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Cleaning Up the Corporate Opportunity Doctrine Mess: A First Principles Approach

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Cleaning Up the Corporate Opportunity Doctrine Mess: A First Principles Approach

Yifat Naftali Ben Zion*

Abstract

Almost a century ago, a legal dispute over who is the rightful owner of Pepsi-Cola, at the time an unknown syrup company on the verge of bankruptcy, led the Supreme Court of Delaware to develop what is now famously known as the corporate opportunity doctrine. This doctrine is the central framework Delaware courts use to this day to determine whether an officer who seized a business opportunity has breached his fiduciary duties. Despite the doctrine's old roots, it has thus far failed to reach stable ground. For one, while many corporate law scholars have supported the rule developed following this decision—which instructs the courts to consider not only the company's interests, but also the officer's "rights"—others have

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argued that the rule is too soft and even perversely so. For another, the application of this lenient rule has proven unstable. The corporate opportunity doctrine is vague and contested, as demonstrated by the contradicting rulings from other U.S. states. This Article suggests a way out of the mess. Using a comprehensive comparative analysis of the case law from the United States, the United Kingdom, and Canada, this Article demonstrates that the lenient interpretation of the corporate opportunity doctrine by Delaware courts is misguided and results from a misunderstanding of its normative foundations. The corporate opportunity doctrine derives from the general principles of fiduciary law, and thus a theoretical understanding of the concept of "fiduciary" is crucial for its proper application. As this Article shows, this decisive aspect of the doctrine has been largely neglected by the literature. By taking a "first principles" approach and going back to the roots of this concept, this Article demonstrates that neither side in this ongoing debate on the desirability of the doctrine is free from error. It concludes that the lenient position should be rejected and explains how to ameliorate current legal instability.

Table of Contents

INTRODUCTION 1611

I. CORPORATE OFFICERS AS FIDUCIARIES 1619

II. WHICH PERSPECTIVE MATTERS? 1623
- A. *The Fiduciary Law Perspective* 1623
- B. *Why Does It Matter?* 1626

III. FINDING FIRST PRINCIPLES: CORPORATE OPPORTUNITY DOCTRINE IN A COMPARATIVE LIGHT 1629
- A. *A Short Review of the Literature* 1629
- B. *Finding First Principles* 1631
- C. *The United Kingdom Doctrine—A Strict Rule* 1634
- D. *The Canadian Doctrine—An Intermediate Rule* 1643
- E. *The United States (Delaware) Doctrine—A Lenient Rule* 1653

IV. IMPLICATIONS 1667
A. *The Two Conceptions of Fiduciary Law* 1667
B. *Understanding First Principles Is Vital for Corporate Law Literature* 1672
C. *Cleaning Up the Corporate Opportunity Doctrine Mess* 1678

CONCLUSION 1682

INTRODUCTION

During the great depression, Charles Guth came across an interesting business opportunity.[1] A relatively unknown syrup company was facing bankruptcy.[2] After first establishing a new company named Pepsi-Cola, Guth managed to obtain the secret formula and trademark of the failing company.[3] He then came up with the idea of packaging the beverage in twelve-ounce bottles at the price of only five cents per bottle, making the Pepsi-Cola exceedingly popular.[4] At the time, Guth was serving as the president of a third company called Loft, which was also engaged in the manufacturing and selling of beverages.[5] Using his position at Loft, Guth promoted the interests of Pepsi-Cola in various ways.[6] Investing little or no money of his own in the venture, Guth became the owner of 91 percent of the capital stock of Pepsi-Cola.[7] Pepsi-Cola soon turned out to be worth millions of dollars.[8] In its 1939 decision, *Guth v. Loft, Inc.*,[9] the Supreme Court of Delaware concluded that Guth's actions were

1. *See* Guth v. Loft, Inc., 5 A.2d 503, 505–06 (Del. 1939) (discussing Guth's opportunity to buy Pepsi-Cola).
2. *See id.* at 505 (noting National Pepsi-Cola's 1931 bankruptcy).
3. *See id.* at 506 (discussing how the secret formula and trademark of National Pepsi-Cola Company were acquired by Pepsi-Cola Company of which Guth was a founder).
4. *Id.* at 507.
5. *Id.* at 505.
6. *See id.* at 506 ("[Guth] drew upon Loft without limit to further the Pepsi enterprise having at one time almost the entire working capital of Loft engaged therein.").
7. *Id.* at 515.
8. *Id.*
9. 5 A.2d 503 (Del. 1939).

a breach of his fiduciary duties and ordered him to transfer all his shares in Pepsi-Cola to Loft.[10]

Today, *Guth* still guides the courts in situations where officers breach their fiduciary duties by exploiting business opportunities privately.[11] But whereas Guth was forced to return all the profits he made by abusing his company's money, estates, and workers, Delaware courts later developed a very lenient rule.[12] Courts have repeatedly referred to Guth as a "seminal case," emphasizing that fiduciary law "requires an undivided and unselfish loyalty to the corporation,"[13] yet the corporate opportunity doctrine they adopted assists officers in seizing new opportunities for themselves. The reason is that, in practice, the doctrine makes life easy for officers because it imposes a heavy burden of proof on a company claiming that a breach of fiduciary duty has occurred.[14]

An extensive debate has evolved in the literature.[15] Some scholars have offered different policy considerations, such as the

10. *See id.* at 515 ("Guth, as its President, had no right to appropriate the opportunity to himself.").

11. *See, e.g.*, Deane v. Maginn, No. 2017-0346, 2022 WL 16557974, at *14 (Del. Ch. Nov. 1, 2022) (characterizing *Guth* as setting out the "classic statement of the [corporate opportunity] doctrine"), *appeal dismissed*, 291 A.3d 651 (Del. 2023); *In re* Pattern Energy Grp. Inc. S'holders Litig., No. 2020-0357, 2021 WL 1812674, at *47 (Del. Ch. May 6, 2021) ("Corporate fiduciaries 'are not permitted to use their position of trust and confidence to further their private interests.'" (quoting *Guth*, 5 A.2d at 510)).

12. *See, e.g.*, Broz v. Cellular Info. Sys. Inc., 673 A.2d 148, 159 (Del. 1996) (finding no violation where an officer finds an opportunity while acting in their private capacity); U.S. WEST, Inc. v. Time Warner Inc., No. 14555, 1996 WL 307445, at *26–27 (Del. Ch. June 6, 1996) (finding that an opportunity must belong to the company for there to be a violation); Mountain West Res. Ltd. v. Fitzgerald, 2005 BCCA 48, [2005] B.C.J. No. 126, para. 26–27 (Can. B.C.C.A.) (requiring a concrete business plan to conclude that an opportunity actually belonged to the company).

13. City of Fort Myers Gen. Emps.' Pension Fund v. Haley, 235 A.3d 702, 721 (Del. 2020) (citing *Guth*, 5 A.2d at 510).

14. *See infra* Part III.E; *see also* Metro Storage Int'l LLC v. Harron, 275 A.3d 810, 882–88 (Del. Ch. 2022) (finding a breach of fiduciary duty only after a complex factual examination despite the fiduciary receiving a six-figure commission from taking a finance opportunity of the company).

15. *See* Martin Gelter & Geneviève Helleringer, *Corporate Opportunities in the US and in the UK: How Differences in Enforcement Explain Differences in Substantive Fiduciary Duties*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 331, 331–32 (Andrew Gold & Gordon Smith eds., 2018) (discussing the responsibilities of fiduciaries across jurisdictions).

need for business innovation, to justify Delaware's lenient approach.[16] They have argued that directors do not consign to the company all their time, efforts, and talent.[17] Supporters of the lenient approach have warned that officers could not be expected to be on call twenty-four hours a day and that "[f]iduciaries believe that they retain the privilege to compete with the corporation in the future and to prepare for such competition while they are with the corporation."[18] It has been argued that the strict approach of demanding complete loyalty to a corporation is based on a historical position that should not be used to determine the liability of fiduciaries today.[19] In modern times, as commercial enterprises have become more complex, the strict rule does not accommodate "the tension between capitalist principles which encourage profit-making and equity's strict rules governing liability."[20] In response, other scholars have passionately claimed that strictly prohibiting any exploitation is efficient and preferable.[21] It has been suggested that Delaware's approach is not based on substantive policy considerations, but stems from the regulatory competition in the U.S. and the "race to the bottom" it encourages.[22] It has also been suggested that the flexibility of a lenient rule "undermines

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16. *See, e.g.*, Christyne J. Vachon, *Blurring. Not Fading. Looking at The Duties of Care and Loyalty as Nonprofits Move into Commercialism*, 12 TRANSACTIONS: TENN. J. BUS. L. 37, 62 (2011).

17. *See* Pat K. Chew, *Competing Interests in the Corporate Opportunity Doctrine*, 67 N.C. L. REV. 435, 448 (1989) ("Fiduciaries do not ordinarily assign to the corporation 100 percent of their energies, time, efforts, and cumulative talents; they are not on call twenty-four hours a day.").

18. *Id.* at 449.

19. *Id.* at 493.

20. John Lowry & Rod Edmunds, *The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies*, 61 MOD. L. REV. 515, 517 (1998) ("Analogizing current fiduciaries to trustees or even to the historically rigid fiduciary role is outdated.").

21. *See, e.g.,* David Kershaw, *Lost in Translation: Corporate Opportunities in Comparative Perspective*, 25 OXFORD J. LEGAL STUDS. 603, 609 (2005) [hereinafter Kershaw, *Lost in Translation*] (referring to Pearlie Koh, who suggested that "the murky flexibility and ambiguity of US approaches threatens the integrity of the duty of loyalty").

22. *See* Gelter & Helleringer, *supra* note 15, at 349 (discussing the influence of business trends on the "erosion of fiduciary duty").

the integrity of the fiduciary relationship and even the moral structure of the market place."[23]

Cases related to this issue are still constantly litigated in courts,[24] and not all U.S. jurisdictions adhere to the lenient approach.[25] In Maine, for example, the rule adopted obligates the directors to reveal all relevant facts regarding the business opportunity.[26] An old Massachusetts case, which is still used as precedent,[27] adopts a test of fairness, where "the true basis of the governing doctrine rests fundamentally on . . . . the application of ethical standards of what is fair and equitable in particular sets of facts."[28] The courts in New York have also adopted a more stringent standard.[29] A California court nominally adopted Delaware's position, but in fact it developed a stricter rule.[30] This stricter rule was later applied in other

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23. Kershaw, *Lost in Translation*, *supra* note 21, at 604.

24. *See, e.g.*, Bocock v. Innovate Corp., No. 2021-0224, 2022 WL 15800273, at *16–27 (Del. Ch. Oct. 28, 2022) (holding that nearly all of the corporate opportunity claims in that case failed); Pers. Touch Holding Corp. v. Glaubach, No. 11199, 2019 WL 937180, at *30 (Del. Ch. Feb. 25, 2019) (ordering a co-founder of a company, who served as its president and a member of its board of directors, to pay the company three million dollars after initiating separate negotiations in his personal capacity regarding the purchase of a desirable office building that the company was interested in acquiring).

25. *See, e.g.*, Kulick v. Gamma Real Est. LLC, No. 20-cv-03582, 2022 WL 4467341, at *8 (S.D.N.Y. Sept. 23, 2022) (noting New York's more stringent standard as compared to Delaware).

26. *See* Ne. Harbor Golf Club, Inc. v. Harris, 725 A.2d 1018, 1022 (Me. 1999) ("Full disclosure is likewise important to prevent individual directors and officers from using their own unfettered judgment to determine whether the business opportunity is related to the corporation's business . . . .").

27. *See, e.g.*, *In re* Bos. Grand Prix, LLC, 624 B.R. 1, 19 (Bankr. D. Mass. 2020) (citing Durfee v. Durfee & Canning, Inc., 80 N.E.2d 522, 528–29 (Mass. 1948)); Fronk v. Fowler, 923 N.E.2d 503, 510 (Mass. 2010) (citing *Durfee*, 80 NE.2d at 528–29).

28. Durfee v. Durfee & Canning, Inc., 80 N.E.2d 522, 529 (Mass. 1948) (citing HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS, 204–05 (rev. ed. 1946)). The court also noted that the corporate opportunity doctrine is based on "our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity." *Id.* at 528.

29. *See, e.g.*, *Kulick*, 2022 WL 4467341, at *8 (noting where defendants revised a claim to "sidestep New York's more stringent standard").

30. *See* Indus. Indem. Co. v. Golden State Co., 256 P.2d 677, 686 (Cal. Dist. Ct. App. 1953) (stating that, although *MacIsaac v. Pozzo*, 183 P.2d 910

California cases.[31] However, these attempts to clarify the proper content of the doctrine have been insufficient, and it is likely that in the coming years this will continue to be an important topic of future rulings.[32] More than two decades ago, an article published in the Yale Law Journal noted that "[r]epeated endeavors by litigants, judges, and legal scholars to clarify the doctrine have generated a panoply of tests, variations, and

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(Cal. Dist. Ct. App. 1947) deals with joint ventures, it is "applicable in all situations in which a person manage[s] or transacts business for another").

31. *See, e.g.*, Kelegian v. Mgrdichian, 39 Cal. Rptr. 2d 390, 394 (Cal. Ct. App. 1995) (stating that the corporate opportunity doctrine is based upon "the 'line of business' test, the 'interest or expectancy' test, and the 'fairness' test"); Wood v. Hock, No. C055122, 2008 WL 4358682, at *8–9 (Cal. Ct. App. Sept. 24, 2008) (declining a claim that there was no breach of duty since the parties agreed to act for a specific project); New v. New, 306 P.2d 987, 995 (Cal. Dist. Ct. App. 1957) (relying on *Indus. Indem. Co.*, 256 P.2d at 689); Digit. Video Sys., Inc. v. Sun, No. H034407, 2011 WL 1134662, at *9 (Cal. Ct. App. Mar. 29, 2011)

> [T]he corporate opportunity doctrine allows a corporate officer or director to take advantage of a corporate opportunity only if he first offers it to the entity. It is a breach of a director's fiduciary duty to enter into a competing enterprise that injures the corporation of which he remains a director. If he does, the corporation may claim for itself all benefits so obtained by him. (internal citation omitted).

In a case where the defendant was attorney-in-fact of a reciprocal insurance exchange, the corporate opportunity doctrine was described as prohibiting officers from taking a business opportunity. *See Indus. Indem. Co.*, 256 P.2d at 686

> [I]t has been generally accepted that a corporate officer or director may not seize for himself to the detriment of his company business opportunities in the company's line of activities which the company has an interest and prior claim to obtain, and that if he seizes them in violation of his fiduciary duty the corporation may claim for itself all benefits so obtained by him.

The court further explained that the director is not entitled to "engage in a competing business to the detriment of the corporation which they represent." *Id.*

32. *See, e.g.*, Leased Access Pres. Ass'n v. Thomas, No. 2019-0310, 2020 WL 108563. at *1, 5 (Del. Ch. Jan. 8, 2020) (finding a violation of the corporate opportunity doctrine where a corporate officer bid against the company he worked for). *See generally* Nate Emeritz & Brian Currie, *Corporate Opportunity Doctrine: Litigation Continues into 2020,* HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 27, 2020), https://perma.cc/DLM7-ASGU.

hybrids."[33] Yet years later, uncertainty is still a prominent feature of this legal doctrine.[34]

This Article aims to clean up the doctrinal mess. To do so, it will focus on an extremely important yet neglected aspect of the unsettled debate: the relationship between these doctrinal developments and fiduciary law theory.[35] Indeed, one does not need to agree with Elon Musk on everything to see that "it's important to reason from first principles."[36] To find the doctrine's first principles,[37] this Article examines how the doctrine was developed by courts outside the United States.[38] By going back to the roots of the legal concept of fiduciary, this Article offers a new perspective on this old debate.[39] A thorough analysis of the case law reveals that the divergence in the development of the legal doctrine has a theoretical explanation that stems from the concept of fiduciary, or more accurately,

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33. Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 YALE L.J. 277, 279 (1998). The article, which criticized the lack of coherence of the doctrine, also stated that "the end product of this collective effort appears—by virtually all accounts—more tautologous than diagnostic, replete with exceptions and indecipherable distinctions that provide little guidance either to theorists or to practitioners." *Id.*; *see also* Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity*, 117 COLUM. L. REV. 1075, 1141–47 (2017) (pointing to the empirical consequences of this incoherence).

34. *See* Talley, *supra* note 33, at 279 n.2 (showing that uncertainty persists by surveying a multitude of cases).

35. *See infra* Part III.B.

36. Drake Baer, *Elon Musk Uses This Ancient Critical-Thinking Strategy to Outsmart Everybody Else*, INSIDER (Jan 5, 2015), https://perma.cc/4WF3-JYYJ.

37. *See* ARISTOTLE, PHYSICS bks. I & II, at 184a (J.L. Ackrill & Lindsay Judson eds., William Charlton trans., Oxford: Clarendon Press 1970) (c. 350 B.C.E.)

> In all disciplines in which there is systematic knowledge of things with principles, causes, or elements, it arises from a grasp of those: we think we have knowledge of a thing when we have found its primary causes and principles, and it followed back to its elements. Clearly, then, systematic knowledge of nature must start with an attempt to settle questions about principles.

38. *See infra* Part III.B.

39. *See infra* Part IV.C.

from the *two* possible theoretical understandings of this concept.[40]

First, this research shows that the strict and harsh rule in the United Kingdom, that almost never allows an officer to exploit a corporate opportunity for personal gain, was grounded in what this Article calls a *proprietary conception* of fiduciary law, which focuses on its role in protecting the property of the beneficiary.[41] In contrast, a more lenient rule in Canada that takes into consideration certain specific facts of a case or the officer's good faith, which are not considered relevant to the discussion under the strict rule, is based on what this Article calls an *interpersonal conception* of the concept of fiduciary, defining its purpose as a tool for regulating legal relationships.[42]

This Article then uses a theoretical foundation to examine the extremely lenient rule in Delaware, which expands the terms under which an officer can exploit a corporate opportunity for personal profit.[43] This Article goes on to demonstrate that the lenient rule is tied to the interpersonal conception of the concept of fiduciary.[44] The lenient Delaware rule, which contemplates the relationship between the fiduciary and the beneficiary, is almost *horizontal*, because not only should the interests of the company be considered, the interests of the officer should be as well.[45] This horizontal conception stands in clear contrast with the primary *vertical* understanding of fiduciary relationships.[46] The vertical understanding focuses on the power and control that the fiduciary has over the interests of the other party and, accordingly, sees the interests of the beneficiary as superior to the interests of the fiduciary.[47]

This theoretical comparative perspective reveals that current literature has missed an important insight regarding the development of the doctrine in Delaware.[48] These courts

40. *See infra* Part IV.A.
41. *See infra* Part III.C.
42. *See infra* Part III.D.
43. *See infra* Part III.E.
44. *See infra* Part III.E.
45. *See infra* Part III.E.
46. *See infra* Part IV.A.
47. *See infra* Part IV.A.
48. *See infra* Part III.A.

have declared that they wish to advance the purposes of fiduciary law.[49] At the same time, they have also created a rule that ignores the very foundations of the concept of fiduciary.[50] Clearly, these two legal stances cannot coexist. If indeed advancing fiduciary law is what Delaware's courts strive to achieve, the current lenient rule must be rejected. Yet this does not necessarily mean that those supporting an extremely strict rule were right; as this Article will show, the intermediate rule adopted in Canada was both theoretically well-established and less restrictive for officers, thus not subject to the criticism raised on the strict rule.[51]

Part I of this Article presents a short background on the status of corporate officers as fiduciaries. Then, Part II explains the boundaries of the discussion and clarifies the aims of the Article and the advantage of taking a first principles approach. Part III starts with a short review of the literature. It then analyzes the development of the corporate opportunity doctrine in different jurisdictions. First, it examines the case law from the United Kingdom and Canada and elaborates on how the two possible theoretical meanings of fiduciary law, the proprietary and the interpersonal conceptions, could explain the divergence in the rulings of the courts.[52] It then uses this analytical framework to examine the law in Delaware.[53] Part IV first explores in more detail the meaning of the proprietary and interpersonal conceptions of fiduciary law. It also argues that the analytical findings suggest that the theoretical conceptions correlate with and contribute to certain doctrinal developments, thus providing a significant theoretical contribution to corporate law literature.[54] Finally, it explains how this perspective reveals an internal legal inconsistency in the doctrine adopted by Delaware courts and argues that it is time to reject Delaware's position and find a way forward.[55]

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49. *See infra* Part III.E.
50. *See infra* Part III.E.
51. *See infra* Part III.D.
52. *See infra* Part III.C–D.
53. *See infra* Part III.E.
54. *See infra* Part IV.B.
55. *See infra* Part IV.C.

I. CORPORATE OFFICERS AS FIDUCIARIES

In both personal and commercial relationships, when a person (the fiduciary) is given the power to act in the interest of another person (the beneficiary), the common law legal system imposes certain duties on the person entrusted with this power.[56] At the center of fiduciary relationships lies the idea of "loyalty," which requires the fiduciary to act in the best interest of the beneficiary,[57] while avoiding a conflict of interest between the fiduciary's affairs and the interests of the beneficiary.[58] If the fiduciary fails to do so, the law provides a strict and harsh set of remedies to answer the breach of duty, including disgorgement of profits.[59] In providing harsh remedies, the legal system recognizes that it is necessary to monitor power through a specific set of rules, since neither contract nor tort law provide apt means for regulation.[60] This understanding, which stands at the heart of fiduciary law, has ancient historical roots.[61]

The historical development of corporate law as a legal branch of partnership and trust law led to the establishment of the duty of loyalty as a central and inseparable part of the duties

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56. As an example, the relationship between a parent and a child is considered a fiduciary relationship in some common law jurisdictions. *See, e.g.*, M(K) v. M(H), [1992] 3 S.C.R 6, para. 72 (Can.) ("It is intuitively apparent that the relationship between parent and child is fiduciary in nature, ..."). Another prominent example is the relationship between a director and a company. *See, e.g.*, Cook v. Deeks, [1916] 1 AC 554 (PC) (appeal taken from Can.).

57. MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 1 (2010).

58. *See* Keech v. Sandford [1726] 15 Eng. Rep. 223 (Eng.) (finding that any possibility of a conflict of interest may mean a breach of trust in a case which is considered a landmark in the evolution of fiduciary law).

59. *See, e.g.*, Irit Samet, *Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-Stripping Rule,* 28 OXFORD J. LEGAL STUDS. 763, 766 (2008) (discussing the justification for the harsh remedies following a breach of the duty of loyalty).

60. *See id.* at 778 (arguing that a fiduciary loyalty rule is necessary because of the "very limited ability to monitor and detect exploitation" of corporate officers).

61. In fact, the English judicial system was not the first one to deal with these concerns. *See* David Johnston, *Trusts and Trust-Like Devices in Roman Law, in* ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE 45, 45 (Richard H. Helmholz & Reinhard Zimmermann eds., 1998); *see also* TAMAR FRANKEL, FIDUCIARY LAW 80–99 (2011).

of corporate officers.[62] At first, officers of the company were entrusted with the property of the shareholders and were perceived as trustees.[63] Long before the modern complex corporate entities existed, the English courts held that a person who took upon themselves a managing position in a company is obliged to carry it out with "fidelity and integrity" and could not justify a failure to fulfill his duties by claiming that he had no profits from his position.[64] This understanding that "with great power comes great responsibility"[65] soon spread to all common law countries.[66] In one of the most quoted decisions of fiduciary law, *Meinhard v. Salmon*,[67] the New York Court of Appeals clarified that due to the managerial position of the defendant, "[f]or him and for those like him, the rule of undivided loyalty is relentless and supreme."[68]

Time has passed, corporate law and trust law have long gone their separate ways, and directors are no longer considered trustees.[69] Nonetheless, while the corporate sphere has evolved

62. *See* RONALD RALPH FORMOY, THE HISTORICAL FOUNDATIONS OF MODERN COMPANY LAW (1923); *see also* L.C.B. GOWER, THE PRINCIPLES OF MODERN COMPANY LAW (3d ed., 1969).

63. *See, e.g.*, Benson v. Heathorn [1842] 1 Y. & C. Ch. 326 (Eng.); Beth Nosworthy, *A Directors' Fiduciary Duty of Disclosure: The Case(s) Against*, 39 U. NEW S. WALES L. J. 1389, 1392 (2016).

64. *See* Charitable Corp. v. Sutton [1742] 26 ER 642, 645 (Eng.) (explaining that those who accept officer positions have advantages beyond taking a salary).

65. The Supreme Court of Israel quoted this phrase, referring to the words of Uncle Ben to his nephew Peter Parker (better known as Spiderman), in CrimA 3506/13 Habi v. The State of Israel (Jan. 12, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (discussing the fiduciary duties of controlling shareholders). *See also* Moran Ofir, *Controlling Non-Controlling Shareholders: The Case of Effective Control* (L. Soc'y Econ., Working Paper 17/2023, 2023) (discussing the fiduciary duties of controlling a dominant shareholders). For an investigation of whether the sentence was actually said by Uncle Ben, see *With Great Power Comes Great Responsibility*, QUOTE INVESTIGATOR (July 23, 2015), https://perma.cc/S6B2-C3PY.

66. *See* Lowry & Edmonds, *supra* note 20, at 517 n.13 (citing cases which demonstrate the foundational nature of the corporate opportunity doctrine).

67. 164 N.E. 545 (N.Y. 1928).

68. *Id.* at 548.

69. *See* L.S. Sealy, *The Director as Trustee*, 25(1) CAMBRIDGE L.J. 83, 83–86 (1967) (reviewing the historical development of the case law); *see also* Robert Flannigan, *Shareholder Fiduciary Accountability*, J. BUS. L. 1, 8–9 (2014).

and extended, the establishment of companies is still based on the same basic idea: creating a relationship where the officer of the company is entrusted with the power to manage property that ultimately belongs to others.[70] As was noted by Adam Smith more than two hundred years ago, "being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own."[71] Accordingly, still today these relationships are governed by fiduciary duties, primarily the duty of loyalty.[72]

Overall, in the context of corporate law, the duty of loyalty compels the officer to avoid any unauthorized conflict of interest between his own interest and his duty toward the company.[73] The duty of loyalty requires that an officer must not use their position to promote their personal business and must not derive a hidden profit from it.[74] As fiduciary duties govern different kinds of relationships, their content and limits change according

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70. *See* Sealy, *supra* note 69, at 85 ("It was sufficient for [judges] to reason that [officers] had accepted an appointment or 'trust'; therefore, they were 'trustees' and

accountable for 'breaches of trust.'").

71. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 574–75 (S. M. Soares ed., MetaLibri 2007) (1776).

72. *But see, e.g.*, Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 240 (2009) (claiming that officers of companies today should no longer be treated as fiduciaries). However, courts still view officers as fiduciaries, and it is hard to dispute that understanding the meaning of this legal status should remain a significant concern for corporate law theory.

73. *See, e.g.*, Nosworthy, *supra* note 63, at 1392 ("A person who owes a fiduciary obligation to another . . . must not place themselves in a position where their personal interests or duties conflict with . . . the interests of the person to whom the duty is owed . . . nor may they secretly profit from the relationship.").

74. *See, e.g.*, *id.* (stating that fiduciary duty extends to avoiding both actual and possible conflicts as well as "secret profits"); *see also* Pearlie Koh, *Once a Director, Always a Fiduciary*, 62 CAMBRIDGE L.J. 403, 405 (2003) (discussing whether the "no profit" rule is a specific provision of the "no conflict" rule, or whether they are two separated rules); Stanley M. Beck, *The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered*, 49 CAN. BAR REV. 80, 90 (1971) (pointing out that, in reality, courts often avoid separating sharply between the two rules).

to the nature of these relations.[75] Thus, the content of these duties was adapted to the corporate sphere so that the business activities of companies would not be negatively affected.[76] Over the years, the specific content of each duty was shaped by courts' rulings.[77] Various rules were developed to guide the conduct of officers and ensure that they did not confuse their personal interests with the objectives of the company.[78] Yet, the convention that, an officer should not involve personal interests with the interests they were appointed to guard, still constitutes the basis upon which the duty of loyalty of the officer rests.[79]

Like any other fiduciary, the officer must always act in the best interest of the beneficiary—that is, the company.[80] Although some of the principles have been gradually regulated by specific legislation,[81] which includes provisions that specify the conduct which is expected from an officer,[82] the list of "expected behaviors" is not a closed one. These specific rules

75. *See* Nosworthy, *supra* note 63, at 1391 ("[I]t has been said that the obligation itself may vary depending on the nature of the underlying relationship.").

76. *See id.* at 1409 (noting that fiduciary duty aids corporate governance by both "their deterrent and disclosure effects"). For example, a transaction between the director and the company may be allowable if the officer acts in good faith and the transaction is approved in advance by the shareholders.

77. *See, e.g.*, Fraser v. NRMA Holdings Ltd. (1992) 55 FCR 452 (Austl.) (holding, for the first time in Australian courts, that directors are under a duty to make a "full disclosure of all facts within their knowledge which are material" to shareholders).

78. *See, e.g.*, Nosworthy, *supra* note 63, at 1392 (observing the developments of the "no conflict" and "no profit" rules in Australian law).

79. *See id.* at 1394 (stating that one with a fiduciary duty may not put themselves in a position to personally benefit).

80. *See, e.g.*, Cede & Co. v. Technicolor, 634 A.2d 345, 360 (Del. 1993) ("[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders."); s*ee also* Nosworthy, *supra* note 63, at 1393 (noting that the High Court of Australia holds that fiduciary duty "prohibits the fiduciary from acting inconsistently with the interests of the beneficiary of the duty").

81. *See, e.g.*, DEL. CODE ANN. tit. 8 § 144(a) (2017) (dealing with rules for approval of transactions between a corporation and directors, which could raise concern for conflict of interest); s*ee also* CAL. CORP. CODE § 310 (West 1999).

82. *See, e.g.*, Companies Act, (2006) § 171 CURRENT LAW 323, 323–24 (U.K.) (duty to act for the best interest of the company); *id.* § 175 (duty to avoid conflict of interest).

illustrate, rather than detract from, the meaning of "loyalty" in the context of corporations. Furthermore, to state the obvious, not all the duties of a company officer are fiduciary ones, and boundaries of fiduciary law are controversial.[83] For example, in the United States, particularly in Delaware, case law includes the duty of care as part of fiduciary law.[84] However, this classification is not accepted throughout the common law,[85] and some claim that, despite the formal classification, this duty does not fit the concept of fiduciary.[86] Thus, the classification of officers as fiduciaries continues to be a source of interest and debate.

II. WHICH PERSPECTIVE MATTERS?

A. *The Fiduciary Law Perspective*

As was briefly explained above, officers' duty of loyalty has played a significant role in corporate law from its very beginning.[87] Consequently, it is not surprising that this duty is

83. *See* LAC Mins. Ltd. v. Int'l Corona Res. Ltd., [1989] 2 S.C.R. 574 (Can.) ("[N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty.").

84. *See, e.g., Cede & Co.*, 634 A.2d at 361 (holding that fiduciary duty does not only include acting in the best interest of the shareholders, "but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it"); Christopher M. Bruner, *Opting Out of Fiduciary Duties and Liabilities in U.S. and U.K. Business Entities*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 287 (Andrews Gold & Gordon Smith eds., 2018) [hereinafter Bruner, *Opting Out of Fiduciary Duties*] (observing that the duty of care for fiduciary duty uses "standard negligence-based terms" and liability for breaches is "predicated upon concepts of gross negligence").

85. *See* Christopher M. Bruner, *Is the Corporate Director's Duty of Care a "Fiduciary" Duty? Does It Matter?*, 48 WAKE FOREST L. REV. 1027, 1029–32 (2013) (claiming that the incorrect classification has led to some unique developments in Delaware corporate law).

86. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2017) (allowing a company to add a provision eliminating or limiting the personal liability for breaching the duty of care, but not for breaching the duty of loyalty); *see also* Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701, 702 (2011) (discussing fiduciary duties under Delaware law).

87. *See* Sealy, *supra* note 69, at 83 (observing that the first case that found a breach of trust by directors in 1742 was based on a trust being owed to the corporation, and that during the 150 year period before most companies

frequently cited in both academic literature and case law.[88] This Article's perspective starts with the *fiduciary* status of corporate officers. It closely examines cases of *divergence* that deal with this concept and draws more general conclusions about the meaning of the concept "fiduciary." The underlying assumption and point at issue is that a systematic examination of this concept's definition, as adopted by different jurisdictions in similar contexts, could lead to insightful conclusions. Investigating how the same concept was applied, understood, and used to develop different rules could offer more than just a better functional description of the concept. It also allows us to dive into the reasoning and values underlying the legal norm.[89]

This Article argues that viewing the corporate opportunity doctrine from a comparative perspective can contribute to the theoretical research regarding how different courts understand the concept of fiduciary.[90] The relevant case law, where different courts have reached different conclusions about the scope of officers' loyalty, will be thoroughly analyzed from the point of

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were incorporated, courts held directors accountable to the company "on a strict basis").

88. For example, a search for American case law in Lexis Advance database of the words "fiduciary duty" and "director" yields more than 80,000 results in federal courts and over 70,000 results in state courts. *See* LEXIS NEXIS, https://perma.cc/W5BB-RYWS (last visited Sept. 23, 2023) (searching "fiduciary duty" and "director" in all federal jurisdiction cases); LEXIS NEXIS, https://perma.cc/E75V-W8E6 (last visited Sept. 23, 2023) (searching "fiduciary duty" and "director" in all state jurisdiction cases).

89. *See* Mathias Reimann, *Comparative Law and Neighbouring Disciplines, in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 13, 26 (Mauro Bussani & Ugo Mattei eds., 2012) (explaining that comparative analyses can "add crucial descriptive depth and enormous explanatory potential"). However, some of the research methods based on comparative law assume theoretical guidance is not necessary for such studies. *See* Gunter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law,* 26 HARV. INT'L L.J. 411, 412 (1985) (discussing how de-emphasized theoretical discussions impact comparative approaches); *see also* Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUDS. 101, 112 (1989) ("By employing comparative law as 'a substitute for the experimental method' . . . one can come to understand more about the nature of law, of legal institutions, and of legal development.").

90. *See* Lowry & Edmunds*, supra* note 20, at 516 (observing growing yet diverging caselaw in Australia, Canada, New Zealand, and the United States around the corporate opportunity doctrine causing a rise of comparative analyses).

view of fiduciary law.[91] That is to say, the reading of the cases will focus on an aspect that, so far, had been neglected by the literature: the ways the concept of fiduciary has been understood by courts.[92] Since the current literature has yet to determine whether this doctrine is desirable, the discussion should return to the principles of the law, which will reveal the needed systematic knowledge for forming a better understanding of the law.

Indeed, extensive academic literature already aspires to clarify the way corporate law has developed, and is still developing, in different jurisdictions.[93] Clearly, some of these discussions also deal with differences in the way fiduciary duties were shaped.[94] However, the debate was mostly isolated from the theoretical and conceptual framework of fiduciary law,

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91. *See generally* Regal (Hastings) Ltd. v. Gulliver [1942] 1 All ER 378, [1967] 2 A.C. 134 (HL) (appeal taken from Ct. App.) (U.K.) (United Kingdom's strict rule view); Cook v. Deeks [1916] 1 A.C. 554 (P.C.) (Can. Ont. C.A.) (Canada's intermediate rule view); Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939) (Delaware's lenient rule view).

92. *See* DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 373 (2018) (noting that "[t]he willingness to borrow from, and treat corporate law as part of, other fiduciary law continues even today" in United Kingdom courts).

93. Some commentators claim that presently, there is a resemblance between corporate law in different common law countries. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Governance*, 89 GEO. L.J. 439, 453–54 (2001) (explaining forces of "internal logic of efficiency, competition, interest group pressure, imitation, and the need for compatibility" as well as "explicit efforts at cross-border harmonization and competition among jurisdictions for corporate charters" has pushed international convergence for a "standard model of corporate law"). However, others emphasize the differences between legal systems and offer various explanations for these differences, such as "the race to the bottom," which characterizes Delaware's unique development of its corporate law. *See, e.g.*, Daniel R. Fischel, *Race to the Bottom Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 920–22 (1982) (finding that "Delaware's preeminence, in short, is in all probability attributable to success in a 'climb to the top' rather than to victory in a 'race to the bottom'"); L.A. Bebchuk, *Federalism and the Corporation: The Desirable Limits of State Competition in Corporate Law*, 105 HARV. L. REV. 1443, 1444–46 (1992) (comparing and contrasting both the "race for the bottom" and the "race for the top" theories that attempt to explain state competition of corporate charters); s*ee also* L.C.B. Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369, 1376–80 (1956) (claiming that differences originated from historical developments).

94. *See e.g.*, KERSHAW, *supra* note 92, at 373.

concentrating instead on the effect of economic forces or pressures exerted by interest groups on legal rules.[95] These discussions on the evolution of corporate law generally, and their effect on the development of corporate opportunity doctrines specifically, are not the perspective this Article seeks to take. The starting point of this discussion is different. It emerges from the understanding that fiduciary law is a significant and meaningful legal concept, and understanding this concept is a necessary step in the process of realizing corporate law doctrines.[96]

B. *Why Does It Matter?*

The fiduciary law perspective matters since, like any other conceptual classification, understanding why a particular situation can be classified as a breach of the duty of loyalty is important in and of itself for the proper and coherent development of the law. This discussion is of practical value due to the unique remedies of fiduciary law[97] and also since specific rules might not cover the variety of situations that are regulated under the standard of loyalty. Moreover, the classification of certain conduct as a breach of the duty of loyalty is of importance, since it has normative value and could therefore affect an officer's behavior, regardless of its legal effect on the

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95. *See* David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. 395, 397 (2012) [hereinafter Kershaw, *The Path of Corporate Fiduciary Law*] (arguing against the common understanding of corporate law evolution as responsive to the economic interests of both pressure groups and markets and suggesting that more room should be given for the internal account of legal change); *see also* Kershaw, *Lost in Translation*, *supra* note 21, at 605 (arguing that common understanding of corporate law lacks nuanced attention to the fact United States companies are regulated in a competitive market "where states compete to attract incorporations").

96. *See* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 1–2 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter PHILOSOPHICAL FOUNDATIONS] (noting that fiduciary law is "a critically important body of law" and "has been woefully under-analyzed by legal theorists").

97. *See* Samuel L. Bray, *Fiduciary Remedies, in* OXFORD HANDBOOK ON FIDUCIARY LAW 449, 450 (E. Criddle et al. eds., 2018) (listing unique remedies of fiduciary law such as: accounting for profits, equitable compensation, constructive trusts, injunctions, rescissions, reformations, avoidance, cancellation, instruction, and removal); HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 237 (2004) (discussing remedies within restitution damages, such as unjust enrichment).

concrete situation.[98] Even if there are other possible explanations for the divergence in these rulings, external to the law, without these lenses, the picture this literature painted is incomplete. Moreover, the contribution of this perspective goes beyond the development of fiduciary law theory. The research will start with the search for first principles and ask what corporate law doctrines can tell us about fiduciary law.[99] However, it ends by indicating what the different concepts of fiduciary law tell us about corporate law, and more specifically, about Delaware's rulings. [100]

Clearly, taking this perspective does not suggest that these cases would or could teach us all there is to know about fiduciary law. In recent years, legal academia has taken a profound interest in the foundations of the concept of fiduciary, and may shed light on the theoretical questions surrounding this unique legal setting.[101] The existing and growing substantial literature provides meaningful explanations as to what fiduciary law stands for.[102] There are many controversies in the literature

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98. *See, e.g.*, Samet, *supra* note 59, at 769 (noting "fiduciary duty" is broad enough to apply to many situations and acts as a deterrent); *see also* IRIT SAMET, EQUITY: CONSCIENCE GOES TO MARKET 125–134 (2018) (arguing that equitable principles of obligation discourage fiduciaries from exploiting the beneficiaries by making such a breach akin to a moral breach); TAMAR FRANKEL, FIDUCIARY LAW 6 (2011) (describing legal duties of trustees in the context of entrustment of property for beneficiaries).

99. *See infra* Part III.B.

100. *See infra* Part III.E.

101. *See supra* note 96 and accompanying text.

102. The growing theoretical literature sought to answer various questions, such as, what is the role and content of the duty of loyalty? *See*, *e.g.*, Peter Birks, *The Content of Fiduciary Obligation*, 34 ISR. L. REV. 3, 28 (2000) (arguing that the duty of care for a fiduciary includes special positive duties); Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations, in* MAPPING THE LAW: ESSAYS IN HONOUR OF PETER BIRKS 577, 582 (A. Burrows & A. Rodger eds., 2006) (examining the legal history around the origins of fiduciary duty); James Edelman, *When Do Fiduciary Duties Arise?*, 126 L. QUARTERLY REV. 302, 307 (2010) (exploring where obligations for fiduciary duties come from outside of contractual agreement, such as implied voluntary undertaking to take care); Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570, 585 (2013) (noting that, while there are questions on what exactly fiduciary duty is, there is no dispute that the fiduciary owes a duty of loyalty, and that the fiduciary will comply with both the "conflict-of-interest" and "conflict of duty" rules). For an economic analysis perspective on fiduciary law, see, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993)

regarding the exact purposes of fiduciary law.[103] Yet, there almost seems to be a consensus that the answer to what fiduciary law stands for—whatever that answer may be—will not change across different common law jurisdictions.[104] The reality, however, is quite different, and across different types of fiduciary relationships, variances in fiduciary law can be found.[105] This Article focuses on one such case of divergence and aims to gain general insights for the close examination of this case.[106]

Certainly, it could be claimed that concentrating on one group of case law might be misleading, as situations of divergence represent uncertainty about the correct nature or extent of fiduciary principles. Nonetheless, these cases could have substantial theoretical importance precisely because they represent a situation where the boundaries of the law are not certain. This uncertainty indicates that the justification presented by the courts in these cases may provide insights into the nature of the concept. When the application of the norm to a specific circumstance is controversial, the court is compelled to

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(discussing the meaning of fiduciary); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1048–55 (1991) (explaining that central to understanding the fiduciary relationship is the "appropriation-incentive model, a particular form of the principal-agent model"); PHILOSOPHICAL FOUNDATIONS, *supra* note 96, at 1–2; Shelly Kreiczer-Levy, *The Duties of Online Marketplaces*, 58 SAN DIEGO L. REV. 269, 288–94 (2021) (discussing fiduciary law's role in understanding the duties of online platforms). *See generally* CONTRACT, STATUS AND FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., 2016); RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold, eds., 2016); OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds., 2018).

103. *See, e.g.*, Agasha Mugasha, *Evolving Standards of Conduct (Fiduciary Duty, Good Faith and Reasonableness) and Commercial Certainty in Multi-Lender Contracts*, 45 WAYNE L. REV. 1789, 1795–96 (2000)

> [I]n any particular analysis concerning the fiduciary principle, one has to ascertain the subject matter over which fiduciary obligations extend. A fiduciary for certain purposes need not be a fiduciary for all purposes; equally, a person who is generally not a fiduciary can be a fiduciary for certain limited purposes.

104. *See, e.g.*, Hansmann & Kraakman, *supra* note 93, at 453–54 (discussing convergence in corporate law).

105. *See, e.g.*, Mugasha, *supra* note 103, at 1795 ("[T]he terms of a particular contract determine the scope of fiduciary duties.").

106. *See infra* Part III.C–E.

confront the concept's deeper meaning, its rationale, and its purpose in the specific context.[107] Thus, examining cases where different courts have reached different conclusions about the content of fiduciary law through a comparative perspective contributes to the ongoing search for the roots of this legal concept. In the following Part, this Article applies that comparative perspective to the case law.

III. FINDING FIRST PRINCIPLES: CORPORATE OPPORTUNITY DOCTRINE IN A COMPARATIVE LIGHT

A. *A Short Review of the Literature*

As mentioned, the officer's duty of loyalty prohibits him from exploiting his position for personal profits.[108] The corporate opportunity doctrine was developed from this general rule.[109] Whereas the need to prevent a conflict of interest between the officer and the company is indisputable, the case law in different common law jurisdictions is divided on whether there are circumstances in which the restriction should be eased.[110] The development of conflicting positions on such a central question has aroused interest in the academic literature and led to extensive debates.[111] On the one hand, some have argued that a strict approach, which would prohibit any exploitation of business opportunities, is indispensable.[112] According to this

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107. *See* H.L.A. HART, THE CONCEPT OF LAW 126 (3d ed. 2012) (explaining how authoritative facts from precedents applying to novel cases cause uncertainty because of linguistic limitations of creating a Brightline rule).

108. *See supra* note 74 and accompanying text.

109. *See* Kelegian v. Mgrdichian, 39 Cal. Rptr. 2d 390, 394 (Ct. App. 1995) (providing that the corporate opportunity doctrine is based upon the duties of the director for the company and not their own interests).

110. *See infra* Part III.C–E.

111. *See, e.g.,* Lowry & Edmunds, *supra* note 20, at 536–37 (contending that a strict approach stifles the spirit of entrepreneurialism); Shue Sing Churk, *Just Abolish the No-Profit Rule*, 7 INT'L COMP. & COMM. L. REV. 244, 251 (2015) (arguing directors should be excused in some cases); David Gibbs, *The Absolute Limit of Directors' Fiduciary Liability for Conflicts of Interest: The Director's Perspective*, 36 COMP. LAW. 231, 242 (2015) (offering that entrepreneurial activity is not negatively impacted by a rigid approach).

112. Assuming that the approval of the shareholders (or the board of directors, under certain circumstances) has not been granted in advance, after full and complete disclosure of all the relevant facts. *See* Kershaw, *Lost in*

position, minimizing the officer's ability to exploit corporate opportunities is necessary to ensure that he is fulfilling his duty towards the company.[113] On the other hand, it has been claimed that this approach is not adapted to the modern corporate world and that there are good policy considerations, such as the need for business innovation, that justify a more lenient approach.[114] Thus, the desire to maintain the officer's loyalty should be balanced against the need to permit, in certain cases, the generation of personal profit.[115]

In response, it has been argued that the lenient rule is undesirable and that it is not rooted in a calculated policy, but rather originates from the "race to the bottom" of American corporate law,[116] leading to ambiguity and inconsistency in the law.[117] Furthermore, it has been argued that the source of these differences lies in the structural differences between the United Kingdom and the United States legal systems,[118] or that the strict approach is based on a historical conception of equity that is outdated.[119] Another substantial work relied on a detailed

Translation, *supra* note 21, at 603–04 (explaining the different approaches in the debate regarding the scope of an officer's corporate duty).

113. *See id.* at 603–05 (doubting the claim that the flexibility of the law in Delaware allows for innovation and creativity and prevents economic waste); *see also* Koh, *supra* note 74, at 408–10 (noting the importance of maintaining the integrity of the fiduciary-company relationship).

114. *See* Churk, *supra* note 111, at 250–51 (calling for the complete abolition of the rule).

115. *See id.*

116. *See* Gelter & Helleringer, *supra* note 15, at 348 (exhibiting that the difference in United States and United Kingdom corporate opportunity doctrine stems from their respective corporate cultures); *see also* Fischel, *supra* note 93, at 915–16 (outlining the "race to the bottom" thesis according to its proponents).

117. *See, e.g.*, Koh, *supra* note 74, at 415 (referencing the guessing games created in the absence of clear boundaries for a fiduciary's corporate freedom); *see also* Talley, *supra* note 33, at 280–81 (criticizing the lack of coherence of this doctrine).

118. *See* Bruner, *Opting Out of Fiduciary Duties*, *supra* note 84, at 302 (claiming that "[s]tronger fiduciary duties, [in the United Kingdom, unlike in the United States,] promoting single-minded focus on the shareholders' interests, are fully consistent with this more shareholder-centric governance structure"); *see also* Gelter & Helleringer, *supra* note 15, at 352–53 (explaining how enforcement by private litigation rather than by public one or by institutional investors affected the development of the law).

119. *See* Lowry & Edmunds, *supra* note 20, at 517.

historical analysis of cases.[120] It explored the difficulties with some of these external explanations for the divergence between corporate opportunity doctrines in the United Kingdom and the United States and criticized the accuracy of these claims, given that they could not be reconciled with the historical data.[121] As already mentioned, these discussions did not solve the confusion created by these contradicting views.

B. *Finding First Principles*

This subpart focuses on an aspect of these discussions that so far had been neglected: the relations between this group of cases and the general fiduciary law theory. Therefore, it examines whether the adoption of a strict or lenient rule regarding the question of corporate opportunity could illuminate the general concept of fiduciary law. My aim in this reading of the case law is to expose the first principles and the primary causes that led to the development of the legal doctrine. As will be discussed in the final part, the perspective this Article takes raises questions regarding the validity of some of the external arguments raised in the literature. Moreover, this Article reinforces, from a different angle, the criticism regarding the rules developed in Delaware, and thus offers a way to settle the doctrinal dispute.[122]

An analysis of the case law affirms that the development of a certain rule is related to different understandings of the concept of "fiduciary."[123] Indeed, the theoretical perspective provides an internal legal explanation for the divergence. As will be further explained, the analysis identifies two possible general trends regarding the role fiduciary law plays in the legal system, or in other words, two different conceptions of the concept of

120. *See* KERSHAW, *supra* note 92, at 465–74 (showing that external explanations for divergence between corporate opportunity doctrines cannot be reconciled with historical data).

121. *Id.* (citing moral ideation, the nature of corporations, and divergent understandings of property law to be external explanations for the difference between the United States and United Kingdom corporate opportunity doctrines).

122. *See infra* Part IV.

123. *See* Broz v. Cellular Inf. Sys., Inc., 673 A.2d 148, 154 (Del. 1996) (providing a unique understanding that an officer consents to placing the interest of the company before his own only in certain circumstances).

"fiduciary."[124] A *proprietary conception* sees fiduciary law as a legal tool whose purpose is to protect the material assets entrusted to the hands of the fiduciary. Its focus is the instrumental economic need for this legal institution, which provides owners of property with alternative ways to manage it.[125] This conception does not base a decision about the classification or the scope of the relations on interpersonal characteristics. Hence, situations involving other aspects of the relationship between the parties are not regarded as part of fiduciary law. The rigorous prohibition on taking any possession from the other is the guiding rule according to which the duty of loyalty should be formed. In corporate law, the proprietary conception will focus on defining and protecting the property of the company. This approach avoids addressing the moral aspects of the behavior of the officers or its possible justification. Instead, it will ask whether the company was deprived of its wealth and, if so, liability will be imposed on the officer.

In contrast, the paramount purpose of the *interpersonal conception* of fiduciary law is to regulate fiduciary relationships. Fiduciary law is understood as aiming to protect a broader spectrum of interests, which are not limited to proprietary interests alone.[126] It assigns considerable weight to the normative aspect of the fiduciary institution and dedicates attention to achieving justice between the parties.[127] It focuses on the nature of the relationship between the parties to dictate its scope and sees fiduciary rules as a legal tool for promoting the worthy behavior of fiduciaries. The legal analysis under this conception will therefore examine the characteristics of the relations between the parties. Certainly, in many cases, the

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124. *See infra* Part IV.A.

125. As will be explained, while a mere opportunity is not the "property" of the company in the traditional sense, understanding fiduciary law as a tool aiming to preserve control over the beneficiary's property is in line with a rule that restricts the power or freedom of the beneficiary (in this case, the officer), and thus prevents any chance for a taking that might jeopardize more concrete economic interests of the company. *See* Frame v. Smith, [1987] 2 S.C.R. 99, 101–03 (Can.).

126. *See, e.g.*, Samet, *supra* note 59, at 764 (describing fiduciary duty as "prophylactic").

127. *See* SAMET, EQUITY: CONSCIENCE GOES TO MARKET, *supra* note 98, at 139 (pointing out that fiduciary laws are characterized by an "appeal to conscience").

protection of property is an integral part of the relations and therefore is understood to be among the goals of fiduciary law also under this conception. However, the protection of property is not regarded as the only purpose of these rules, nor as the only way to determine their existence.[128] Instead, the conduct of the fiduciary, the nature of the relations between the fiduciary and the beneficiary, and the expectations of the beneficiary, as well as the ethical aspect (i.e., the need to promote worthy behavior of fiduciaries) are important factors in the process of outlining the boundaries of the duty of loyalty.

While this Article primarily examines the case law pertaining to a specific corporate law doctrine, it acknowledges that the breadth of relevant cases extends beyond its feasible scope. Hence, it will concentrate on the leading cases in each jurisdiction, cases from which it was possible to extract evidence regarding the theoretical basis of the doctrine.[129] The discussion will start with the English law approach, which has adopted a strict rule on this issue.[130] Subsequently, the central cases of the Supreme Court of Canada will be scrutinized, which will show that a more lenient rule, or in other words an intermediate rule, has been adopted there.[131] Finally, an extremely lenient rule was adopted in the United States, specifically in Delaware.[132]

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128. *See, e.g.*, Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. REV. 1289, 1290 (2011) (outlining fiduciary rules as linked to numerous open-ended conditions that allows fiduciary law to accommodate new situations).

129. Cases that received a high number of quotes and references, or that later rulings refer to as significant.

130. A search in Westlaw U.K. database of the central judgment for "Regal (Hastings) Ltd.," found over 300 results in various courts, of which more than 30 judgments were classified as "Key Cases," the most relevant of which will be discussed.

131. A search in Westlaw database of the central judgment for "Peso Silver," found around 180 results. The other substantial case, *Canadian Aero Service Ltd. v. O'Malley*, had more than 600 references in case law (however, many discuss aspects of the decision which are not relevant here). [1974] S.C.R. 592 (Can.).

132. A search in Lexis Advance database of the two central judgments for "corporate opportunity" found hundreds of rulings. *Guth v. Loft*, is a guiding ruling regarding the duty of loyalty of directors. 5 A.2d 503 (Del. 1939).

C. *The United Kingdom Doctrine—A Strict Rule*

Prior to any legislation, English courts imposed a duty of loyalty on corporate officers.[133] At present, comprehensive legislation regulates the fiduciary duties of officers.[134] However, the rulings that preceded the legislation are still in force.[135] The discussion will commence with *Regal (Hastings) Ltd. v. Gulliver*,[136] which remains a prominent authority as the first case directly addressing the issue.[137] Regal filed a lawsuit against its former directors, claiming that they breached their fiduciary duty toward the company.[138] While the company was searching to expand its business, an opportunity to acquire a lease of two cinemas arose.[139] Regal's subsidiary was supposed to perform the transaction, assuming it could raise more capital or offer other assurances.[140] The directors determined that Regal's capital allowed it to invest a sum of only £2,000.[141] It was therefore decided that the rest of the needed funding (an extra £3,000) would be provided by the directors themselves, through

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133. *See* Charitable Corp. v. Sutton (1742) 26 Eng. Rep. 642, 645 (finding that a breach of trust is in gross negligence of a corporate officer's duty).

134. *See* Companies Act 2006, (2006) 46 CURRENT LAW §§ 171–177 (U.K.) (providing the seven general duties of directors); *e.g.*, *id.* § 175(1) ("A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company."); *id.* § 175(2) ("This applies in particular to the exploitation of any property, information or opportunity . . . .").

135. *See* KERSHAW, *supra* note 92, at 423 (describing the ways legislation and court rulings interact); s*ee also* Simon Witney, *Corporate Opportunity Law and the Non-Executive Director*, 16 J. CORP. L. STUD. 145, 151–156 (2016) (examining the implementation of Section 175 of the Companies Act 2006).

136. *See* [1942] 1 All ER 378, [1967] 2 A.C. 134 (HL) 134 (appeal taken from Ct. App.) (U.K.).

137. *See, e.g.*, KERSHAW, *supra* note 92, at 389 (stating that *Regal (Hastings) Ltd. V. Gulliver* is "the first UK case to deal directly with the connected assets problem"); *see also* E. Lim, *Directors' Fiduciary Duties: A New Analytical Framework*, 129 L. Q. REV. 242, 243 (2013) (referring to decisions of lower courts in England that have applied the rule in a more lenient way when the director's term of office had ended).

138. *See Regal (Hastings) Ltd.* [1967] 2 A.C. 134 (HL) 157–58 (claiming that the former directors used their knowledge from their position with the company to further personal gains).

139. *Id.* at 134.

140. *Id.*

141. *Id.*

a direct purchase of shares in the subsidiary company.[142] These shares were later sold, leading to substantial profits for both Regal and the directors.[143] The Court of Appeals dismissed the company's claim.[144] However, the appeal to the House of Lords was accepted.[145]

Lord Russell of Killowen explained that restitution in these cases does not depend on proof of fraud or lack of good faith, as it is sufficient that the profits were generated at the time the defendant was acting as a fiduciary.[146] Citing older cases dealing with the duties of trustees, he emphasized that the alleged fact that Regal could not take advantage of this business opportunity is irrelevant to the decision.[147] There is no need to examine the manner in which the directors actually acted, the purity of their intentions, or the motives behind their actions. In other words, there is no need to question the "content" of the relations between them and the company.

The rule is a strict one, which focuses on the fact that the directors hold a fiduciary status and that the shares were acquired "by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office."[148] Lord Macmillan added that there is no need to question the *bona fides* of the directors, and in fact, "[t]hey were not said to have done anything wrong."[149] The grounds on which the directors were considered accountable was merely the fact that they were in fiduciary relations, and that their actions were related to their role as managers in the company.[150] Lord Porter emphasized that while directors are not trustees, they do occupy

142. *Id.* at 152.

143. *See id.* at 135 (explaining that these profits are what Regal is seeking to recover through the action).

144. *Id.* at 137.

145. *Id.* at 141–43.

146. *See id.* at 145.

147. *See, e.g.*, *id.* at 149 (referencing Keech v. Sandford [1726] EWHC (Ch) J76, a foundational English law case on fiduciary duty providing that for a plaintiff to succeed on a breach of fiduciary duty claim, they must show that there was a duty to obtain the shares for the plaintiff).

148. *Id.* at 150.

149. *Id.* at 153.

150. *See id.* (citing no hesitation in concluding based on the facts that respondents benefitted from the transaction due to their fiduciary role).

a fiduciary position, and therefore should not profit from it.[151] Lord Wright stressed that profiting in itself, whether or not any harm was caused to the beneficiary, is "a fundamental breach of the fiduciary relationship."[152] While quoting an old decision of the House of Lords, he added that the strict and absolute rule is needed, no less, "because 'the safety of mankind' requires it to be absolutely observed in the fiduciary relationship."[153]

The court was not interested in discussing the content of the relationship between the directors and the company. It emphasized again and again that the actual conduct of the directors is not at all relevant in deciding whether a breach of duty had occurred once it is clear that the relationships are fiduciary. The court refused to tie the breach of duty to the existence of ethical flaws in the behavior of the directors. It did not question the "morality" of the director and declined any factual inquiry into the matter. While the court mentioned the factual difficulties that arise in these cases, this alone could not explain its decision to decline the factual inquiry altogether.[154] Clearly, there are possible solutions to these difficulties. However, the refusal of the court to consider the good faith of the directors as a valid defense is plausible, if the main aspiration of the fiduciary law is to guard the property of the beneficiary, as opposed to regulating the relations between the parties. Both the lack of interest in the specific circumstances of the case and the denial of any opportunity for the officer to offer a justification for his actions, fit a position that focuses on the duty of loyalty as a tool which is created to protect economic

151. *See id.* at 158 (stating broadly that when one is in a position of trust, they cannot make a profit from a transaction they can only acquire through their fiduciary position).

152. *Id.* at 154.

153. Regal (Hastings) Ltd. v. Gulliver [1942] 1 All ER 378, [1967] 2 A.C. 134 (HL) 157 (appeal taken from Ct. App.) (U.K.) (quoting Parker v. McKenna [1874] 10 Ch. App. 96, 124–25 (U.K.)).

154. *See id.* at 154 (stating that "facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged"); *see also* KERSHAW, *supra* note 92, at 421 (examining the reasoning in *Regal (Hastings) Ltd.*); Amir N. Licht, *Motivation, Information, Negotiation: Why Fiduciary Accountability Cannot Be Negotiable, in* RESEARCH HANDBOOK ON FIDUCIARY LAW 159 (Andrew Gold & Gordon Smith eds., 2018) (discussing theories of contract law and fiduciary duties). *See generally* Amir N. Licht, *Lord Eldon Redux: Information Asymmetry, the Roots of Accountability, and the Structure of Fiduciary Loyalty*, 37(4) OXFORD J. LEGAL STUDS. 770 (2017).

assets and not as a means to govern and manage relations. Hence, as will be further explained, this ruling conforms with a proprietary conception of the concept of fiduciary.

A proprietary conception of fiduciary law is also reflected in the way the court chose to define what should be considered, *de facto*, as "belonging" to the company.[155] The refusal of the court to examine whether the company could have taken the opportunity[156] is in fact equivalent to a decision that a business opportunity should always be considered part of the "property" of the company. In fact, the dramatic rhetoric, arguing that the strict rule is necessary for "the safety of mankind," illustrates the need to justify why such rigorous deterrence is reasonable.[157] This strict position is conceivable if the main aspiration of the duty of loyalty is to guard the property of the company. Necessarily, this position means that the rule would be at most over-inclusive (protecting opportunities that in fact did not belong to the company), rather than under-inclusive (not protecting opportunities that the company could have taken and would have resulted in the acquisition of actual property). Thus, referring to a *proprietary* understanding of fiduciary law does not suggest that the position will concentrate on a clear and separately developed theory of "property rights" in their classical meaning.[158] From this perspective, the mere chance that the fiduciary will exploit an opportunity that the company could have used is enough to justify an *a priori* assertion that every opportunity, regardless of its exact content, should in fact be treated as "belonging" to the corporation.

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155. While the label of "property" was not used by the court, this implicit reading of the decision can be also found in some subsequent cases. *See* KERSHAW, *supra* note 92, at 393–94 (considering what the property of a company is according to case law).

156. *See* Koh*, supra* note 74, at 406 (suggesting that since it is possible to impose liability on the basis of only one of the rules, they are independent of each other); s*ee also* KERSHAW, *supra* note 92, at 427 (summarizing the common law rules for officer loyalty).

157 Parker v. McKenna [1874] 10 Ch. App. 96, 124–25 (U.K.). As will be further explained, under an *interpersonal conception* deterrence is also important, yet the emphasis is not on the protection of the corporation's assets, rather it is on preventing improper conduct by the officer.

158. *See* KERSHAW, *supra* note 92, at 474–82 (pointing to the same lack of theoretical intuition in other contexts, such as trademarks and trade secrets).

As previously stated, a substantial academic discourse emerged regarding the appropriateness of the stringent rule.[159] Yet, the rigorous approach was generally adopted by the English courts,[160] and *Regal* is still the binding precedent in the United Kingdom.[161] Another prominent example substantiating the claim that the fiduciary perspective matters is *Boardman v. Phipps*.[162] While this is not a corporate law case, on numerous later occasions it was applied in the context of companies.[163] This case, therefore, demonstrates why understanding how courts perceive the concept of "fiduciary" is highly important for understanding how corporate law doctrines develop. The court based its ruling on *Regal*, stating that it "applies to the facts here since the appellants stood in a fiduciary relationship."[164] On the facts of the case, there was no debate as to the *bona fides* of the fiduciaries, nor was there any doubt that their actions significantly increased the profits of the beneficiaries. Yet the court concluded that these considerations were not relevant.[165] The court stressed that the rule is strict, utterly prohibiting fiduciaries from making personal profit.[166] With a clear understanding of the content of the strict rule, it is now feasible

159. *See, e.g.*, John Lowry & Jen Sloszar, *Judicial Pragmatism: Directors' Duties and Post-Resignation Conflicts of Duty*, 2008 J. BUS. L. 83, 90–91 (examining existing case law on fiduciary duties).

160. *See Regal (Hastings) Ltd.* [1967] 2 A.C. 134 (HL) 134 (presenting an adherence to enforcing the strict rule on those with a fiduciary duty that they use to their personal advantage); Blaston Ltd. v. Headline Filters Ltd. [1990] FSR 385, 386 (Eng. & Wales) (same); Foster Bryant Surveying Ltd. v. Bryant [2007] EWCA (Civ) 200 (Eng. & Wales) (same).

161. *See, e.g.,* HMRC v. Lomas [2017] EWCA (Civ) 2124 [42] (U.K.) (relating a case concerning whether statutory interest payable on proven debts is within the meaning of the U.K. income tax statute to the precedent in *Regal*).

162. [1966] UKHL 2, [1967] 2 AC 46 (U.K.); *see also* KERSHAW, *supra* note 92, at 371–75 (discussing perspective differences in case law).

163. *See, e.g.*, Halton Int'l Inc. (Holding) SARL v. Guernroy Ltd. [2005] EWHC (Ch) 1968 (Eng. & Wales) (considering *Boardman* in a case regarding fiduciary duty between shareholders of an airline company); Bhullar v. Bhullar [2003] EWCA (Civ) 424 [18] (U.K.) (utilizing *Boardman* to decide on a fiduciary duty conflict between shareholders of a family company).

164. *Boardman* [1967] 2 AC 46, 69.

165. *Id.*

166. *Id.* at 115; *see also* KERSHAW, *supra* note 92, at 394–98 (suggesting that the *Boardman* majority held that using information about the opportunity amounted to "an unauthorized expropriation of trust property").

to examine whether the same perspective is evident in the subsequent cases.[167]

One frequently cited decision is *Bhullar v. Bhullar*.[168] The High Court (the lower court) determined that the appellants breached their duty of loyalty by acquiring for themselves an asset while they were still serving as directors.[169] The appellants claimed that the opportunity came to them privately, and that, at the relevant time, the company was trying unsuccessfully to sell and divide its assets.[170] The Court of Appeals rejected these arguments, stating that by purchasing the property, the directors created a conflict of interest, thereby breaching their duty.[171] The court clarified that it suffices that at the relevant time, it would have been "'worthwhile' for the company to have acquired the [p]roperty," albeit the negotiations for the division of assets of the company were afoot.[172] The court did not present the evidence explaining why the purchase was considered "worthwhile," but only mentioned that the relevant property was in close proximity to the company's property.[173] The court refused to inquire whether the company would or could have taken the opportunity. Instead, it declared that it was directors' duty to communicate it to the company.[174]

As in the case of *Regal*, the court expressed a complete lack of interest in the specific circumstances of the case, such as the fact the company was in the process of ending its activity, or the question of the actual, not theoretical, relevance of the property

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167. *Cf.* KERSHAW, *supra* note 92, at 413 (claiming that from a historical perspective, "[t]he modern anti-director position is a late twentieth-century, not a nineteenth-century, product").

168. [2003] EWCA (Civ) 424 (U.K.).

169. *See id.* at para. 17.

170. *See id.* at para. 20, 22.

171. *See id.* at para. 42. In reaching this determination, the court relied on the earlier case, *Indus. Dev. Consultants Ltd v. Cooley* [1972] 1 WLR 443, [1972] 2 All ER 162, 166 (U.K.). In that case, a commercial opportunity was offered to the managing director in his private capacity. He was held accountable, even though "the opportunity was not one which the company could itself have exploited." *Id.* at para. 36. For a detailed analysis of *Cooley*, see KERSHAW, *supra* note 92, at 409.

172. *Bhullar* [2003] EWCA (Civ) 424 [41].

173. *See id.*

174. *See id.*

to its business, besides its proximity.[175] As explained, this position is plausible if the main purpose of the duty is to protect the company's assets, even at the cost of harming the interests of the directors. From this *proprietary* perspective, once it was determined that the relationships were fiduciary, liability would have been imposed, and there would be no need to examine their content, or in this context, the fact that the opportunity had come to the directors privately. Indeed, the court had difficulty in stating that the opportunity in this case was "owned" by the company.[176] Hence, it clarified that the accountability of a fiduciary does not depend only on "some improper dealing with property 'belonging' to the party to whom the fiduciary duty is owed," rather, it is enough that there is a conflict of interest.[177] All the same, by determining that there was a conflict, the court did *de facto* classify the opportunity as one which "belongs," if only theoretically, to the company. This is conceivable under an understanding of fiduciary law as concentrating on protecting the material assets, even at the expense of ignoring the possible interests of the fiduciaries themselves.

Courts have repeated these views. For example, in *Wilkinson v. West Coast Capital*,[178] the High Court, while thoroughly reviewing different cases, pointed out that the "no profit" rule means that the director would be accountable "if he uses any property (including information) of the company for his own benefit."[179] That is, the court sees "information" as something that automatically belongs to the company, without a need for factual inquiry as to whether it could have been used by the company. A proprietary conception of fiduciary law would explain the rationale behind this statement, which leads to a broad classification of what could be included as a "property" of the company. Another example is *CMS Dolphin Ltd v. Simonet*,[180] where it was claimed that a former director had

175. *Id.* para. 39 (citing Parker v. McKenna [1874] 10 Ch. App. 96, 124 (U.K.)).

176. *See* KERSHAW, *supra* note 92, at 474–82 (providing a detailed possible explanation as to the reason that the "property" language was not used in some cases).

177. *Bhullar* [2003] EWCA (Civ) 424 [27].

178. [2005] EWHC (Ch) 3009 (Eng.).

179. *Id.* para. 248.

180. [2001] EWHC (Ch) 415 (Eng.).

diverted business and opportunities from the company to a competitor he established.[181] The court noted that the underlying basis of the liability of the director in these cases is that the business opportunity should be considered "as if it were property of the company in relation to which the director had fiduciary duties."[182] As discussed above, a strict rule that sees every opportunity, regardless of its nature or the circumstances, "as if" it belongs to the company, is reasonable if the main purpose of the duty of loyalty is to protect the beneficiary's property and to prevent any possibility of its loss.

Finally, another interesting example is *O'Donnell v. Shanahan & Anor*.[183] The appellant was a small company that engaged in providing financial advice.[184] During their work at the company, two of the three directors were informed about real estate that might be of interest to one of the company's customers.[185] The transaction, which might have generated agency fees for the company, did not take place.[186] Therefore, the two decided to purchase the property themselves.[187] The High Court determined that there was no breach of duty, since "that opportunity fell outside the scope of the company's business and so the taking up of the opportunity involved no breach of the 'no profit' rule."[188] The Court of Appeals overruled that conclusion.[189] The court emphasized that the rationale of the rule "to underpin the fiduciary's duty of undivided loyalty" obligated the court to prevent the director from deciding alone whether he is allowed to "help himself to [an opportunity's] benefit" when one comes to him in his capacity as a fiduciary.[190]

181. *See id.* at para. 82 ("The essence of the allegation of breach of fiduciary duty is that [the former director] . . . diverted that business and those opportunities . . . .").

182. *Id.* at para. 96; *see also* Kingsley IT Consulting Ltd v. McIntosh [2006] EWHC (Ch) 1288 (Eng.) (categorizing business opportunity as property of the company).

183. [2009] EWCA (Civ) 751 (Eng.). *But see* KERSHAW, *supra* note 92, at 417 (criticizing *O'Donnell*).

184. *See O'Donnell* [2009] EWCA (Civ) 751 [5].

185. *Id.* at para. 22–28.

186. *Id.* at para. 28.

187. *Id.* at para. 29.

188. *Id.* para. 45.

189. *Id.* at para. 54.

190. *Id.* at para. 55.

The circumstances of the case, including the fact the company never purchased and did not intend to purchase real estate, were deemed irrelevant.[191] In fact, the memorandum of association stated that the company's purpose was to carry on "the business of financiers, bankers, [and] financial agents," meaning this opportunity did not fall within the realm of the declared purposes of the company.[192] Yet, it was enough for the court that the memorandum also included a general statement that the company could conduct any other trade according to its board's decision.[193] The court underlined that the director should not be allowed to determine to whom the opportunity belongs, meaning that, in practice, it saw the opportunity as (always) belonging to the company.[194] As explained earlier, this stance is comprehensible if loyalty is seen as a practical tool for guarding property. Accordingly, any factual inquiries with regard to the content of the relationships between the company and the directors are deemed irrelevant. As will now be discussed, courts in other jurisdictions have chosen a different way to delineate the boundaries of the duty of loyalty, which presents a different perspective on the meaning of the concept of fiduciary.[195] Hence, an explanation for the divergence in corporate law could be found not in external descriptions, e.g.,

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191. *Id.*

192. *Id.* para. 5.

193. *See id.* at para. 67 (concluding that the decision in *Aas v. Benham* [1891] 2 Ch 244 (U.K.), where opportunity was outside the scope of the agreements when the partnership's limits were set in advance, to be irrelevant to the fiduciary duties of the directors).

194. *See id.* at para. 70 ("It is not for the director to make his own decision that the company will not be interested and to proceed, without more, to appropriate the opportunity for himself.").

195. The Australian courts have adopted a very similar approach to the U.K. courts, which is not surprising considering the historical connection between the countries. *See, e.g.*, Warman Int'l Ltd. v. Dwyer (1995) 182 CLR 54 (Austl.) (drawing its holding from English cases); Ancient Ord. of Foresters in Victoria Friendly Soc'y Ltd. v. Lifeplan Austl. Friendly Society Ltd. [2018] HCA 43 (Austl.) (same); Fexuto Pty Ltd. v. Bosnjak Holdings Pty Limited & Ors [2001] NSWCA 97 (Austl.) (same); *see also* Anthony Mason, *Future Directions in Australian Law*, 13 MONASH U. L. REV. 149, 150 (1987) ("Although Australian courts were not formally bound by decisions of English courts . . . Australian judge-made law has, certainly . . . been largely derived from English judicial precedent.").

structural differences between different legal systems,[196] but rather in the internal reading of the cases and the theoretical assumptions that are hidden within them.

D. *The Canadian Doctrine—An Intermediate Rule*

As in the United Kingdom, long before the Canadian corporate law legislation,[197] court rulings have played a pivotal role in shaping the content of the fiduciary duties of officers.[198] Although the Canadian courts did make reference to the English decision in *Regal* and declared its acceptance in Canada,[199] a closer look reveals that, in effect, their position was less strict than the English one, as these courts declared that "the 'strict ethic' is not unlimited in its scope or absolute in its application."[200] The courts did discuss questions relating to the *bona fides* of the directors, whether the business opportunity was a "mature" one at the time it was taken, or whether the company had the financial capacity to take the opportunity—issues that were all determined to be irrelevant by the English courts.[201] The following examination will seek to approximate the conception of fiduciary law that accompanied these decisions.

One prominent decision is the Supreme Court of Canada ruling in *Peso Silver Mines Ltd. v. Cropper*.[202] The appellant, Peso Silver, was a mining company.[203] It was later brought to

196. *See supra* note 118 and accompanying text.

197. *See, e.g.*, Canada Business Corporations Act, R.S.C. 1985, c C-44, § 122(1)(a) (Can.) (stating that "every director and officer shall . . . act honestly and in good faith with a view to the best interests of the corporation").

198. *See, e.g.*, Cook v. Deeks, [1916] 1 AC 554 (PC) (appeal taken from Can.) ("The directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely." (quoting 19th century judgments)).

199. *See, e.g.*, Charles Baker Ltd. v. Baker [1954] O.R. 418 (Can. Ont. C.A.).

200. Canadian Metals Expl. Ltd. v. Wiese, [2007] B.C.C.A. 318, para. 23 (Can.).

201. *See also* Lowry & Edmunds, *supra* note 20, at 517 (supporting the conclusion that there are differences between the rules adopted).

202. [1966] S.C.R. 673 (Can.). For an earlier ruling, see Zwicker v. Stanbury, [1953] 2 S.C.R. 438 (Can.).

203. *Peso*, [1966] S.C.R. at para. 10.

the attention of the company that three groups of claims in the Mayo district, where the company had other mining claims, were available for sale.[204] There was no dispute that this was a speculative investment.[205] While the company might have benefited from the location of these claims, the directors decided to vote against the purchase.[206] The reason was the financial state of the company, which had recently purchased a new group of claims and needed to invest more in its development.[207] Three directors and the consulting geologist that recommended the transaction purchased the claims privately.[208] A year later, another company, Charter Oil Company Ltd, earned control of Peso.[209] Charter then demanded that the ownership in these claims would be transferred to Peso.[210] The respondent refused, and Peso appealed to the court.[211] In a short decision, the Supreme Court of Canada approved the earlier decision to dismiss the claim.[212] The court stated that the affirmative findings were that the directors had acted in good faith in the interests of the company and concluded that they had not breached their duties.[213] While officially adopting the ruling in *Regal*,[214] it seems that the decision was based on a lenient interpretation of the strict rule, not just different facts.[215] As the decision was short and mainly referred to the Court of Appeal, the statements of the lower court will be the focus of our

204. *Id.* at paras. 7–27.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at para. 43.

213. *Id.* at para. 35.

214. *Id.* at para. 38.

215. *See id.* para. 1 (mentioning the lower court's decision by citing to Judge Norris's dissent, claiming that the adoption of the strict rule should have led to the acceptance of the claim in accordance with *Regal* since the good faith of the directors is considered irrelevant). *But see id.* at paras. 33–40 (asserting that the disagreement between the majority and the minority was not about the validity of *Regal*, rather about its implication on the fact); s*ee also* Beck, *supra* note 74 (claiming the application of *Regal* was erroneous); Canadian Metals Expl. Ltd. v. Wiese, [2007] B.C.C.A. 318, para. 24 (Can.).

examination. Two main aspects in the ruling demonstrate variations in the way the court understood the purpose of fiduciary duty.

First, it is noteworthy that a major part of the court's decision was devoted to the behavior of the directors, to prove their *bona fides*.[216] In order to substantiate its conclusion that the directors' acquisition of the claims was justified due to the board's decision to reject the transaction, the court provided a detailed description of the factual backgrounds.[217] While the English courts refused to discuss such details, the Supreme Court of Canada in *Peso* emphasized that the business opportunity was not unique, that the investment was speculative, and its value unproven.[218] In other words, from the perspective of fiduciary law, the conduct of the directors and the reasons for exploiting the opportunity that had arisen were understood as relevant for determining whether a breach of duty had occurred. If those reasons are justified, since the company had no interest in exercising the opportunity, the directors should not be held liable. This preoccupation with the content of the relationships between the director and the company deviated from the proprietary understanding of fiduciary law as described above. It is, however, comprehensible if the purpose of the duty of loyalty is indeed to regulate the relations.

Second, Judge Bull stated that a wide application of the strict rule would not be wise, as "in this modern day . . . substantially all business and commercial undertakings, regardless of size or importance, are carried on through the corporate vehicle."[219] Therefore, care should be taken during the interpretation of the strict rule, "in the light of modern practice and way of life."[220] In contrast, Judge Norris, in the dissenting opinion which supported the strict application of the rule, stated that the strict rule is necessary since "activities of many corporate bodies has disclosed scandals and loss to the public due to failure of the directors to recognize the

216. Peso Silver Mines Ltd. v. Cropper, [1965] 56 D.L.R.2d 117, para. 33–40 (Can. B.C.C.A.).

217. *See id.*

218. Peso Silver Mines Ltd. v. Cropper, [1966] S.C.R. 673, para. 10–12 (Can.).

219. *Peso*, [1965] 56 D.l.R.2d at para. 115.

220. *Id.*

requirements of their fiduciary position."[221] In other words, Judge Norris focused on the purpose of protecting the company from economic loss, thus believing it is justified that the business opportunity would be automatically perceived as belonging to the company.[222] The more flexible majority statement, on the other hand, focuses on the fact that corporate law is used for many different purposes and should thus reflect the complexity of this sphere.[223] This stance fits in with an *interpersonal conception* of fiduciary law, which perceives it as a tool for the modulation of the relationships between the company and its directors and allows their specific characteristics to be taken into consideration.[224]

Another important decision is *Canadian Aero Service Ltd. v. O'Malley*.[225] The main business of Canadian Aero Service ("Canaero") was the performance of complicated contracts of topographical mapping.[226] In order to obtain such contracts, considerable investment was needed (e.g., in equipment and fieldwork) before the company had any guarantee that it would win the contract.[227] For several years, through two of its employees, Canaero had invested time and money in an attempt to win a mapping project in Guyana.[228] The two officers later resigned and shortly thereafter were involved in the establishment of another company, which eventually won this project.[229] Canaero sued. The Supreme Court granted the appeal

221. *Id.* at para. 71.

222. *Id.*

223. *Id.* at para 115.

224. A different question, discussed later, is how the term "property" relates to this discussion. *See* infra note 240 and accompanying text.

225. [1974] S.C.R. 592 (Can.); *see supra* note 131; *see also* Matic v. Waldner 2016 MBCA 60, para 126 (Can.) (recently referring to Canadian Aero as one of the leading precedents with regard to the business opportunity doctrine); Abbey Glen Prop. Corp. v. Stumborg, [1978] 85 D.L.R. (3d) 35 (Ab.S.C.A.D. Can.).

226. *Canadian Aero*, [1974] S.C.R. at 595 ("Canaero was incorporated . . . as a wholly-owned subsidiary of Aero Service Corporation, a United States company whose main business, like that of Canaero and other subsidiaries was topographical mapping and geophysical exploration.").

227. *See id.* at 599 (explaining what kinds of investments were made to obtain the contracts).

228. *Id.* at 597.

229. *Id.*

and found that both individuals had violated their fiduciary duty.[230] Again, some aspects of the decision reflect an interpersonal conception of fiduciary law.[231]

The Supreme Court of Canada concluded that a formal appointment of the two as directors was not necessary.[232] Their service as senior managerial officers was sufficient to conclude that their duties were similar to those of official directors, as their positions "charged them with initiatives and with responsibilities far removed from the obedient role of servants."[233] This analysis, which focuses on the characteristics of the relationship as relevant to the assignment of fiduciary duty (and not only to the official status), is compatible with an interpersonal conception of the duty.[234]

Moreover, in its debate over whether *Peso* had applied *Regal* accurately, the court concluded that in the current circumstances, even a more lenient rule would still lead to the same conclusion.[235] In contrast to *Peso,* in this case it could not have been claimed that the company had not been interested in the opportunity.[236] Still, the court clarified that the strict rule adopted in *Regal* should not necessarily determine the outcome

230. *Id.* at 622.

231. *See* Bhullar v. Bhullar [2003] EWCA (Civ) 424 [265] (U.K.) (quoting *Island Export v. Umunna* [1986] BCLC 460 (Eng.), which referred to the reasoning presented in *Canadian Aero* in support for the conclusion that there was no breach of duty in the circumstances of that case). Some academics later quoted *Island Export* as an example for a more lenient rule in the United Kingdom, even though it does not represent the general understanding of the rule there.

232. *See Canadian Aero*, [1974] S.C.R. at 605 ("[I] do not think it matters whether O'Malley and Zarzycki were properly appointed directors of Canaero . . . .").

233. *Id.* at 592–98.

234. Therefore, it is unsurprising that in the United Kingdom, where a proprietary understanding of fiduciary law was adopted, in many cases where a lower court had determined there was no breach of duty, the claim was brought against a director whose term had already concluded. *See e.g.*, *supra*, note 137 and accompanying text.

235. *See* Canadian Aero Serv. Ltd. v. O'Malley, [1974] S.C.R. 592, 618–19 (Can.).

236. *Id.*

in future cases.[237] The court explained that the purpose of strict fiduciary rules is to act in the public interest and that at the same time it is "an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour."[238] This interpretation of the concept of "fiduciary" is similar to the way Judge Bull expressed it in *Peso,* an understanding that aspires to use these rules as a means to regulate important social relationships, beyond its basic purpose of protection of property. The court emphasized the need to promote "norms of exemplary behavior," a position that is reconcilable with an interpersonal conception, which takes interest in the normative aspect of fiduciary law and sees it as an instrument for encouraging decent behavior in society.[239]

Finally, the court concluded that the officers knew that the company had a continuing interest in the project and that they were thus still under a fiduciary duty not to procure for themselves the business opportunity, and certainly not immediately after their resignation.[240] The court then added that this conclusion should not be interpreted as laying down an inflexible rule of liability.[241] Rather, this doctrine is about general standards of "loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively."[242] The court then elaborated on the

237. *See id.* at 619 ("As in other cases in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it. So it is in the present case.").

238. *Id.* at 610.

239. *Id.*

240. *See id.* at 617–18

> [W]hen it was approved at about the time of their resignations and at a time when they knew of Canaero's continuing interest, are factors considered in deciding whether they were still under a fiduciary duty not to seek to procure for themselves or for their newly-formed company the business opportunity which they had nurtured for Canaero.

241. *See id.* at 620.

242. *Id.*

factors that should be taken into account.[243] It included among them the "position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained," as well as the factor of time[244] and the circumstances of the termination.[245]

The discussion did not revolve around whether something was taken from the company; rather, it recognized that the knowledge of the officer and the circumstances under which the acquisition was made are relevant and could determine whether the behavior of the officer was decent.[246] This position is reasonable if the purpose of the duty is to regulate the relationship, not only to protect the proprietary interest of the company; that is, this view can be substantiated if an interpersonal conception of fiduciary law is adopted. Thus, this case also suggests that the Canadian position should be classified as supporting an *intermediate* rule. Courts took a more lenient position in comparison to the strict English rule, yet the general position was still much stricter than the one taken in Delaware, as will be further discussed.

In *Mountain-West Resources Ltd. v. Fitzgerald*,[247] a mining company claimed that the defendant learned of an investment opportunity for gold exploration in Nevada during his work at the company.[248] The defendant provided prospecting services to the corporation, which eventually took the opportunity, for remuneration that included 5 percent interest in the investment, which became highly valuable years later.[249] The court referred to *Canadian Aero* and emphasized that an examination of the facts is needed before deciding whether a breach had occurred.[250] The company agreed that the defendant's role did not prevent him from engaging in his

243. *See id.*
244. If the relationship with the company had terminated.
245. Canadian Aero Serv. Ltd. v. O'Malley, [1974] S.C.R. 592, 620 (Can.).
246. *Id.*
247. 2005 CarswellBC 147 (Can. B.C.C.A.) (WL).
248. *Id.* at para. 16.
249. *Id.* at para. 22.
250. *Id.* at para. 17.

profession as a consulting geologist.[251] Moreover, there was no evidence at the time that the opportunity was a mature one.[252] These facts, as well as the fact that the company "was not a very active company" and could not provide the defendant "with a living" and that its business focused on mineral exploration (not gold) in British Columbia (not Nevada), led to the conclusion that he did not breach his fiduciary duty, and the claim was declined.[253] Again, the court concentrated on the nature of the relationships between the parties.[254] According to the court, "the affidavit evidence makes it clear that, whatever was the scope of [the] legal duty of loyalty," the defendant "was relieved of that duty," since the parties agreed that he would be allowed "to pursue his own professional interests."[255]

In *Canadian Metals Exploration Ltd. v. Wiese*,[256] the consulting geologist of a minerals mining company recommended that it acquire claims in the areas adjacent to the land it was holding.[257] The defendant was one of the owners, and while he was not officially appointed as a director, he was acting as its "guiding mind" and did not dispute his fiduciary position.[258] After a discussion was held between the directors, without an official protocol, the defendant purchased the claims privately.[259] Later, when it became clear that these claims could be profitable, the company sued.[260] The trial court accepted the claim, and the appeal was rejected.[261] The court acknowledged that the rule is strict; however, it also stated that it is not

251. *Id.* at para. 23.
252. *Id.* at para. 24.
253. *Id.* at para. 23–26.
254. *Id.* at para. 21.
255. *Id.* at para. 27.
256. [2007] B.C.C.A. 318 (Can.).
257. *Id.* at para. 2.
258. *Id.* para. 3.
259. *See id.* at para. 5–12 (detailing the directors' discussion surrounding the company's interest in staking a claim in the property which led the defendant director to privately stake claims "at his own cost").
260. *See id.* at para. 12 (explaining that when the company recognized the value of the claims, its directors threatened to sue the defendant director if he refused to transfer the claims to the company).
261. *See id.* at para. 13, 31.

"unlimited in its scope or absolute in its application."[262] The court accepted that a *bona fide* decision is a relevant defense against a claim for breach of duty.[263] Further, it declined the trial judge's holding that a formal meeting of the directors was necessary and pointed out that "[s]uch formalities are often waived, and properly so."[264] In the circumstances of the case, however, there was no evidence that the defendant had acted in good faith,[265] and the appeal was denied.[266]

The court stated that "[t]he essence of the fiduciary relationship is the right of the beneficiary (in this case the company) to the impartial and *bona fide* exercise of decision-making powers by the fiduciary, free of any suggestion of personal interest."[267] The focus is not on the protection of the company's property, but rather on the conduct of the fiduciary.[268] This understanding of the boundaries of the duty, which seeks to perform an inquiry into the substance of the relationships before determining whether a breach has occurred, falls in line with an interpersonal conception of the duty. A more recent decision, that summarized and analyzed the Canadian authorities, was *Matic v. Waldner*.[269] According to the court, "[t]he overall goal of the analysis is to determine whether the opportunity fairly belonged to the corporation in the circumstances."[270] The focus of the court on the specific facts of the case, such as that it was a maturing business opportunity,

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262. *Id*. at para. 23.

263. *See id*. at para. 29 (considering whether the directors' meeting constituted a "*bona fide* decision by [the company] that the staking of the claims was not something it ought to do and was something it consented to [the defendant director] doing, despite his position of conflict").

264. *Id*. at para. 29.

265. *See id*. (explaining that to fall under the good faith exception the defendant must "ensure that all present at the meeting knew what they were being asked to do, and that their decision was reached free of the influence of any considerations other than the company's best interests").

266. *Id.* at para. 31.

267. *Id.* at para. 19.

268. *See id.* ("A fiduciary is therefore prohibited from using information he has obtained in the course of his or her duties, for personal benefit, even though the beneficiary is unable or unwilling to use the information (or, in this case, take up the opportunity) for itself.").

269. 2016 MBCA 60 (Can.).

270. *Id*. at para. 153.

and the reference to the question of "fairness" are compatible with an interpersonal conception of the director's duty, which is interested in regulating the relationship and the moral aspects of the officer's behavior.[271]

To summarize, the analysis of the intermediate rule adopted in Canada illustrates that this doctrine could be reasoned based on an interpersonal understanding of fiduciary law.[272] This understanding allows for taking into account not merely the preservation of the proprietary interest of the beneficiary, but also the directors' conduct and their *bona fides*.[273] The courts mentioned the need for promoting "exemplary behavior" and saw the fiduciary duty as an instrument aiming to protect more than the assets of the company.[274] Interestingly, this conception of fiduciary law is evident also in cases outside of corporate law that relied on *Canadian Aero*.[275] One prominent example is the dissent in

271. *See id.* at para. 128–32 (discussing how factors such as fairness and business maturity are relevant in determining whether an opportunity belonged to the corporation); *see also* Énerchem Trans. Inc. v. Gravino, [2005] Q.J. No. 11404, para. 112 (Can. Que. S.C.) (demonstrating some of the difficulties associated with the factorial based test for the taking of a business opportunity).

272. *See, e.g.*, *Matic*, 2016 MBCA at para. 153 (explaining that interpersonal factors must be considered when determining whether a director has breached their fiduciary duty).

273. *See id.* (noting that to determine whether an opportunity belongs to the corporation the court must consider the way the opportunity arose, whether the other directors knew a director was pursuing the opportunity, and whether the directors fully consented to the director's pursuit of the opportunity).

274. *See* Canadian Metals Expl. Ltd. v. Wiese, [2007] B.C.C.A. 318, para. 20 (Can.) (describing "the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour" (citing Canadian Aero Serv. Ltd. v. O'Malley, [1947] S.C.R. 592, 611 (Can.))); *see also Matic*, 2016 MBCA at para. 124 ("At a minimum, [fiduciary duty] requires the directors to ensure that the corporation meets its statutory obligations."); *Gravino*, [2005] Q.J. at para. 145 ("Employees must also behave honestly towards their employers. The degree and intensity of the obligation also increases according to the hierarchical level of employees or the importance of their professional responsibilities in the business.").

275. *See e.g.*, Frame v. Smith, [1987] 2 S.C.R. 99, para. 17–18 (Can.) (discussing fiduciary duty in the context of family law); Reading v. Attorney-General, [1951] 1 All ER 617 (HL) 620 (appeal taken from Eng.)

Frame v. Smith,[276] which examined the essence of fiduciary relations.[277] While describing the relationships between the director and the company, the dissent stated:

> [T]he corporation's interest which is protected by the fiduciary duty is not confined to an interest in the property of the corporation but extends to non-legal, practical interests in the financial well-being of the corporation and perhaps to even more intangible practical interests such as the corporation's public image and reputation.[278]

Clearly, this conception of fiduciary law sees its aims as including more than protecting the company's property. We can now discuss the position adopted in Delaware.

E. *The United States (Delaware) Doctrine—A Lenient Rule*

While alternative approaches have been adopted by various American courts, the emphasis of the discussion will be placed on the lenient rule that Delaware embraced.[279] Despite its small size, Delaware serves as the state of incorporation for a significant number of business entities in the United States (and globally),[280] with a unique legal system of a separate court of equity, with specific jurisdiction over corporate disputes.[281] Accordingly, much academic writing has been dedicated to suggesting reasons for the way corporate law has developed in

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(describing a fiduciary relationship in the context of an English solider and their uniform).

276. [1987] 2 S.C.R. 99 (Can.).

277. *See id.* at para. 60 (Wilson, J., dissenting) (describing fiduciary relationships as the ability of the fiduciary to exercise discretion or power, the ability of the fiduciary to unilaterally exercise that discretion or power in a way that affects the beneficiary's interests, and the vulnerability of the beneficiary due to the fiduciary's discretion or power).

278. *Id*. at para. 62.

279. *See generally* GEORGE E. PALMER, THE LAW OF RESTITUTION 154–57 (1978).

280. *See Delaware Corporate Law: Why Businesses Choose Delaware*, DELAWARE.GOV, https://perma.cc/E8FA-RZ5F (explaining that many businesses choose Delaware because of its statutory law, case law, judicial system, legal traditions, and secretary of state).

281. *See id.* ("The Delaware Court of Chancery is a specialized court of equity with specific jurisdiction over corporate disputes.").

Delaware.[282] For instance, some have claimed that Delaware's dominance was possible since it was leading the "race to the bottom," that is, deregulation of the business environment in order to attract economic activity.[283] Others claimed that some differences between Delaware's "pro-managerial" rules and the United Kingdom's more "pro-shareholder" rules stem from pressures by different interest groups.[284] At this point, the discussion will focus on the fiduciary law perspective. These questions will be revisited at the end of this Article.

Although certain aspects of the doctrine are now codified in legislation,[285] the Supreme Court of Delaware's decision in *Guth v. Loft, Inc.* is still often cited as the landmark ruling that established the doctrine.[286] Loft was a company located in New York and engaged in the manufacturing and selling of beverages, and Guth was its president.[287] In 1931, Loft was purchasing a large amount of its syrup from the Coca-Cola Company and decided to examine the possibility of replacing

282. *See, e.g.*, Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CALIF. L. REV. 1775, 1781 (2002) (exploring how corporate law developed in Delaware); Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 126 (2009) (discussing Delaware's corporate lawmaking in relation to interstate charter market).

283. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) ("The absurdity of this race for the bottom, with Delaware in the lead—tolerated and indeed fostered by corporate counsel . . . ."); Fischel, *supra* note 93, at 913 (discussing a highly publicized article which attributes "Delaware's prominent role in corporation law . . . as a result of its success in the race for the bottom").

284. *See* KERSHAW, *supra* note 92, at 440 (criticizing this claim due to the limits of basing a legal theory on an external explanation); *see also* Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 603 (2002) (discussing the "way in which the indeterminacy feature of Delaware law serves Delaware's interests").

285. *See, e.g.*, DEL CODE ANN. tit. 8, § 122(17) (2023) (permitting corporations to renounce any interest in "specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation").

286. A search in Lexis Advance database of the decision found more than 500 references, over 180 of them in Delaware. *See, e.g.*, Dweck v. Nasser, No. 1353, 2012 Del. Ch. LEXIS 7, at *36 (Del. Ch. Jan. 18, 2012) (describing *Guth v. Loft, Inc.* as "the seminal corporate opportunity case in Delaware jurisprudence").

287. *See Guth v. Loft, Inc.*, 5 A.2d 503, 512 (Del. 1939) (describing Guth as "not merely a director and the president of Loft," but as "its master").

these purchases with Pepsi-Cola syrup.[288] At the time, the syrup was manufactured by the National Pepsi-Cola Company, which was controlled by Roy Megargel, and was facing bankruptcy.[289]

Megargel and Guth then entered into an agreement and established a new company called the Pepsi-Cola Company.[290] Guth used his control of Loft to promote the interests of Pepsi-Cola in various ways, including using almost all the working capital of Loft. Loft eventually sued and demanded ownership of Pepsi's shares.[291] It was clear that Guth would be held liable, as he had used the corporation's estates as his own.[292] However, it seemed that Guth hoped that while he would have to pay Loft for its services, he would be able to keep ownership of the shares (at that time worth millions of dollars).[293]

The court emphasized that while directors are not trustees, they do stand in a fiduciary relationship with the company.[294] Thus, the public policy, "derived from a profound knowledge of human characteristics and motives," obliged them to fulfill their duties strictly, protect the interests of the corporation, and abstain from causing harm to the company or depriving it of any profits.[295] The rule demands "undivided and unselfish loyalty to the corporation," thereby prohibiting any conflict of interest; but, "[t]he occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated."[296] The court stated that the rule, "inveterate and uncompromising in its rigidity," does not rest upon ideas of harm or damage, but rather upon "a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation."[297]

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288. *Id.*
289. *Id.*
290. *Id.* at 512–13.
291. *Id.* at 228.
292. *Id.* at 510.
293. *Id.* at 508–10.
294. *Id.* at 510.
295. *Id.*
296. *Id.*
297. *Id.*

The focus of the court's statements, in this case, is on the value of relationships.[298] Indeed, emphasizing the need to prevent the temptation can certainly be reconciled with a proprietary conception of fiduciary law (where the goal of deterrence is to protect the company's property). However, the court's emphasis lies in the significance of honesty, good faith, and loyal behavior, which are descriptors associated with the preservation of fiduciary relationships.[299] This is also evident from more specific statements in the ruling. For instance, in its closing remarks, the court noted that "Guth took without limit or stint from a helpless corporation" and that "[c]unning and craft supplanted sincerity," and "[f]rankness gave way to concealment,"[300] thus placing the harm to the relationship between the parties, not just the loss to the corporation, at the center of the description of the content of fiduciary duties.[301]

Despite the description of the duty as strict and uncompromising, the court took a different road in shaping the doctrine.[302] In fact, the court's discussion opens with the statement that "it is true" that in certain conditions "the officer or director is entitled to treat the opportunity as his own"[303] and only then pointed out that "[o]n the other hand, it is equally true" that when other conditions apply, "the law will not permit him to seize the opportunity for himself."[304] This is a completely different approach from the English one, which refuses to examine in depth the nature of the opportunity or its content.[305]

298. *See id.* at 515 (stating that fiduciary relations require more "than the morals of the market place").

299. *See id.* at 511 (describing duty and loyalty as inseparably connected, specifically "[d]uty is that which is required by one's station or occupation; is that which one is bound by legal or moral obligation to do or refrain from doing").

300. *Id.* at 515.

301. *See id.* ("[Guth] thrust upon Loft the hazard, while he reaped the benefit.").

302. *See id.* at 510 (explaining that while the rule "requires an undivided and unselfish loyalty to the corporation" and "demands that there shall be no conflict between duty and self-interest," that "[t]he standard of loyalty is measured by no fixed scale").

303. *Id.*

304. *Id.* at 511.

305. *See, e.g.*, Regal (Hastings) Ltd. v. Gulliver [1942] 1 All ER 378, [1967] 2 AC 134 (HL) 157 (U.K.) (discussing what an officer must do when presented with any opportunity); Charitable Corp. v. Sutton [1742] 26 ER 642, 645 (U.K.)

The court further clarified that the question should be decided "upon broad considerations of corporate duty and loyalty," not on a technical basis.[306] In the circumstances of the case, since the opportunity was "so closely associated" with Loft's existing business activity, the taking should not be allowed.[307]

As demonstrated regarding the Canadian cases, the more lenient approach sees facts such as the good faith of the directors as relevant for the determination of a breach, in correspondence with an *interpersonal* understanding of the concept of "fiduciary."[308] However, the factual examination in *Guth* is significantly more lenient in comparison to the Canadian one.[309] The Supreme Court of Delaware presented the two alternatives—situations where the director is allowed to take the opportunity, and cases where it belongs to the corporation.[310] This is not merely a consequential test (that is, the opportunity does not belong to the corporation, and hence the director is allowed to use it), but rather an analysis in which both possibilities are equally valid. This analytical approach differs from allowing certain factual considerations, such as good faith, to be taken into account.[311] In fact, this analysis assists a director in claiming that he did not breach his duty.[312]

(holding that an individual in a managing position in a company is bound to carry it out with fidelity and integrity).

306. Guth v. Loft, Inc., 5 A.2d 503, 511 (Del. 1939).

307. *See id.* at 514 (describing the tie between Loft's business and Pepsi-Cola's enterprise as close, specifically Loft "had the necessary resources, facilities, equipment, technical and practical knowledge and experience" in the manufacture of syrups).

308. *See* Matic v. Waldner, 2016 MBCA 60, para. 153 (Can.) (explaining that interpersonal factors are considered when determining whether a director has breached their fiduciary duty).

309. *See Guth*, 5 A.2d at 511 (describing the corporate opportunity doctrine analysis as largely fact specific, where interpersonal components are dispositive). *But see Matic*, 2016 MBCA at para. 153 (listing a limited set of relevant factors that must be considered for the corporate opportunity analysis and not allowing interpersonal factors to have as much latitude).

310. *See Guth*, 5 A.2d at 511–13.

311. *See id.* at 510 (stating that the rule of corporate opportunity demands that "an officer or director" have "the utmost good faith in his relation to the corporation which he represents").

312. *See, e.g.*, Fliegler v. Lawrence, 361 A.2d 218, 224–25 (Del. 1976) (analyzing whether the opportunity belonged to either the corporation or the director and then determining that because the corporation was not financially and legally able to take the opportunity, the directors were allowed to use it

Another highly cited decision is *Broz v. Cellular Information Systems, Inc.*[313] Broz was a director of Cellular Information Systems ("CIS"), and the sole stockholder of another company.[314] Broz acquired for his company a cellular telephone service license that entitled its holder to provide cellular telephone services in northern Michigan.[315] CIS argued that Broz breached his fiduciary duty, as he did not formally present the opportunity to it.[316] CIS also relied on the fact that a company named PriCellular, which was at the time engaged in the acquisition of CIS, was interested in this license.[317] The Supreme Court of Delaware concluded that Broz did not breach his duty.[318]

The court mentioned that the doctrine of corporate opportunity represents one class of the broad fiduciary duties and was developed as "a means of defining the parameters of fiduciary duty in instances of potential conflict."[319] In these cases, "[h]ard and fast rules are not easily crafted."[320] Therefore, the court suggested different factual tests.[321] The court noted that Broz had learned of the opportunity in his private capacity, and thus many of the concerns underpinning the rule, such as the appropriation of the corporation's proprietary information,

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privately). Once again, this is not solely a consequential evaluation but rather an analysis that presents both possibilities as being equally viable.

313. 673 A.2d 148 (Del. 1996).

314. *Id.* at 150.

315. *Id.*

316. *See id.* ("CIS brought an action against Broz and RFBC for equitable relief, contending that the purchase of this license by Broz constituted a usurpation of a corporate opportunity properly belonging to CIS . . . .").

317. *Id.* at 151.

318. *See id.* at 150 (concluding that "although a corporate director may be shielded from liability by offering to the corporation an opportunity which has come to the director independently and individually, the failure of the director to present the opportunity does not necessarily result in the improper usurpation of a corporate opportunity").

319. *Id.* at 154.

320. *Id.* at 155.

321. *See id.* ("[T]he determination of 'whether or not a director has appropriated for himself something that in fairness should belong to the corporation is a factual question to be decided by reasonable inference from objective facts.'" (quoting Guth v. Loft, Inc., 5 A.2d 503, 513 (Del. 1939))).

were not present.[322] The court refused to take into account the possibility that PriCellular would have financed the transaction,[323] and determined that the taking did not create a conflict of interest.[324] The court concluded that while presenting the opportunity officially could have protected Broz *ex post*, an *ex ante* presentation was not a prerequisite.[325] If the director believes the opportunity does not belong to the company, "he may take it for himself."[326] The court added that the "background of bad faith is not present in the case at bar."[327]

This decision did not ignore the director's duty to preserve the property of the company.[328] This comes as no surprise, as this responsibility forms the foundation of the relationship between an officer and a company.[329] Therefore, it would clearly be relevant also under an *interpersonal* conception of fiduciary law. However, it did not see this duty as the only purpose of the law.[330] The state of mind of the director, along with their good faith, were also deemed pertinent, aligning with the perspective of fiduciary law as a mechanism for governing legal relationships.[331] Indeed, in contrast to a strict rule, the inquiry into whether the opportunity "belongs" to the company implies that the protection of the property is not the only or even the

322. *See id.* at 157 (explaining that Broz, as the sole party interested in RFBC, did not breach his fiduciary duty because he "comported himself in a manner that was wholly in accord with his obligations to CIS").

323. *See id.* at 156 (describing the claim that PriCellular could have purchased the service license as "immaterial" and "wholly speculative").

324. *See id.* at 155 (concluding that the facts "do not support the conclusion that Broz misappropriated a corporate opportunity").

325. *See id.* at 157 ("It is not the law of Delaware that presentation to the board is a necessary prerequisite to a finding that a corporate opportunity has not been usurped.").

326. *Id.*

327. *Id.* at 158.

328. *See id.* at 154 ("A corporate fiduciary agrees to place the interests of the corporation before his or her own in appropriate circumstances.").

329. *See id.* at 155 (discussing the importance of fiduciary relations between an officer and a company).

330. *See id.* at 154 (describing fiduciary duty as involving both questions of law and questions of fact).

331. *See id.* (stating that a director's purported breach of fiduciary duty is fact specific and has to do with loyalty).

central purpose of fiduciary law.[332] Moreover, it is also clear that the court allowed factual justifications that would not have been accepted under the Canadian rule.[333] For example, the court determined that a concrete business plan is needed to conclude that the opportunity "belongs" to the company, even though the opportunity was in line with the business of the company.[334] That is, in contrast with the Canadian rulings, in Delaware, the interpersonal understanding of fiduciary law, involves a more lenient rule.

Taking the fiduciary law perspective also offers a possible answer to this puzzle. While both the Canadian and Delaware rulings conform to an interpersonal conception of fiduciary law, they differ in the conception of the substance of those relationships.[335] The court in Delaware did not only ask whether the director's behavior was a breach of his fiduciary duty, rather, it determined that "[t]he *right* of a director or officer to engage in business affairs outside of his or her fiduciary capacity would be illusory," if directors were asked to consider any potential future conflict of interest.[336] This point of view, according to which a director should be allowed "to engage meaningfully in business unrelated to his or her corporate role," led the court to conclude that a director should be able to make his own decision as to whether the opportunity is his to take.[337] In essence, the court examined the circumstances of the case not only through the lens of the director's obligations to the company, but also from the standpoint of the director's "right" to partake in

332. *See, e.g.*, U.S. W., Inc. v. Time Warner Inc., No. 14555, 1996 WL 307445, at *21 (Del. Ch. 1996) ("[M]ost basically, the duty of loyalty proscribes a fiduciary from any means of misappropriation of assets entrusted to his management and supervision.").

333. *See supra* note 309 and accompanying text.

334. *See, e.g.*, Mountain-West Res. Ltd. v. Fitzgerald, 2005 BCCA 48, para. 27 (Can.) (concluding the appellee did not breach his fiduciary duty because, whatever the scope of the legal duty beforehand, "he was relieved of that duty by an explicit understanding that the appellant's operations would remain dormant, permitting [appellee] to pursue his own professional interests").

335. *See supra* note 309 and accompanying text.

336. Broz v. Cellular Info. Sys., Inc., 673 A.2d 148, 159 (Del. 1996) (emphasis added).

337. *See id.* (concluding that "the director must be allowed to make decisions based on the situation as it exists at the time a given opportunity is presented").

external transactions.[338] It emphasized that Broz was entitled to realize his "own economic interest," and chose to use the term "right" in describing this entitlement.[339]

The current framing of the discussion reveals an inherent difficulty with the position of the Delaware court. On one hand, the court agrees that the source of the doctrine is fiduciary law, which as explained in *Guth*, requires from the officer undivided and unselfish loyalty to the corporation.[340] On the other hand, these statements indicate that the court did not relate to the fiduciary relationship as *vertical*—i.e., relations in which the interest of one party, the beneficiary, is superior to the interest of the other party, the fiduciary.[341] Instead, they are described by the court *horizontally*, meaning that that the discussion is premised on the notion that the director has a "right" (in certain circumstances) to compete with the company.[342] The statement that the officer "agrees" to place the interest of the company before his own only "in appropriate circumstances"[343] represents a different understanding of the fiduciary relationship, one that attenuates the content of fiduciary law and the boundaries of the duty of loyalty.

This unique understanding of fiduciary relationships was not accompanied by an explanation or reasoning for the deviation. The classic vertical understanding of these relationships focuses mostly on the power and control that the fiduciary has over the interests of the other party and accordingly rejects any consideration of the fiduciary's private interests.[344] Indeed, the Delaware Court did not forsake the

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338. *See id.* at 150 (stating that if a corporation is the target "of an acquisition by another company which has an interest and ability to entertain the opportunity, the director of the target company does not have a fiduciary duty to present the opportunity to the target company" but has rights to the opportunity).

339. *Id.* at 159.

340. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

341. *See Broz*, 673 A.2d at 158 ("[A] director's right to appropriate an opportunity depends on the circumstances existing at the time it presented itself to him without regard to subsequent events." (citing *Guth*, 5 A.2d at 513)).

342. *See id.*

343. *Id.* at 154.

344. *See* H. Justin Pace, *What Equity, the Promise Economy, and Cognition Mean for How Fiduciary Law Should Develop*, 20 U. PA. J. BUS. L. 684, 699

rhetoric of the importance of honesty, loyalty, and the removal of temptation.[345] However, in practice, it did not see the unique features of the fiduciary relationship as a justification for overlooking the fiduciary's interest.[346]

This is also evident from the court's conclusion that without the lenient rule, officers would be unduly restricted, and this would be "antithetical to certainty in corporation law."[347] This conclusion is plausible only if one accepts that the purpose of the rule is not merely to protect the company's property, but also to allow the director to exercise his "rights." Otherwise, it is hard to dispute that a strict law, which simply prohibits any exploitation of business opportunities, provides greater clarity and certainty.[348] This *horizontal* understanding of the relationship, which allows the rights of the fiduciary to enter the equation and emphasizes the status of the manager as "an employee" rather than his role as a "fiduciary," affects the scope of his obligations.[349] Even though the court officially adheres to the classic assumptions of fiduciary law, it developed a rule that is incompatible with these very assumptions.

Broz is still considered binding precedent.[350] Another decision that was published shortly thereafter, *Thorpe v. CERBCO, Inc.*,[351] also demonstrates this *horizontal* interpersonal conception. Both defendants, who served as directors, were also the controlling shareholders in the

(2018) ("Traditional fiduciary relationships have been depicted as vertical, with the beneficiary taking an inferior role and the fiduciary taking a dominant role.").

345. *See Broz*, 673 A.2d at 154 ("A corporate fiduciary agrees to place the interests of the corporation before his or her own in appropriate circumstances.").

346. *See id.*

347. *Id.* at 159.

348. *See id.* at 155 (discussing that because the corporate opportunity doctrine is largely fact specific "[n]o one factor is dispositive and all factors must be taken into account insofar as they are applicable").

349. *See id.* at 159 (describing the corporate opportunity doctrine as "a judicially crafted effort to harmonize the competing demands placed on corporate fiduciaries in a modern business environment" and "reduce the possibility of conflict between a director's duties to the corporation and interests unrelated to that role").

350. *See, e.g.*, Deane v. Maginn, No. 2017-0346, 2022 WL 16557974, at *14–15 (Del. Ch. Nov. 1, 2022) (relying on *Broz*).

351. 676 A.2d 436 (Del. 1996).

company, CERBCO.[352] The court concluded that, since the directors could prevent the transaction by voting in their capacity as shareholders, the company's request for compensation should be denied.[353] When analyzing the circumstances, the court mentioned the doctrine usually applied in "circumstances where the director and the corporation compete against each other to buy something."[354] Here again, the starting point of "competition" was the basis for the ruling.[355] Accordingly, the court stated it needed to determine whether the two business opportunities (that a company named INA would acquire the shares from CERBCO or that it would instead purchase the controlling interest from the directors) were equal.[356] That is, "[i]f INA considered none of the CERBCO transactions to be an acceptable substitute to the INA-Erikson transaction, then the opportunity was never really available to CERBCO."[357]

This less stringent stance regarding the duties of the directors compelled the company to provide complex evidence pertaining to INA's financial capabilities, disregarding the indisputable fact that INA was indeed interested in the transaction with CERBCO (as evidenced by its initiation of

352. *Id.* at 437.

353. *See id.* at 444 ("Damages cannot be awarded on the basis of a transaction that has a zero probability of occurring due to the lawful exercise of statutory rights."). However, the court did permit restitution for the directors' gains from the negotiation, aiming to "discourage disloyalty." *Id.* at 445. This conclusion raises a challenge. If the reason for denying compensation for the lost opportunity was that the opportunity did not *fairly belong* to the corporation, it remains unclear why the failure to disclose the existence of the opportunity should be deemed a breach of duty. On linking gains and the wrongs that produced them, see generally Maytal Gilboa, *Linking Gains to Wrongs*, 35 CANADIAN J. L. & JURIS. 365 (2022).

354. *Thorpe*, 676 A.2d at 443.

355. *See id.* ("This case differs in that both the [directors] and CERBCO wanted to sell stock, and the objects of the dispute, their respective blocks of stock to be sold, were not perfectly fungible.").

356. *See id.* ("In order for the [directors] and CERBCO to compete against one another, their stock must have been rough substitutes in the eyes of INA.").

357. *Id.*

discussions with the directors).[358] Again, the starting point of "competition" reflects a horizontal understanding of fiduciary relationships—which accepts that the director has a right to compete with the company—without offering a clear explanation as to how this understanding of the concept of a fiduciary can coexist with the classic assumptions of fiduciary law, which the court does not reject.[359]

Another interesting example is *Science Accessories Corp. v. Summagraphics Corp.*[360] For the purpose of the court's discussion, there is no need to elaborate on the facts. The plaintiffs argued that even if the claims, which were based on the corporate opportunity doctrine, were to be denied, the conduct of the defendants would constitute an "independent" violation of the duty of loyalty, under the principles of agency law.[361] In its discussion, the court elaborated on the sources of the duty of loyalty in agency law, which deals with the relationship between an employee and an employer.[362] The court noted that in the context of employee-employer relations, two competing policy interests can be discerned.[363] First is the concern for the "integrity" of the relationships, which "has led courts to establish a rule that demands of a corporate officer or employee an undivided and unselfish loyalty to the corporation."[364] Second is the off-setting policy "recognized by the courts . . . of safeguarding society's interest in fostering free and vigorous competition in the economics sphere,"[365] which has prompted "recognition of a privilege in favor of employees" and allows employees to "make arrangements to compete with their

358. *See id.* ("[I]t is clear that the opportunity was one in which the corporation had an interest. Despite this fact, CERBCO would never be able to undertake the opportunity to sell its East shares.").

359. *See id.* ("Since the corporation was not able to take advantage of the opportunity, the transaction was not one which, considering all of the relevant facts, fairly belonged to the corporation.").

360. 425 A.2d 957 (Del. 1980).

361. *See id.* at 961–62.

362. *See id.* at 962 (explaining that the principles and limitations of agency law carry over into the field of corporate employment to establish a common law rule demanding an employee's "undivided and unselfish loyalty to the corporation").

363. *See id.*

364. *Id.*

365. *Id.*

employers."[366] According to the court, the corporate opportunity doctrine represents "one aspect of the law's effort to reconcile these competing policy interests."[367]

This analogy, between the competing policy interests of an employee and an employer,[368] and the corporate opportunity doctrine,[369] demonstrates again the difference between Delaware and Canadian courts (where the proper analogy would be the relationship between a trustee and a beneficiary). As explained, caring for the *integrity* of the relationship fits an *interpersonal* conception of fiduciary law.[370] However, considering a policy interest that is based on the desire to *promote competition* is only relevant under the assumption that the director has (almost) equal rights, rather than seeing him as an official with clear and strict duties to act for the benefit of the other party.[371] Again, this view of fiduciary relations is *horizontal* and leads to a more lenient rule regarding the seizure of opportunities by the director.[372] The same *horizontal interpersonal* conception was also present in other decisions of the Delaware Court of Chancery.[373] The rulings stated that the duty was "absolute" and that there was a need to remove "temptation" from the directors, yet the complex factual examination allowed courts to decline claims for breach of duty more easily, even when the flaws in the directors' behavior were obvious.[374]

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366. *Id.* at 963.

367. *Id.*

368. *See* Aditi Bagchi, *Fiduciary Principles in Employment Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 187 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019) (discussing the fiduciary duties of employees, which usually apply to employees in situations of "trust and confidence").

369. *See supra* Part III.B.

370. *See supra* Part III.D.

371. *See supra* notes 361–367 and accompanying text.

372. *See supra* notes 342–359 and accompanying text.

373. *See, e.g.*, McKenna v. Singer, No. 11371, 2017 WL 3500241, at *16–17 (Del. Ch. July 31, 2017) (considering the corporation's "interest [and] expectancy in [the] opportunity" in evaluating whether directors breached their fiduciary duty by misappropriating a corporate opportunity); Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961, 973 (Del. Ch. 2003) (same).

374. The courts stressed that deciding whether the director has taken to itself something that fairly "belong*s*" to the company is a complex factual question. *See, e.g.*, Kohls v. Duthie, 791 A.2d 772, 782 (Del. Ch. 2000)

In summary, while the courts in Delaware presented an *interpersonal* conception of the concept of fiduciary, which focuses on the regulation of the relationships as the main purpose of fiduciary law and uses the rhetoric of integrity and trust to describe these relationships, they also adopted a more lenient rule compared to the Canadian courts. This could be explained by the fact that the fiduciary relationship between the director and company was perceived differently, in a way that considers the directors' interest—that is, as an almost *horizontal* relationship.

This insight immediately leads to another question—namely, what was the reason for adopting a *horizontal* interpersonal conception in Delaware? The case law itself does not provide an answer. The literature that seeks to justify (or criticize) the lenient rule did offer possible external answers to this doctrinal development.[375] However, these explanations do not solve the internal legal inconsistency. That is, they do not offer an alternative justification for a doctrine that aims to supervise relationships of power and information, yet, at the same time, inevitably fails to do so by adopting a perspective that refers to these relationships as (almost) equal.

After summarizing the two discussed conceptions of fiduciary law, the final Part will discuss the possible implications of these findings on the theoretical literature

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(demonstrating that even when the flaws in the behavior of the directors were very clear, the court examined the complicated facts); *see also* Dweck v. Nasser, No. 1353, 2012 WL 161590, at *13 (Del. Ch. Jan. 18, 2012) (engaging in a complex factual analysis to determine whether the directors misappropriated a corporate opportunity). These decisions focused on the relationships between the director and the company in order to determine if a breach of duty has occurred. *See, e.g.*, U.S. W., Inc. v. Time Warner, Inc., No. 14555, 1996 WL 307445, at *21 (Del. Ch. June 6, 1996) ("[T]he fair treatment that a fiduciary owes to his beneficiary includes the obligation not to take for oneself profitable opportunities that come to the beneficiary under certain sets of circumstances."). That is, the court does not see the opportunity as part of the property of the company but demands that the fiduciary will act "fairly" and, in certain cases, avoid the taking.

375. *See, e.g.*, Kershaw, *Lost in Translation*, *supra* note 21, at 604 (mentioning that there exist good policy reasons for the lenient rule, including not restricting entrepreneurial activity and fairness to the director when their actions also benefit the corporation); Koh, *supra* note 74, at 409 (recognizing that there are "profit-making activities which a director is free to pursue for himself, even whilst still a director").

surrounding fiduciary law and, furthermore, clarify the difficulties with the unique position of Delaware.

IV. IMPLICATIONS

A. *The Two Conceptions of Fiduciary Law*

The focus on the divergence in the development of the corporate opportunity doctrine has provided interesting insights. The analysis of the judgments has revealed three possible tendencies in the corporate opportunity doctrine.[376] It has also allowed us to locate the theoretical justification for the different rules from a fiduciary law perspective and revealed that there is, in fact, more than one possible understanding of the concept of "fiduciary."

The first doctrinal tendency is to adopt a *strict rule*, which is reflected in the prohibition of any exploitation of a business opportunity for personal gain, and the refusal of the courts to consider the good faith of the officer or specific features of the opportunity.[377] The rigid position reprimands any profit-making by the director and rejects any attempt to show that the seizure of an opportunity is appropriate or desirable in the circumstances of the case.[378] As the analysis above showed, this position exemplifies a *proprietary conception* of fiduciary law, which considers the protection of the economic interests of the beneficiary the central purpose of the duty of loyalty.[379] According to this approach, the protection of the beneficiary's property is paramount, while considerations relating to the relationship between the fiduciary and the beneficiary are not relevant.[380] The law should concentrate on protecting the beneficiary's wealth and impose liability accordingly. Hence, the design of the legal rules, which define the boundaries of this concept, is influenced by considerations concerning the protection and preservation of economic interests.[381] As explained, the refusal of the English case law to examine

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376. *See supra* Part III.C–E.
377. *See supra* Part III.C.
378. *See supra* notes 146–154 and accompanying text.
379. *See supra* Part III.C.
380. *See supra* notes 155–158 and accompanying text.
381. *See supra* notes 146–154 and accompanying text.

whether the company could have taken the opportunity for itself is justified if the only purpose of the rule is to safeguard the proprietary interests of the beneficiary, even at the price of overinclusion.[382] Put differently, under this understanding of fiduciary law, something that *potentially could* belong to the company should be treated as part of the company's "property."

Moreover, this conception does not establish the *scope* of the fiduciary duties on the interpersonal characteristics of the relationship. It focuses on determining whether the actions of the fiduciary, even if committed in good faith and without any intention of exploitation, actually harmed, or even might have harmed, the beneficiary's financial interests.[383] The ethical aspects of the fiduciary's conduct, on the other hand, are not considered particularly relevant.[384] Questions relating to the conduct of the directors, the purity of their intentions, or their motivation, are ignored.[385] The preservation and protection of the "trust" between the fiduciary and the beneficiary serve a practical purpose (not a moral one)—namely, to enable the transfer of property to the fiduciary.[386] Hence, even in cases where there was no doubt as to the directors' *bona fides*, and in fact "[t]hey were not said to have done anything wrong,"[387] the officers were still considered liable.[388]

The second doctrinal tendency was to adopt an *intermediate rule*.[389] This rule accepts that the starting point of the discussion is the need to prevent the exploitation of a business opportunity for personal gain, but at the same time recognizes that the good faith of the officer as well as more concrete facts that relate to the relationships, are relevant in determining whether a breach of duty has occurred.[390] Thus, under this rule, "the 'strict ethic'

382. *See supra* notes 127–154 and accompanying text.

383. *See supra* notes 150–153 and accompanying text.

384. *See supra* notes 136–149 and accompanying text.

385. *See supra* notes 136–149 and accompanying text.

386. *See supra* notes 150–153 and accompanying text.

387. *See* Regal (Hastings) Ltd. v. Gulliver [1942] 1 All ER 378, [1967] 2 A.C. 134 (HL) 153 (appeal taken from Ct. App.) (U.K.).

388. *Id.* at 149.

389. *See supra* Part III.D.

390. *See, e.g.*, Canadian Aero Serv. Ltd. v. O'Malley, [1974] S.C.R. 592, 620 (Can.) (recognizing, as relevant to determining the appropriateness of the

is not unlimited in its scope or absolute in its application."[391] The courts in Canada adopted an intermediate rule.[392] As explained, this was accompanied by an *interpersonal conception* of the concept of fiduciary, which sees the purpose of fiduciary duty as a tool for regulating relationships and promoting proper behavior.[393] According to this view, the interpersonal characteristics of the relationships are meaningful considerations for determining the scope of the duty.[394] That is, they influence both the design of the legal rules governing the content of the duty of loyalty as well as the drawing of its boundaries.[395] While proprietary interests are a relevant component in the equation (particularly in situations where the primary objective of the relationship involves the fiduciary overseeing the beneficiary's assets), they are not an exclusive or essential one.[396] Under this perspective, these rules aim to protect not just proprietary interests but also a wider range of harm that could follow from the breach, including the intuitive sense of the beneficiary that he has been wronged and abused.[397]

From an interpersonal perspective, when referring to the fiduciary relationship as one of "trust," the term is used in the deeper social sense, which expects of the fiduciary certain ethical conduct and assigns weight to the normative aspect of the fiduciary institution.[398] This view sees "the essence of the fiduciary relationship" as focusing on "the right of the

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director's actions, the knowledge of the officer and the circumstances under which the acquisition was made).

391. Canadian Metals Expl. Ltd. v. Wiese, 2007 BCCA 318, para. 23 (Can.).

392. *See id.* para. 28 (disagreeing that it is always necessary for the director to reject a corporate opportunity).

393. *See Canadian Aero*, [1974] S.C.R. at 610 (recognizing that the strict application of loyalty, good faith, and avoidance of a conflict of duty and self-interest would promote better social behavior by the directors).

394. *See supra* notes 242–255 and accompanying text.

395. *See supra* notes 242–255 and accompanying text.

396. *See* Matic v. Waldner, 2016 MBCA 60, para. 153 (Can.) ("The overall goal of the analysis is to determine whether the opportunity fairly belonged to the corporation in the circumstances.").

397. *See id.* para. 122 (stating directors must avoid benefitting at the expense and abuse of the beneficiary).

398. *See id.* ("[Directors] must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation.").

beneficiary (in this case, the company) to the impartial and bona fide exercise of decision-making powers by the fiduciary, free of any suggestion of personal interest."[399] It understands this institution as aiming to protect not only economic interests but also the social value of trust.[400] As explained, the Canadian courts indeed emphasized the need "to compel obedience by it and by its promoters, directors and managers to norms of exemplary behavior,"[401] and concluded that the good faith of the officer could be relevant in determining whether a breach of duty occurred.[402]

By highlighting the differentiation between the proprietary and interpersonal perspectives of fiduciary law, this Article does not imply that the existence of these two understandings is significant and applicable in all contexts where the breach of fiduciary duty is under discussion. It is evident that there may be scenarios where both perspectives would lead to the same legal outcome. In cases where the content of the duty is indisputable, e.g., when a director uses the funds of the company for his own private benefit, both conceptions will conclude that a breach of fiduciary duty occurred.[403] Nonetheless, this focus on a case of divergence sheds light on an important theoretical difference regarding the substance and purpose of fiduciary law, and offers a valuable contribution to the theoretical literature on fiduciary law.

Finally, the third doctrinal tendency was to adopt a *lenient rule* to determine whether the director's exploitation of the business opportunity was a breach of his duty.[404] Under this rule, a thorough factual inquiry is needed to resolve the matter at hand.[405] This inquiry seeks to balance the company's interest

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399. *Canadian Metals*, 2007 BCCA 318, para. 19.

400. *See supra* notes 198–226 and accompanying text.

401. *Canadian Aero*, [1974] S.C.R. at 610.

402. *See, e.g.*, Peso Silver Mines Ltd. v. Cropper, [1966] S.C.R. 673, para. 36 (considering good faith behavior of the director engaged in an asset purchase against the corporation).

403. *See Canadian Aero*, [1974] S.C.R. at 606–07 (considering both the property acquired while serving as the director of the corporation and the personal traits of the director when obtaining the property, such as good faith and loyalty).

404. *See supra* Part III.E.

405. *See supra* notes 302–307 and accompanying text.

in preventing exploitation with the "rights" of the officer to take business opportunities for themselves.[406] Accordingly, situations in which exploitation for personal gain was permitted are much more common, and the scope of the director's duty of loyalty is narrower.[407] This position was also accompanied by an *interpersonal conception* of fiduciary duty, which placed the relationship between the parties (rather than merely proprietary questions) at the center of the discussion.[408] It emphasized the importance of the legal rule for moral guidance and for promoting "undivided and unselfish loyalty to the corporation,"[409] but considered the good faith of the officer relevant to determining whether a breach of duty occurred.[410]

While under the lenient rule, the courts likewise understood fiduciary duty as a means to regulate the relationship between the company and the officer, the adoption of the lenient rule in Delaware is explained by the different ways in which the legal systems in Delaware and Canada understand the substance of these relations.[411]

The adoption of an *intermediate rule* was accompanied by a more classic understanding of fiduciary relationships, as representing situations of power, control, and entrustment.[412] This *vertical* understating of the relationship prioritizes the interest of the beneficiary over the interest of the fiduciary.[413] Thus, the wishes and desires of the fiduciary need not be taken into account, as the fiduciary is "charged . . . with initiatives and with responsibilities far removed from the obedient role of servants."[414]

In contrast, the adoption of a *lenient rule* was accompanied by a different view. While it did not treat the parties as completely "equal" (e.g., as contractual parties), this *horizontal* understanding tended to emphasize the contractual aspect of

406. *See supra* notes 335–343 and accompanying text.
407. *See supra* notes 340–346 and accompanying text.
408. *See supra* notes 302–307 and accompanying text.
409. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).
410. *See* Broz v. Cellular Info. Sys., Inc., 673 A.2d 148, 158 (Del. 1996).
411. *See supra* notes 340–346 and accompanying text.
412. *See supra* Part III.D.
413. *See supra* notes 341–344 and accompanying text.
414. Canadian Aero Serv. Ltd. v. O'Malley, [1974] S.C.R. 592, 606 (Can.).

the relationships and required that the needs of the officers be considered.[415] This conception still comprehends the primary purpose of the concept of fiduciary as supervision of relationships. However, under this perspective, the court can consider both the interest of the corporation and "[t]he right of a director or officer to engage in business affairs outside of his or her fiduciary capacity."[416] As the next section of this Article will explain, taking this position leads to an internal legal inconsistency. Subpart B will first explain how these insights contribute to corporate law literature and then discuss specific conclusions regarding Delaware.

B. *Understanding First Principles Is Vital for Corporate Law Literature*

As articulated in Part I of this Article, fiduciary law governs many kinds of relationships: personal, professional, and commercial. Consequently, when deciding cases from these different areas, judges explain that the concept of "fiduciary" should be adjusted to the specific field.[417] However, this Article demonstrated that in cases requiring a decision about the boundaries of fiduciary duties, such as the debate on the taking of a business opportunity, the different perspectives of fiduciary law become a highly relevant factor. Pointing out that the *conception* of the concept of "fiduciary" produces different legal outcomes means that despite this ambition to adjust the concept to the specific relationship, a theoretical *conception* adopted in one field (e.g., corporate law) might—consciously or unconsciously—be replicated in another (e.g., regarding the professional duties of lawyers).

If that hypothesis holds true, it may well be that the theoretical conception did not only correlate with a certain

415. *See supra* notes 347–348 and accompanying text.

416. *Broz*, 673 A.2d at 159.

417. As Justice Frankfurter famously said:

> [T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1943).

doctrinal development, but also contributed to it. In other words, the development of corporate law doctrine depends on the way the concept of fiduciary law is generally understood in the relevant jurisdiction.[418] More concretely, it is possible that the different theoretical understandings of fiduciary law affect the design of corporate opportunity rules and not vice versa. Thus, the theoretical insights for this paper offer a significant contribution to our ability to understand and criticize other cases of divergence in corporate law.

Indeed, substantiation for this hypothesis can readily be identified in the aforementioned cases and their subsequent application.[419] The Canadian case *Frame*, which dealt with the fiduciary duties of parents, relied on the decision in *Canadian Aero*, a leading corporate law decision.[420] This decision was referenced by a vast number of cases in a variety of subjects, including *Norberg v. Wynrib*,[421] which discussed the essence of fiduciary relations while asking whether the relationship between a doctor and patient is of a fiduciary nature;[422] a decision concerning a dispute regarding financial arrangements about developing and marketing two hotels on the same property;[423] and a struggle between investors in a mineral-mining transaction.[424] The Canadian courts are not exceptional in that sense. As mentioned, the often-quoted English case regarding the duties of officers, *Boardman v.*

418. *See supra* Part III.C–E.

419. *See supra* Part III.C–E.

420. *See* Frame v. Smith, [1987] 2 S.C.R. 99, para. 68 (Can.) (referencing *Canadian Aero* as a case where "a corporation ha[d] a substantial interest in its relationship to corporate opportunities and customers that [was] worthy of protection").

421. [1992] 2 S.C.R. 226 (Can.).

422. *See id.* at 275–76 (explaining how many of the principles of the fiduciary relationship, as outlined in *Frame*, apply to the doctor-patient relationship).

423. *See* Sharbern Holding Inc. v. Vancouver Airport Ctr. Ltd., 2012 S.C.C. 71, para. 139 (Can.) (asking whether "undisclosed differences in financial arrangements gave rise to at least a potential conflict of interest" and thus whether one of the sides to the agreement, VAC, in its capacity as manager, "was liable for breach of fiduciary duty").

424. *See* T & C Arndt Mins. Ltd. v. Silver Spurs Res. Ltd., 2018 SKQB 337, paras. 98, 102 (Can.) (outlining the principles of the fiduciary relationship from *Frame* and ultimately finding that no duty was owed).

Phipps, was a trust law case.[425] The Delaware courts also relied on decisions exterior to corporate law in determining the content of the officer's duty of loyalty.[426] For instance, in a case where the court allowed restitution of the profits made from the breach, it justified its conclusion based on a case that concerns the fiduciary duties of lawyers.[427]

Evaluating the extent of the phenomenon requires an analysis of different fiduciary relations, which is beyond the scope of this Article. It could be mentioned, for example, that while in the United Kingdom, parents and doctors are not considered fiduciaries.[428] As one would expect under a *propriety* conception of fiduciary law, Canadian and American courts have concluded that fiduciary law does apply to these relations as well, which fits within an *interpersonal* perspective of fiduciary law.[429] Furthermore, support for this hypothesis can be found also when looking at the development of the corporate opportunity doctrine in the United States. As already mentioned, the development of the this doctrine outside of Delaware was far from consistent.[430] Delaware has a unique

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425. Boardman v. Phipps [1966] UKHL 2, [1967] 2 AC 46, 46 (U.K.).

426. *See, e.g.*, Thorpe v. CERBCO, Inc., 676 A.2d 436, 444 (Del. 1996) (citing Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994)). *Milbank* involved an action to recover legal fees from a client, showing that breaches of the fiduciary relationship have less stringent causation and damage requirements. 13 F.3d at 543.

427. *See Thorpe*, 676 A.2d at 444 (holding that the damages following a breach of fiduciary duties are liberally calculated (citing *Milbank*, 13 F.3d at 543)).

428. *See* James E. Penner, *Is Loyalty a Virtue, and Even If It Is, Does It Really Help Explain Fiduciary Liability?*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 159, 173–74 (Andrew S. Gold & Paul B. Miller eds., 2014) (explaining that wrongdoing by parents does not constitute a breach of a fiduciary obligation); Sidaway v. Bd. of Governors of the Bethlem Royal Hosp. [1985] UKHL 1 (Eng.) (stating that doctors are not fiduciaries).

429. *See, e.g.*, M(K) v. M(H), [1992] 3 S.C.R 6, 61 (Can.) ("It is intuitively apparent that the relationship between parent and child is fiduciary in nature . . . ."); McInerney v. MacDonald, [1992] 2 S.C.R.138, 149 (Can.) (finding a fiduciary duty rooted in "the duty of the doctor to act with utmost good faith and loyalty"); Stafford v. Shultz, 270 P.2d 1, 7 (Cal. 1954) ("[T]he confidence growing out of the relationship of doctor and patient imposed upon the physician the duty of refraining from fraudulent concealment, that is, the duty of disclosure when he had knowledge of the facts.").

430. *See* Talley, *supra* note 33, at 279 n.2 (providing the inconsistencies among the various jurisdictions).

position of influence on American corporate law, and many court rulings in the United States are based on Delaware's decisions.[431] Still, there are many examples of cases where, despite the dominance of Delaware law, the courts adopted an *intermediate rule*, similar to the Canadian rule, and accordingly presented the *vertical interpersonal conception* of fiduciary relationships.[432] This is to say that, despite other possible external influences, such as the dominance of the Delaware jurisdiction, the general understanding of the concept of "fiduciary" can still shape the legal outcome.[433] This is because the way courts understand the meaning and purposes of fiduciary law as an independent legal concept can affect the legal outcomes of specific cases.[434]

Suggestions were made in legal literature regarding possible external effects that contribute to the development of this doctrine, such as the fact that its development in the United Kingdom "correlates well with increasing public distrust of managerial behaviour during this period,"[435] or that its advancement in Delaware "was a good fit with anti-monopoly sentiment" in the United States.[436] Establishing a causal

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431. *See, e.g.*, Huff Energy Fund, L.P. v. Longview Energy Co., 482 S.W.3d 184, 190 (Tex. App. 2015) (recognizing *Guth v. Loft, Inc.*, a Delaware Supreme Court case, as the seminal corporate opportunity doctrine case). The influence could be indirect or direct. *See, e.g.*, *id.* at 190, 193 (appealing to Delaware case law even though the matter involved Texas law); Demoulas v. Demoulas Super Mkts., Inc., 677 N.E.2d 159, 182 (Mass. 1977) (deciding all issues under Massachusetts law but electing to appeal to Delaware corporate opportunity doctrine).

432. *See, e.g.*, Ne. Harbor Golf Club, Inc. v. Harris, 661 A.2d 1146, 1150 (Me. 1995) (determining that the corporate opportunity doctrine "rest[s] on a single fundamental policy . . . . that a corporate fiduciary should not serve both corporate and personal interests at the same time"); *see also* Durfee v. Durfee & Canning, Inc., 80 N.E.2d 522, 527 (demonstrating a more *vertical* understanding of the fiduciary relationships); MacIsaac v. Pozzo, 183 P.2d 910, 914 (Cal. Dist. Ct. App. 1947) (detailing a joint venturers case that officially accepted the position in Delaware but, in the absence of a *horizontal* understanding of the relationships, developed an *intermediate* rather than lenient rule).

433. *See* KERSHAW, *supra* note 92, at 462.

434. *See supra* Part III.

435. *See* KERSHAW, *supra* note 92, at 468.

436. *Id.* at 473; *see also id.* at 466 ("[T]he jurisdictional sources and the timeline associated with the development of US . . . law do not fit well with a

connection between such external changes and common law rules is necessarily speculative.[437] In addition, if indeed the way in which courts have understood the legal concept of fiduciary had contributed to the legal outcome, it raises further doubt regarding the ability of external factors to explain the internal development of the law.[438] Hence, this Article demonstrates the important contribution fiduciary law theory offers to corporate law. Corporate law literature should not concentrate only on such external arguments, it must consider how the theoretical perspective of fiduciary law could provide a possible explanation for the development of legal doctrines.

By focusing on the relationships between fiduciary law theory and corporate law doctrines, this Article provides a necessary new perspective to the current literature. This perspective understands that to evaluate correctly how legal doctrine evolves, external perspectives are insufficient, and they could not fully replace the careful reading of the case law, from theoretical and comparative perspectives.[439] Highlighting the effect that fiduciary law could have had on the development of the doctrine does not suggest that this is the one and only factor in the design of the legal rule. However, the possibility of causality—between the theoretical understanding of the legal concept and the development of the law—is hard to dismiss.

Historical evidence further supports the claim that the internal understanding of fiduciary law is relevant to the development of corporate law doctrine.[440] In his book, which analyzes some of the cases discussed here, Kershaw suggested differentiating between the "property-lens" rule (the lenient rule), where "the nature and extent of the corporate opportunity doctrine are not determined by a broad obligation of loyalty but by ideas about justifiable property claims and entitlements," and "the corporate interest lens," (the strict rule) which

claim that the pressures of charter competition have formed the . . . rules and explain a pro-managerial deterioration in fiduciary standards.").

437. *Id.* at 468.

438. *See id.* (questioning the validity of external explanations for the historical development of corporate fiduciary doctrine).

439. *See id.*

440. *See id.* at 439 (examining the development of corporate law doctrine from the internal perspectives of historical cases outside of the United States).

"involves an exploration of the no-conflicts loyalty obligation."[441] While Kershaw uses the term "property-lens" to describe the rule developed in the United States, his conclusions can sustain the analysis proposed here.[442] As he explains, "[t]hrough the property lens," rights of enjoyment and exclusion are typically justified by exploring the relationship between the possible right holder and the asset.[443] In other words, adopting a "property lens" (i.e. a more lenient rule) while looking at corporate opportunities still suggests that the accepted fiduciary law conception is indeed an interpersonal one, which sees the relation between the parties as dictating the proprietary conclusions. Hence, through this lens, "[t]he primary legal question of relevance is whether the nature of these relationships justify exclusionary rights."[444] Thus, this analysis can coexist with the current arguments.

Even if in many cases the content of the fiduciary duty is adjusted to the specific relevant context, the fact is that the same highest court, and, in most countries, the same trial court, handles a variety of cases in different private law fields. If a judge who just yesterday decided a case involving the fiduciary duty of a doctor has to decide today a case that deals with the fiduciary duty of a director and uses the same legal concept in order to explain his reasons for imposing liability, the inherent analogy could affect the analysis of the case and, thus, the legal outcome. As fiduciary duties apply to many kinds of legal relationships, its effect could spread across the classic division of legal fields.

By highlighting the connection between the concept of fiduciary and the legal doctrine, this Article does *not* aim to support the "familiar narrative about the evolution of UK [corporate opportunity doctrine] . . . that its strictness and its anti-director bias are the product of the fact that these rules are

441. *Id.* at 454.

442. *See id.* (applying the term "property lens" while describing the development of corporate law doctrine under the more lenient rule in United States cases).

443. *Id.*

444. *See id.* at 405 (analyzing the evolution of fiduciary doctrine with regard to *Boardman v. Phipps*, which is a United Kingdom case that represents a property-lens rule that was later rejected).

borrowed from trusts law."[445] The mentioned historical research already pointed out that the United Kingdom case law on corporate opportunities deviated from the classic trust law cases and that "the increasing strictness of UK law is the product of a change in approach in the early 1970s."[446] It is worth emphasizing that reading cases from the *fiduciary* law perspective can provide important theoretical insights for both the United States and the United Kingdom.[447] This Article reveals an internal legal explanation, so far absent from the literature, for the development of the law that focused on external explanations.[448] As will now be explained, it also offers important insight into the corporate opportunity doctrine debate in Delaware.

C. *Cleaning Up the Corporate Opportunity Doctrine Mess*

Finally, these insights can contribute to our understanding of the legal doctrine that was developed in Delaware. However, it is crucial to address a potential claim pertaining to this discussion before delving further. Prima facie, it could have been argued that the divergence in the presented case law reflects, in fact, a disagreement over how the law should assign the right to exploit a business opportunity. In other words, this is *a property law* debate over who the "owner" of the business opportunity is, rather than *a fiduciary law* controversy about the interpretation of the fiduciary duty.[449] While the concept of "property" is indeed relevant to the discussion,[450] the examination of the case law shows that it is not possible to separate the courts' discussions in the scope or boundaries of fiduciary duty from the question of "ownership" of a business opportunity.

For example, in *Regal,* the English court clarified that the reason for imposing liability for the taking of a business opportunity is that "[e]quity . . . prohibits a trustee [from]

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445. *Id.* at 467.
446. *Id.*
447. *See supra* Parts III.C–D.
448. *See generally* KERSHAW, *supra* note 92.
449. See the comprehensive discussion in KERSHAW, *supra* note 92, at 454.
450. *See id.*

making any profit by his management, directly or indirectly."[451] While indirectly, English courts do answer the question "to whom does the business opportunity belong?" (*always* to the company), this answer is not associated with an external "proprietary" understanding of what should be considered as company property; rather, the court's reasons refer to the way in which it perceives the role of fiduciary duty in the relationships between a director and a company.[452] This is to say, fiduciary law shapes the answer to the "proprietary" question.

This is also true with regard to the rulings of other courts. For instance, in *Canadian Aero*, the Canadian court emphasized that the different factual inquiries the court performs in order to determine whether a business opportunity "belongs" to the company aim to assess adherence to the general standards of "loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform."[453] The starting point of the court was the need to create a rule to dictate proper norms of behavior for officers.[454] In accordance with this ambition, it recognized factual investigation regarding the "ownership" of an opportunity.[455]

Indeed, while the courts in Delaware dedicated significant parts of their decisions to reviewing the facts of the case in order to determine to whom the opportunity "belongs," it would be artificial to isolate the way in which the courts understood the fiduciary relations and attempted to answer the "proprietary" question.[456] In *Broz*, for example, the court thought that determining whether a director should be allowed to exploit a business opportunity hinged first on a decision as to what kind

451. Regal (Hastings) Ltd. v. Gulliver [1942] 1 All ER 378, [1967] 2 A.C. 134 (HL) 153 (appeal taken from Ct. App.) (U.K.).

452. *See* Bhullar v. Bhullar [2003] EWCA (Civ) 424 para. 28 (U.K.) (demonstrating how the conclusion as to the "ownership" in the opportunity is based on the way in which the court has understood the purpose of the fiduciary institution).

453. Canadian Aero Service Ltd. v. O'Malley [1974] S.C.R. 592, 620 (Can.).

454. *See id*. at 610 (acknowledging the need for an updated rule recognizing the importance of corporations within their community and promoting exemplary behavior among its officers).

455. *See id*. at 620.

456. *See supra* Part III.E.

of conflict of interest should be considered.[457] That is, the case depended on *the scope of fiduciary duty*.[458] Moreover, the court also mentioned that the director should not be required to "consider every potential, future occurrence in determining whether a particular business strategy would implicate fiduciary duty concerns."[459] Again, the limits of the fiduciary duty, according to the relevant relations between the parties, shaped the question of "ownership."[460]

It is therefore impossible to detach the *horizontal interpersonal conception* of fiduciary law from the adoption of a lenient rule. In fact, it is extremely challenging to answer the question to whom a business opportunity "belongs" without first determining what the boundaries of the fiduciary duty are and what is required of an officer under this legal standard of behavior. The question thus remains, what conclusions should be drawn from the fact that, in Delaware, the way the legal doctrine has developed is incompatible with what the law theoretically aims to achieve.

As already mentioned, much writing has tried to justify the lenient rule adopted in Delaware, arguing that there are good policy considerations that vindicate the lenient approach and therefore support attempts at creating a balance between the officer's loyalty and the need to permit personal profits.[461] However, the current careful reading of the case law demonstrates that Delaware's courts did not officially reject the

457. *See* Broz v. Cellular Info. Sys., Inc, 673 A.2d 148, 157 (Del. 1996) ("[T]he corporate opportunity doctrine is implicated only in cases where the fiduciary's seizure of an opportunity results in a conflict between the fiduciary's duties to the corporation and the self-interest of the director as actualized by the exploitation of the opportunity.").

458. *See id.* at 159 (determining there was no breach of fiduciary duty in the application of corporate opportunity doctrine under the facts of the case where there was no breach of obligation or business opportunity).

459. *Id.*

460. *See id.* (noting that directors must be allowed to make decisions based on the situation as it exists at the time it is presented to prevent undue restraint and permit meaningful business unrelated to their corporate role).

461. *See* Gelter & Helleringer, *supra* note 15, at 352 (suggesting the attractiveness of Delaware law is derived from enabling policies that permit curtailment or elimination of fiduciary duty in general).

rhetoric of fiduciary law.[462] Rather, they declared that officers are committed to "undivided and unselfish loyalty to the corporation,"[463] and emphasized that the need for "removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation."[464]

Yet, without providing an explanation or rationale for this stance, the case law adopted a distinctive interpretation of the nature of fiduciary relationships, deviating from how they were traditionally understood.[465] That is, the case law failed to confront the fact that this *horizontal* interpretation of the relationship may contradict the very goals fiduciary law has sought to achieve. Adopting this position gives rise to an inherent legal inconsistency within the law, as it creates a disparity between the stated objectives of the ruling and the actual design of the legal rule. As the above-mentioned examples demonstrate, even when the directors seize an opportunity that could benefit the company, an opportunity in which the company was clearly interested, the taking could still be allowed.[466]

As the theoretical writing on fiduciary law has explained, the idea that the fiduciary should act in the best interest of the beneficiary is one of the foundations of fiduciary law; it stems from the apprehension that these situations require monitoring the power granted to the fiduciary by a unique set of rules.[467] A decision that disregards this principle will necessarily affect the ability of fiduciary duties to fulfill their purposes. Thus, if, as some have argued, there are policy considerations that justify adopting a more lenient rule,[468] they must be properly balanced

462. *See* Kershaw, *The Path of Corporate Fiduciary Law*, *supra* note 95, at 480 (arguing that Delaware self-dealing law is "clearly rooted in the approaches formed in other states" including New York and New Jersey).

463. Guth v. Loft, 5 A.2d 503, 510 (Del. 1939).

464. *Id.*

465. *See supra* notes 308–334 (illustrating the more lenient approach to fiduciary law adopted by Delaware courts in contrast to the strict approach of prior Canadian rulings).

466. *See supra* notes 347–349.

467. *See* CONAGLEN, *supra* note 57, at 4 (describing the importance of institutional safeguards to avoid conflicts of interest and ensure the protection beneficiaries).

468. *See* Lowry & Edmunds, *supra* note 20, at 521 (describing the "pragmatic flexibility" of the Delaware courts' approach to determining

against the price of such deviation from fiduciary law—e.g., the reduction in the ability of the doctrine to protect the assets of the fiduciary or the relationships of trust between the parties, and the implications that will follow a failure to do so. This was not done.

By pointing out this doctrinal muddle, this Article is not suggesting that corporate law must be based on the historical conception of equity (or more specifically, of fiduciary law). This Article emphasizes that as long as the courts continue to express their intention to promote the objectives of fiduciary law, it is impossible to fulfill these objectives while simultaneously disregarding the fundamental principles underlying the concept of fiduciary, that is, the vertical nature of these relationships. Thus, the lenient rule could be criticized, not only for its lack of coherence and consistency,[469] but also for its failure to consider the implications of adopting this unique understanding of the substance of fiduciary relationships.

Since it is unclear how this internal inconsistency can be resolved, it must be concluded that the extensive debate on which rule is better should be settled in favor of those who reject the Delaware position. However, this does not mean that we must adopt a strict rule. As explained earlier, the Canadian approach is less strict than the one taken by the U.K. courts.[470] Yet, it is also theoretically well-established, and, despite some difficulties, it is clearer and easier to implement, especially compared to the utterly ad hoc application of the case law in Delaware.[471] Sometimes, taking a new perspective can assist in resolving very old debates.

CONCLUSION

The objective of this Article is to provide a fresh perspective on the longstanding debate surrounding how the law should govern cases in which officers in a company appropriate a business opportunity for their own benefit. By adopting a

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liability as "the most appropriate balance between deterring directorial abuse and promoting the prevailing enterprise culture").

469. *See supra* note 117 and accompanying text.

470. *See supra* Part III.D.

471. *See* Yifat Naftali Ben Zion, *Moving Along the Continuum of Loyalty: From a Standard Towards Rules*, 35 CAN. J. L. & JURIS. 187, 216–18. (2022).

comparative approach to this discourse, this Article delves into the fundamental principles of the legal concept of "fiduciary" and uncovers the realization that the diverse doctrinal rules correspond to two distinct understandings of the purpose of fiduciary law. The *strict* rule, adopted in the United Kingdom, was accompanied by a *propriety* understanding of fiduciary law that places at the center of the relations the protection and preservation of the beneficiary's property. In contrast, the Canadian *intermediate* rule, as well as the more *lenient* rule adopted in Delaware, relies on an *interpersonal* conception, according to which the need to protect fiduciary relationships to elicit worthy behavior from fiduciaries is the main purpose of fiduciary law.

Under both the *strict* and the *intermediate* rule, fiduciary relations are understood as *vertical* relations of power and control, where the fiduciary is obligated to act for the benefit of the other side, the beneficiary. In contrast, under the *lenient* rule, the relations are understood in a more *horizontal* way, almost contractual, where the interests of both sides, the fiduciary (in this case the officer) and the beneficiary (the company), are relevant to the discussion. This understanding of the relationship contradicts the statements made by the Delaware court itself and its commitment to safeguard fiduciary relationships. Consequently, the doctrine formulated by Delaware's courts is undesirable and ought to be replaced by a stricter rule, similar to the one adopted in Canada. This would enhance clarity in the application of the legal rule, thus cleaning up the mess caused by the current doctrine.

Equally significant, this Article has brought attention to the broader interconnections between the legal doctrine and the varying conceptions of fiduciary law. Understanding this interrelation provides a tool to scrutinize other contentious cases concerning the boundaries of fiduciary duties. Furthermore, by focusing on the divergence within corporate law from the perspective of fiduciary duties, it becomes evident that fiduciary law possesses the potential to shape the rules of corporate law. Hence, the current perspective not only offers a resolution to the problem stemming from a specific legal doctrine, but also carries broader implications. While external economic or historical discussions concerning the development of legal rules are undoubtedly valuable, this Article demonstrates that they should not overshadow the examination

of first principles and the in-depth theoretical exploration of how a doctrine evolves.