far more rational than "voice," trying to remove management.[24]

Third, the stricter the controls (without undermining the utility of the service) over the fiduciaries' exercise of power, the more relaxed the rules over fiduciaries should be. In these cases, the burden of self-protection rises and we assume that the controls will reduce the risk to entrustors. Conversely, the lower the entrustors' controls over the fiduciaries' exercise of power, the stricter the rules and remedies should be.

Fourth, the higher the costs of verifying the trustworthiness of the fiduciaries, the stricter the rules and remedies should be. The lower the costs of verifying the trustworthiness of the fiduciaries, the more relaxed the rules and remedies should be. In this case as well, we assume that as the costs of verification rise, entrustors will engage in less verification. Unless other

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[23] *See* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1045 (2011).

[24] FRANKEL, *supra* note 17, at 33.

controls that reduce the entrustors' risks are in place, the law imposes stricter rules to prevent abuse.

IV. CALIBRATING THE LAW BY THE MEASURE OF TEMPTATIONS

Fiduciary law reflects the degree of temptation to which fiduciaries are exposed.[25] The larger the entrusted amounts, the greater the fiduciaries' temptation may become. The smaller the amounts, the lower the temptation. The amounts fiduciaries receive demonstrates a second, related effect. Arguably, the higher the amounts they receive, the lower their temptation to abuse. But that conclusion is incomplete. When the earned amounts are linked to evaluation of prestige and signs of power, the amounts fiduciaries need and justify are linked to the amounts that others in more or less the same position receive. Temptation for fiduciaries to equalize or even increase the amounts due by abuse rather than straight-forward means grows, and with it justification for such abuse.

Another temptation arises with the justification of fiduciaries' behavior by others, such as academics. This justification is linked to the evaluation of the fiduciaries' contributions to entrustors. The more money managers earn for entrustors, the more they feel justified in sharing entrusted money and appropriating it for themselves. Academics have propagated this equation by reasoning that sharing with investors would increase the managers' incentives to produce, thus benefiting investors and other entrustors. However, the identity of fiduciaries with entrustors does not always produce the expected results.

First, fiduciaries are led to identify with the status of entrustors-owners – an invitation to abuse trust. Second, when fiduciaries are unsuccessful in production for the shareholders, some management members resort to "cooking the books," imposing enormous pressure on the staff to produce, no matter how, and making misleading disclosures to investors. It is unclear whether the identity of managers' incentives and investors' lead to these results. Causation is hard to prove generally, and impossible to prove in this case. But, giving fiduciaries incentives to identify with their entrustors, without constraints, may be dangerous. Fiduciaries are not, and should not view themselves as, the owners of entrusted property.

Temptations abound when fiduciaries service a large group of entrustors and are entrusted with large amounts of money. These fiduciaries can attract vendors bearing gifts. The Chief Executive Officer of a corporation that employs thousands of people and controls billions of dollars is treated very

[25] *See* Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 871 (2011) ("Causation in the fiduciary realm is far from a narrative of brute sequence, whether the beneficiary seeks disgorgement of ill-gotten gains from a disloyal fiduciary or seeks compensation for harm inflicted by the disloyalty. In both instances, standards to assess causal connections should reflect the underlying objective of imposing liability for fiduciary disloyalty.").

differently from entrustors who contribute small amounts to corporate wealth. The banks, the lawyer, the accountant, and other vendors, who seek to sell their goods and services to the "corporation," do not aim at convincing the money contributors. Rather they aim at influencing the decision of the Chief Executive Officer, and gaining his good graces. It is not surprising that powerful fiduciaries cease to view their powers as entrusted. In fact, when abuse of fiduciary power is rampant, one might expect proposals to justify separation of ownership from control and allocation to controlling persons a greater portion of power ownership.

Fiduciary law can be a useful model in various contexts. For example, David Ponet and Ethan Leib suggest that "features of fiduciary law usefully model how deliberation can be understood between political unequals, in particular when the individual with more political power is supposed to be holding the interests of the individual with less power in trust."[26]

The breadth of fiduciary law defies resorting to the meaning of the words. The meaning of fiduciary rules must be linked to the nature of the problem which the rules are designed to reduce or resolve. A dictionary definition of the rules can undermine the purpose of fiduciary law and result in enormous harm to society.

CONCLUSION

These Conference papers offer a kaleidoscope of views on fiduciary relationships in many situations and the law that should govern them. The papers deal with different fiduciary rules and various evaluations of the problem that fiduciary law is designed to resolve. They address these rules and issues from different disciplines and points of view. Yet, they all focus on the same problem, and all these varied scenes highlight a pattern, which we can generalize and on which we can then draw.

[26] David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1249-50 (2011).