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FIDUCIARY LAW'S ANTI-CORRUPTION NORM

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INTRODUCTION

This Chapter examines an important feature of the Anglo-American common law of fiduciary obligation—what I have previously characterized as the "anti-corruption norm."[1] While this norm has been invoked in a variety of different contexts, the norm has broadly (albeit inconsistently) proscribed and punished the *use of an entrusted position for self-regarding gain* where the fiduciary has failed to disclose the gain to her beneficiary.[2] The norm is animated by a concern that the fiduciary refrain from acting out of an illicit motive—that is, a motivation of self-enrichment—in contrast to the thoroughgoing devotion to the beneficiary's interest reflected in the requirement of loyalty.[3] As courts have occasionally articulated the concern, fiduciaries ought to avoid placing themselves in situations where there is a conflict between their duty and their self-interest, lest the temptation to disloyally exercise their duty-bound judgment proves too great to resist. This "temptation rationale" is suggestive of a traditional, moralistic understanding of corruption as a human failing and serves as the ethical and policy basis for proscribing the use of an entrusted position for self-regarding gain in various contexts.[4]

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[1] Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 903-08 (2013) [hereinafter Kim, *Last Temptation*] (discussing the fiduciary norm against the "use of public office for private gain" for public fiduciaries); *see also* Sung Hui Kim, *What Governmental Insider Trading Teaches Us About Corporate Insider Trading, in* RESEARCH HANDBOOK ON INSIDER TRADING (ed. Stephen M. Bainbridge) (2013); Sung Hui Kim, *Insider Trading as Private Corruption*, 61 UCLA L. REV. 928 (2014) (defining private corruption as "the use of an entrusted position for self-regarding gain").

[2] The norm is often referred to the fiduciary law literature as the "no profit" rule, which is ordinarily expressed as requiring the fiduciary to disgorge all profits received by virtue of a fiduciary office or position. There is some debate about whether the rule is independent of the duty of loyalty and the inherent requirement to avoid conflicts of interests. *See* Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 978 (2013),

[3] Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 L.Q. REV. 608, 609 (2014).

[4] The temptation rationale, the primary basis for the imposition of the anti-corruption norm, is similar to the logic of the "no conflict" rule, which "prohibits the fiduciary from allowing personal interests actually or potentially to conflict with the interests of the beneficiary." *See* Miller, *supra* note 2, at 977. *But see* Lionel Smith, *Deterrence, Prophylaxis and Punishment in Fiduciary Obligations*, 7 J. EQUITY 1 (2013) (arguing that the no-profit rule is justified as a primary rule of attribution).

As will be discussed below, when invoking the norm, courts were not only concerned about the creation of an elevated risk of harm to the beneficiary. Courts also recognized that the fiduciary's mere placement of herself in a position of temptation could itself be wrongful, constituting a betrayal of trust inconsistent with the practice of undivided loyalty.[5] At the same time, courts soberly acknowledged the epistemic challenges inherent in ascertaining the fiduciary's true motivation. As a result, courts have often foreclosed searching inquiries into the fiduciary's state of mind in determining whether there has been a breach of fiduciary duty. As an admittedly selective exposition of caselaw reveals, fiduciaries have been held liable without any finding that the fiduciary had actually succumbed to an illicit motive.

This Chapter argues that the range of improper conduct that *could* be associated with corruption, as signaled by reference to the temptation rationale, is quite broad. It reaches this conclusion by analyzing the invocation of the anti-corruption norm in the following contexts: (i) bribes and secret commissions, (ii) opportunities, (iii) renewals and reversions, and (iv) confidential information. These categories are neither mutually exclusive nor do they exhaust the myriad situations in which the anti-corruption norm has been employed. Due primarily to space limitations, this Chapter excludes treatment of the classic self-dealing situations, where the fiduciary transacts directly with the beneficiary and thus appears on opposite sides of the same transaction—in both personal and fiduciary capacities.[6]

Understanding the breadth of the anti-corruption norm in fiduciary law is important because the Supreme Court has expressed anxiety about the potential breadth of federal statutory law targeting corruption and premised on the breach of fiduciary duty.[7] In 2010, in *Skilling v.*

[5] *See* text accompanying notes 22-25 *infra*; *cf.* Lionel Smith, *The Motive, Not the Deed*, *in* RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 53 (Joshua Getzler ed., 2003); Stephen R. Galoob & Ethan J. Leib, *Intentions, Compliance, and Fiduciary Obligations*, 20 LEGAL THEORY 106 (2014). *But see* Bray v. Ford [1896] AC 44 (HL) (Eng.) (opining that the "no profit" rule "*might* be departed from in many cases, without any breach of morality . . .") (emphasis added).

[6] Such transactions (where the fiduciary also conceals his interest in the transacting counterparty) are often regarded as fraudulent. *See, e.g.*, Searl v. Earll, 221 F.2d 24 (1954).

[7] A majority of circuits has previously required that the defendant must have breached a fiduciary obligation to the defrauded person or entity in order to be found guilty under the honest services mail fraud statute. *See* Samantha Hunter, *Honest Services Fraud and the Fiduciary Relationship Requirement: How the Ninth Circuit Got It Wrong in* United States v. Milovanovic, 2012 BYU L. REV. 509, 514-15 (2012). Unfortunately, *Skilling* left unaddressed the question of

United States,[8] the Court grappled with the issue of whether the government should be able to criminalize a range of conduct involving undisclosed conflicts of interest under the rubric of "fraud." In *Skilling*, the Court substantially limited the scope of 18 U.S.C. § 1346, the primary federal anti-corruption statute, which makes it a crime to engage in a "scheme or artifice to deprive another of the intangible right of honest services." It expressly narrowed § 1346's application to bribery and kickbacks,[9] noting that "proscrib[ing] a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine."[10] While this Chapter takes no position on whether *Skilling* was correctly decided, it affirms the Supreme Court's general intuition that the range of conduct that could be linked to corruption is broad.

I. BRIBES AND SECRET COMMISSIONS

Prior to England's passage of the Prevention of Corruption Act of 1906, which criminalized the bribery of agents and employees,[11] bribery was largely the provenance of civil law and the courts. At common law, any bribe or secret commission received by a fiduciary belonged to his beneficiary, who could sue for its recovery.[12] Common law definitions of bribes focused on the confidential nature of the gift and its apparent purpose to influence the fiduciary's exercise of judgment over the beneficiary's affairs.[13] The typical fact pattern involved an agent,

whether the element of a fiduciary relationship is required. *See* J. Kelly Strader, *Skilling Reconsidered: The Legislative-Judicial Dynamic, Honest Services Fraud, and the Ill-Conceived "Clean Up Government Act*," 39 FORDHAM URB. L.J. 309, 330 (2011).

[8] 561 U.S. 358 (2010).

[9] *Id*. at 368.

[10] *Id*. at 408.

[11] 6 EDW. VII, c. 34, as amended by the Prevention of Corruption Act of 1916, 6 & 7 GEO. 5, ch. 64. In the U.S., states began to criminalize commercial bribery around the turn of the twentieth century. Today, roughly three-quarters of states criminalize commercial bribery. Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM BUS. L.J. 119, 122, 127 (2014).

[12] J.C. SHEPHERD, THE LAW OF FIDUCIARIES 260 (1981).

[13] *See, e.g.*, Hovenden & Sons v. Millhoff (1900) 83 LT 41 (C.A.) at 43 (Eng.) (Lord Romer) ("If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent—that is to say, without the knowledge and consent of the principal—then the gift is a bribe in the view of the law."); PAUL D. FINN, FIDUCIARY OBLIGATIONS 214 (1977) (summarizing the bribe rule); ALBERT CREW, THE LAW RELATING TO SECRET COMMISSIONS AND BRIBES 18 (1913) (a "secret

authorized to enter into transactions on behalf of its principal, accepting payments from a third party supplier or service provider desiring to secure a contract with the principal. By surreptitiously accepting a bribe, the fiduciary used his entrusted position for self-regarding gain without disclosure to the principal.

The first cases requiring fiduciary-donees to disgorge bribes were handed down in 1869.[14] Early cases evinced juror reluctance to punish the fiduciary where it wasn't clear that the fiduciary's judgment was impaired by the bribe.[15] Judges, however, often overrode such juror sentiment, declaring that a bribery agreement was a "corrupt bargain."[16] For example, in *Harrington v. Victoria Graving Dock Company* (1878), the plaintiff fiduciary sued to enforce a contractor's promise to pay a bribe. The jury rendered no judgment on findings because it opined that the undisclosed "agreement did not so bias the mind of the plaintiff."[17] The court disagreed, concluding that the bribe was corrupt in light of its illicit purpose and likely effect:

> The tendency of [the bribe] is undoubtedly to influence and bias the mind of the agent, and lead him to be disloyal and unfaithful to his employer. It is intended to have that effect. The man who takes it does it with the perfect knowledge that it is intended to influence his mind so as to induce him to act unfaithfully towards his employer. To say this was not corrupt would be a contradiction in terms; and to allow trustees to enter into and enforce such a contract would be fraught with the most mischievous consequences.

Therefore, once it was established that a bribe had been given and received, it was "unnecessary to inquire into [the bribe's] actual effect or operation." In *Hovenden & Sons v. Millhoff* (1900), the court went further and announced that it would adopt a practice of not hearing evidence about the donor's motive in giving the bribe, adopting an irrebuttable presumption that the agent-donee was bribed, and adopt a presumption that the principal was damaged by the amount of the bribe.[18] These rules, according to the court, were

commission" will "typically not be fixed but vary in accordance with the total amount of the transaction").

[14] SHEPHERD, *supra* note 12, at 260.

[15] *See, e.g.*, *Hovenden & Sons* 83 LT at 42 (jury finding no conspiracy to defraud the plaintiff and total damages suffered by the plaintiffs to be one farthing).

[16] Harrington v. Victoria Graving Dock Company (1878) 39 LT (QBD) 120 (Eng.).

[17] *Id.*

[18] *Hovenden & Sons* 83 LT at 43.

necessary "in the interests of morality with the view of discouraging the practice of bribery."

It isn't hard to understand why in civil cases some courts would prophylactically foreclose inquiry into the state of mind of the donor/donee and rely almost exclusively on circumstantial evidence of the bribe. Judges and jurors alike face significant epistemic challenges in determining whether the fiduciary actually succumbed to corruption. Fiduciaries tend to have wide discretion and authority to act on behalf of their beneficiary,[19] and beneficiaries are often practically disabled from monitoring the fiduciary's exercise of judgment. As a result, fiduciaries often enjoy a monopoly on the relevant facts; hence, it may be impossible to ascertain the fiduciary's true motivations—whether the fiduciary acted *because of* or *in spite of* the conflict between his self-interest and his duty of loyalty.

It's not just that third parties might not know the fiduciary's true motivations. The fiduciary *himself* might not know since he, like everyone else, lacks introspective access into the more subtle yet pervasive causes of his own behavior.[20] As Lionel Smith explained, "[The no-conflict rules] exist because the law has an insight into the way the human mind works when it is exercising judgement. When a person exercises judgement in a conflict situation, it is impossible for that person to be certain that they have excluded extraneous considerations[,]"[21] such as self-interest.

Given these impediments, *ex post* determination in court of whether the fiduciary's judgment and exercise of discretion were *actually* altered by the illicit pursuit of personal gain will be costly. Thus, it makes sense to adopt a clear *ex ante* prophylactic rule to prevent the fiduciary's temptation in the first place. Accordingly, the common law has adopted a number of *ex ante* prophylactic rules, expressed as different iterations of the anti-corruption norm, including the rule against bribes and secret commissions, designed to prevent the fiduciary's corruption.

To observe that the anti-corruption norm is prophylactic in nature does not mean that the proscribed conduct itself is necessarily

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[19] *See* Gordon Smith, *Critical Resource Theory*, 55 VAND. L. REV. 1399 (2002).

[20] *See* Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977); Timothy DeCamp Wilson & Richard E. Nisbett, *The Accuracy of Verbal Reports About the Effects of Stimuli on Evaluations and Behavior*, 41 SOC. PSYCHOL. 118 (1978).

[21] Smith, *supra* note 3, at 624.

or even likely innocent.[22] In *Boston Deep Sea Fishing & Ice Co. v. Ansell (1886)*,[23] Lord Cotton explained why it was wrongful for an agent who entered into a contract on behalf of a principal to receive money from the person with whom he is dealing, without the knowledge or assent of the principal. He stated:

> It is not an honest act, and, in my opinion, it is a sufficient act to shew that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer.[24]

By emphasizing the fact that the agent put himself in a position of temptation, Cotton seemed to embrace the temptation rationale, the notion that fiduciaries ought to avoid placing themselves in situations where there is a conflict between their duty and their self-interest, lest the temptation to disloyally exercise their judgment becomes too great to resist. Notably, Cotton refrained from suggesting that, by accepting secret commissions, the agent had in fact *yielded* to that temptation. Rather, the agent had placed himself in a situation in which the *tendency* to act contrary to his duty had, perhaps dramatically, increased. Nonetheless, it seems clear that Cotton regarded the acceptance of monies as a dishonest and wrongful act *independent of* the anticipated misuse of the agent's fiduciary discretion. In short, Cotton identified *two* wrongful acts: (i) the antecedent act of accepting bribes and (ii) the subsequent act of altering one's discretion over the beneficiary's affairs in response to the bribe. Cotton favored the prohibition of the first wrongful act in an effort to prevent the second wrongful act. Alternatively framed, the commission of the first wrongful act operates as a irrebuttable presumption that the second wrongful act took place.[25]

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[22] The standard contractarian account of fiduciary law tends to suggest that the proscriptive conduct rules were designed to be overinclusive, occasionally if not systematically punishing innocent conduct and yielding "false positives." See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425, 442 (1993); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1055 (1991).

[23] Boston Deep Sea Fishing and Ice Company v. Ansell (1888) L.R. 39 Ch. D. 339 (Eng.).

[24] *Id*. at 355-56.

[25] To clarify Lord Cotton's point, let's analogize to a different kind of temptation in a non-fiduciary context. Suppose that a recovering child molester has saved up enough money to buy a house and decides to purchase a home within 500 yards of an elementary school in a jurisdiction in which it is not unlawful for sex offenders to do so. Under those circumstances, the sex offender arguably commits a wrongful act independent of and regardless of whether he

Early courts applying the rule against bribes and secret commissions largely confined its application to situations where it was easily inferable that the purpose of the payments by the third party was to alter the fiduciary's exercise of judgment over the beneficiary's affairs, namely, those particular contracts over which the fiduciary had been entrusted with authority. In *Reading v. Attorney-General* (1951),[26] the rule was extended to cover a situation in which the connection to the beneficiary's affairs was more remote.[27]

In *Reading*, a British army sergeant in the Royal Army Medical Corps (stationed in Egypt) was paid by a smuggling ring to escort contraband around the city of Cairo. By sitting—in full military uniform—on the front seat of a civilian lorry loaded with the illicit cargo, the sergeant enabled the smugglers to pass Egyptian police lines and avoid arrest. The sergeant was subsequently apprehended for "conduct to the prejudice of good order and military discipline," court martialed, and imprisoned for two years.[28] After his release from prison, he brought a petition to recover the money that the Crown seized from his apartment. On appeal from dismissal of the petition, the court held that the Crown was entitled to retain the sums confiscated.

Quoting from the lower court's opinion, the House of Lords affirmed the relevant principle of law that was the "essence of [the trial court's] judgment."[29] This principle was: "[I]f a servant, in violation of his duty of honesty and good faith, takes advantage of his service to make a profit for himself, . . . then he is accountable for it to the master."[30] Thus, an accounting of profits is imposed on at least four conditions. First, the gain in question must be the personal, financial gain of the individual. This element was uncontroversial because the sergeant personally pocketed the sum. Second, the individual accruing the gain must be a fiduciary or similar person in a relationship of trust or confidence.

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ultimately commits a sex offense. By buying a home so close to a school, he is placing himself in a position of temptation regardless of whether he ultimately succumbs to the temptation. To be sure, it is possible that this former sex offender never intended to buy the house for illicit reasons but rather because this was the only house that he could afford. Nonetheless, precisely because he can never be certain of his own motivations, it may make sense for the law to forbid him from make the purchase in the first place.

[26] Reading v. A-G [1951] A.C. 507 (HL) (Eng.); Reading v. The King [1948] 2 K.B. 268 (Eng.).

[27] *See also* Kim, *Last Temptation*, *supra* note 1, at 905-08 (discussing the *Reading* and *Drumm* cases).

[28] *Reading v. The King* [1948] at 269.

[29] *Reading v. A-G* [1951] at 514.

[30] *Reading v. The King* [1948] at 275.

Here, the majority based its judgment on the finding of a fiduciary relationship.[31] Third, there must be a causal nexus between the gain and the fiduciary position, i.e., the gain must have accrued by reason of the fiduciary position. Here, the court concluded that the sergeant "got [his money] solely by reason of the position which he occupied as a servant of his master." Fourth, the gain must have been undisclosed to the beneficiary. Here, the sergeant obtained the profit "without his master's sanction."

Importantly, the rule against bribes and secret commissions was extended to a situation where there was no purpose to influence the conduct of the fiduciary's *assigned duties*. The smugglers paid the sergeant to engage in activity completely unrelated to his Medical Corps tasks; the sergeant's regular duties had nothing to do with contraband.[32] "[N]evertheless[, he] was using his position as sergeant in His Majesty's Army and the uniform to which his rank entitled him to obtain the money which he received."[33] In other words, the sergeant's exploitation of his uniform furnished the necessary link between his position and the gain to justify the rule's application. According to the court, it didn't matter that the wrongful act in question was outside of his official capacity or was criminal or whether the Crown was actually harmed.[34]

Reading represents a significant expansion of the rule against bribes and secret commissions to conduct unrelated to the fiduciary's assigned responsibilities and to situations arguably falling outside of the defined scope of the fiduciary relationship. In essence, the rule was interpreted to attach to the occupation of the fiduciary office, regulating how the fiduciary presented himself to the world and not merely the manner in which he performed his fiduciary tasks. Because the fiduciary had exploited his official status, as signaled by the sergeant's uniform, the conduct would be deemed wrongful, giving "his master a right to receive the money so earned."

On the other hand, the expansion in *Reading* was arguably not that significant, as the sergeant's bribery agreement was clearly unlawful and inconsistent with public perception of military deportment. A far more

[31] SHEPHERD, *supra* note 12, at 264. Although there was some disagreement between the trial and the House of Lords as to whether there was a fiduciary relationship, Lord Porter, with whom Viscount Jowitt concurred, noted that the relationship in question was a fiduciary one in "a wide and loose sense." *Reading v. A-G* [1951] at 516.

[32] SHEPHERD, *supra* note 12, at 263.

[33] *Reading v. A-G* [1951] at 514.

[34] *Id.* ("It matters not that the master has not lost any profit, nor suffered any damage."); *id.* at 516 ("It is the receipt and possession of the money that matters, not the loss or prejudice to the master.").

radical extension of the rule appears in *United States v. Drumm* (1964)[35] where it was interpreted to prohibit (and punish) otherwise lawful business activity—the acceptance of private market consideration for providing private market services—because such transaction was deemed to be "in conflict with his fidelity as agent."[36] In *Drumm*, the federal government sued a poultry inspector employed full-time by the U.S. Department of Agriculture (USDA) for an accounting of payments received for part-time consulting work done after hours for a private poultry processing firm in violation of Department policy. The district court found in favor of the defendant through a directed verdict. On appeal, however, the appellate court vacated the district court's judgment and remanded the case.

In explaining its holding, the appellate court restated the rule in the broadest terms possible: "An agent may be held accountable for all profits in excess of his lawful compensation which he acquires during the course of his agency."[37] At the same time, it insisted (more narrowly) that the defendant's private consulting work involved duties "adverse" to those he owed to the USDA and threatened the defendant's impartiality. The court noted:

> An agent is a fiduciary with respect to the matters within the scope of his agency.' Restatement (Second) Agency § 13 (1958). He could not secretly accept a second employment involving duties adverse to those he owed the government. His reliance on [the private poultry processing firms] for a salary surpassing that given him by the government and his work for [them] in advising upon the same processes he was assigned to inspect, certainly compromised to a great extent his position as an impartial poultry inspector and his usefulness to the government.[38]

Whether the defendant's consulting duties *actually* eroded his impartiality as an inspector was disputable. The reported facts indicated no evidence that his specific duties contradicted his mission as a USDA poultry inspector—to ensure that federal standards of sanitation and wholesomeness were met by all companies who enrolled in the USDA's voluntary inspection program.[39] The poultry processing company appeared genuinely interested in improving the quality of its poultry. The defendant advised the company on how to handle chickens after delivery so as to reduce contamination. He assisted the company in tracking down and eliminating the source of discoloration of ducks

[35] 329 F.2d 109 (1964).
[36] *Id.* at 113.
[37] *Id.* (citations omitted).
[38] *Id.* at 112 (citations omitted).
[39] *Id.* at 110.

received from producers.[40] No evidence revealed that the defendant was pressured to cut corners or compromise his government inspections.

Despite this lack of evidence, the court suggested that the defendant acted wrongfully in accepting the consulting job in light of the temptation that such a position may breed. It noted that "the defendant had secretly placed himself in a position of conflicting interests and loyalties. *This he had no right to do*."[41] The court also highlighted evidence showing that the defendant *knowingly* withheld information from his employer and knowingly ignored the Departmental prohibition. The court observed that "a jury could find that the defendant *chose* to remain silent about his work . . .."[42] As a result, the "fact that there is no evidence that defendant passed bad poultry or that the reputation of the government's inspection program was damaged by defendant's conduct" would not bar recovery.[43]

In sum, the rule against bribes and secret commissions has potentially broad application. Originally, the rule was employed narrowly to prohibit transactions that had the purpose of altering the fiduciary's discretion over the beneficiary's affairs. The rule was grounded in the rationale that fiduciaries ought to avoid placing themselves in situations where there was a conflict between the fiduciary's duty and self-interest. In light of this broad rationale, it should not be surprising that the norm would be applied to situations where the connection to the beneficiary's affairs was remote (as in *Reading*) and the purpose to alter the fiduciary's discretion was lacking (as in *Drumm*).

II. OPPORTUNITIES

Where the rule against bribes and secret commissions ends and where the opportunities rule begins is both controversial and unclear.[44] Indeed, early caselaw expressed the opportunities rule as a duty not to take "secret profits."[45] As with bribes and secret commissions, the category of opportunities involves a transaction between a third party

[40] *Id.* at 111.
[41] *Id.* at 112.
[42] *Id.* at 113-14 (emphasis added).
[43] *Id.* at 113.
[44] For example, Shepherd opined that "cases such as *Reading* are in some respects closer to opportunity situations than bribes *per se*." SHEPHERD, *supra* note 12, at 263.
[45] *See* Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55, 73-74 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

and the fiduciary and involves the use of an entrusted position for self-regarding gain. But unlike the typical bribe, an "opportunities" transaction ordinarily lacks the conscious purpose on the part of the third party to alter the fiduciary's exercise of her judgment over the beneficiary's affairs. Therefore, opportunities tend to have a weaker nexus to the fiduciary role and its attendant responsibilities.

Nonetheless, an opportunities transaction may still be troublesome, because the fiduciary may have used his position to gain a self-serving advantage *in competition with* the beneficiary. Therefore, an opportunities transaction still has the *potential*, if not the purpose, to alter the fiduciary's exercise of judgment over the beneficiary's affairs if by appropriating the opportunity for himself, the fiduciary has deprived the beneficiary of an opportunity that would have been in the beneficiary's best interest. Under English law, if in taking an opportunity there is *any* possibility that a director's personal interests may conflict with the company's interest, he may not exploit the opportunity in the absence of shareholder approval.[46] If a director breaches this strict rule, he is liable to account for all profits obtained from the personal exploitation of the opportunity.

This principle was affirmed in the famous House of Lords decision, *Regal (Hastings) Ltd. v. Gulliver* (1942).[47] In *Regal*, the directors of a company personally contributed capital to their company's subsidiary in order to enable the subsidiary to acquire certain valuable leases. These investments were made only after the landlord demanded that the subsidiary be sufficiently capitalized and only after the directors had determined that the company was financially unable to meet those demands. Despite these arguably good intentions, the court adopted the "no conflicts" rule and required the directors to disgorge their profits, which amounted to a 300% return on their investments. It cited evidentiary challenges and embraced the temptation rationale:

> Nor can the court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged. They are matters of surmise; they are hypothetical because the inquiry is as to what would have been the position if that party had not acted as he did, or what he might have done

[46] David Kershaw, *Lost in Translation: Corporate Opportunities in Comparative Perspective*, 25 OXFORD J. LEGAL STUD. 603, 603-04 (2005).

[47] Regal (Hastings) Ltd. v. Gulliver [1967] 2 AC 134 (HL) (Eng.). *See* Gareth Jones, *Unjust Enrichment and Fiduciary Duty of Loyalty*, L.Q. REV. 472, 494 (1968) "[The Regal case] is a good illustration of the approach of English courts").

> if there had not been the temptation to seek his own advantage, if, in short, interest had not conflicted with duty.[48]

By contrast, despite the occasional fiery rhetoric calling for the "remov[al of] all temptation, extinguish[ing] all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation,"[49] U.S. courts generally declined to adopt the strict English rule of "no conflicts" in favor of a more flexible approach. Because courts have employed a variety of different, often conflicting, tests, it is impossible to identify a uniform, precise rule.[50] One can, however, generalize that the U.S. approach typically inquires in the first instance whether the opportunity in question "belongs" to the corporation. Once it has been determined that the opportunity belongs to the corporation, the corporate fiduciary—such as a director, officer, or controlling shareholder—cannot divert and exploit the opportunity for her own benefit, without the corporation's consent.[51] By linking liability to opportunities "belonging" to the corporation, opinions appear to embrace the notion that an opportunity is a corporate asset which can be misappropriated. While this property framing is intuitive, it is also tautological, as "the concept of property is no more nor less than the rights and obligations recognized by law."[52] To say that a particular opportunity belongs to the corporation is merely to state a legal conclusion that it is wrongful or somehow unfair for the defendant to take it. It doesn't answer the question: *which* opportunities may the fiduciary take?

U.S. courts developed a host of factors for determining whether the fiduciary's taking of an opportunity was appropriate. These factors include: whether the opportunity in question is within the company's line of business, whether the company has a present interest or a

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[48] *Regal (Hastings) Ltd*., at 154 (Lord Wright).

[49] Guth v. Loft, 5 A.2d 503, 510 (Del. Ch. 1939). *See* Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 YALE L.J. 277, 299-300 (1998).

[50] *See* Pat K. Chew, *Competing Interests in the Corporate Opportunity Doctrine*, 67 N.C. L. REV. 435, 465 (1989) (noting that "There is considerable variation among states' laws. In some jurisdictions the law is confused and unpredictable."); SHEPHERD, *supra* note 12, at 274 ("Finding a precise rule to govern [opportunities] has been a difficult and, on the whole, unsuccessful undertaking");

[51] *Cf.* Victor Brudney & Robert Charles Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997 (1981) (" . . . corporate fiduciaries cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation").

[52] Henry G. Manne, *Insider Trading and the Law Professors*, 23 VAND. L. REV. 547, 550 (1970).

reasonable expectancy in the opportunity, whether the company is financially capable of exploiting the opportunity, whether the opportunity is uniquely valuable or essential to the corporation's business, whether the fiduciary first learned of the opportunity in her personal or professional capacity, whether the third party providing the opportunity has refused to deal with the corporation, whether the fiduciary's taking of the opportunity was "fair" to the corporation, and whether the corporation impliedly consented to the fiduciary's taking of the opportunity.[53] Through the selective and subjective application of these factors, U.S. courts allocated a greater proportion of potential opportunities to the corporate fiduciary than courts in the U.K.

There are, however, a few U.S. cases that appear to be more in line with the stricter, English approach. In those cases, courts have employed the anti-corruption norm and embraced the temptation rationale. The Second Circuit opinion of *Irving Trust Co. v. Deutsch* (1934)[54] is a prominent example. It departs from the primary American approach,[55] which permits the fiduciary to take the opportunity if the corporation lacks the ability to exploit it due to financial, legal or other constraints.[56] This departure is important because demonstrating corporate incapacity was a common method by which defendants were able to show the absence of harm.

In *Irving*, a syndicate composed (mostly) of directors of Acoustic Product Company purchased for themselves (out of their personal funds) a minority interest in the stock of another corporation which owned patents that were "concededly essential to Acoustic['s]" continuing business.[57] The directors justified their personal investment on the ground that Acoustic was not able to make the acquisition itself due to its impaired credit. In short, the directors believed it was a mutually beneficial proposition: they could speculate in stock for their own benefit and at the same time help out the company under their stewardship by granting it access to the necessary patents.[58] It turned out to be a smart business proposition—at least for the directors. After obtaining board approval for their actions,[59] the directors reaped large profits when they sold their shares on the open market. Unfortunately

[53] *See id.* at 830-37; Kershaw, *supra* note 46, at 608.
[54] Irving Trust Co. v. Deutsch et al, 73 F.2d 121 (2d Cir. 1934).
[55] Chew, *supra* note 50, at 472 (noting that Irving runs counter to the prevailing trend).
[56] *See* Brudney & Clark, *supra* note 51, at 1020-21.
[57] *Irving Trust Co.*, 73 F.2d at 123.
[58] *Id.* at 124.
[59] *Id.* at 122-23.

for Acoustic, access to the valuable patents did not prevent it from having to file for bankruptcy. The trustee of the bankrupt estate sued the defendants for an accounting of the profits made, and the district court dismissed the complaint.

On appeal, the appellate court reversed the dismissal as to some of the defendants, including the directors. It affirmed the equitable rule that "fiduciaries should not be permitted to assume a position in which their individual interests might be in conflict with those of the corporation."[60] Although it harbored specific doubts about the directors' hasty conclusion that Acoustic was unable to make the acquisition itself, it did not ask the district court to revisit this factual finding. Instead, it argued that evidentiary challenges to ascertaining true motive demonstrated "the wisdom of a rigid rule forbidding directors of a solvent corporation contract on the plea of the corporation's financial inability to perform." The court imagined what would happen if this rigid rule contained an explicit exception for corporate financial incapacity:

> If directors are permitted to justify their conduct on such a theory, there will be a temptation to refrain from exerting their strongest efforts on behalf of the corporation since, if [the corporation] does not meet the obligation an opportunity of profit will be open to them personally. Indeed, in the present suit it is at least open to question whether a stronger effort might not have been made on the part of the management to procure for Acoustic the necessary funds or credit.[61]

Thus, the court seemed to embrace the temptation rationale, suggesting that directors should avoid situations where the incentive to advance their self-interest at the expense of their corporation would be strong. After all, their duty "was to determine with an eye single to the interests of their corporation whether to make the contract on its behalf, in an enterprise in which their personal interests might be antagonistic to their fiduciary obligations."[62]

Another way that U.S. courts have pushed cases to a result more in line with the English rule was by defining the corporation's "line of business" so broadly that almost any opportunity would be deemed to belong to the corporation. The Delaware Chancery Court case of *In re eBay, Inc. S'Holders. Litig.* (2004)[63] is illustrative. Shareholders of eBay filed a derivative action against certain eBay directors and officers

[60] *Id.* at 124.
[61] *Id.* (citations omitted).
[62] *Id.* at 126.
[63] No. C.A. 19988-NC, 2004 WL 253521 (Del. Ch. Jan 23, 2004).

seeking an accounting of their profits.[64] Plaintiffs alleged that eBay's investment banking advisor, Goldman Sachs Group, wrongfully allocated to certain eBay insiders lucrative investment opportunities that rightfully belonged to the corporation.[65] In a practice known as "spinning," Goldman Sachs provided to eBay insiders thousands of shares from hundreds of initial public offerings (IPOs) underwritten by Goldman Sachs. At the time, the IPO market was very active, and IPO investors often saw their stock double or triple in a single day.[66] Accordingly, the eBay insiders, who bought IPO shares at the below-market initial offering price, quickly sold their investments into millions of dollars of instant profit. Although the court treated this issue as a corporate opportunity case, it acknowledged and effectively endorsed plaintiff's alternative theory that Goldman Sachs had paid bribes or kickbacks to the eBay insiders, as the IPO allocations were arguably intended "as an inducement to maintaining the business relationship in the future."[67]

The defendants made a motion to dismiss, arguing that these IPO investment opportunities were outside eBay's line of business and thus not belonging to eBay. Their motion was buttressed by the fact that eBay was not an investment company under the federal securities laws and eBay's business was easily distinguishable from that of mutual funds, for example. As the court acknowledged, eBay is a "pioneer in online trading platforms, providing a virtual auction community for buyers and sellers to list items for sale and to bid on items of interest." But the court ultimately rejected defendants' motion and insisted that eBay was "in the business of investing in securities;"[68] thus, the opportunity fell within eBay's line of business. In holding so, the court seemed to embrace the temptation rationale, arguing, "it is easy to understand how steering such commercial rebates to certain insider directors places those directors in an obvious conflict between their self-interest and the corporation's interest.[69]

The court's conclusion that the IPO opportunity fell within eBay's line of business is consistent with economic theory suggesting that any "business opportunity may fall within the opportunity set of publicly held corporations" so long as the opportunity has the potential of producing a "risk-adjusted rate of return at least matching that of its

[64] *Id.* at 1- 2.
[65] *Id.* at 4.
[66] *Id.* at 1.
[67] *Id.* at 5.
[68] *Id.* at 4.
[69] In re eBay, Inc., 2004 WL 253521, at 4.

current operations."[70] Of course, this view, taken to its logical end, translates into there being no meaningful limit on what constitutes an opportunity belonging to the corporation; hence, this view potentially brings the American corporate opportunity doctrine in line with the strict English rule.

In sum, the opportunities rule has potentially broad reach. Courts have punished fiduciaries despite a showing that the beneficiary was financially incapable of exploiting the opportunity (as in *Regal* and *Irving*) and by defining broadly what counts as an opportunity belonging to the beneficiary (as in *eBay*). In other cases, courts have imposed liability for failing to exhaust alternative business options.[71] That said, most U.S. courts have rejected the stricter English approach and proscribed the undisclosed use of an entrusted position for self-regarding gain only in uncommon circumstances.

III. LEASE RENEWALS AND REVERSIONS

There is one subset of opportunities that seemed to run counter to the general trend in the U.S. of increasing flexibility. That subset concerns lease renewals and reversions, and the relevant rule generally prohibits fiduciaries from exploiting their positions for self-regarding gain in competition with the beneficiary where the gain in question takes the form of a property interest and where the nexus between the gain and the entrusted position is perhaps clearer. A review of the caselaw on renewals and reversions reveals a gradual expansion in application as courts have struggled to apply the opportunities rule to situations consistent with the vague rationale adopted in one of the earliest cases in fiduciary law.

In *Keech v. Sandford* (1726),[72] the tenant of a leasehold died, leaving behind a valuable lease of the "profits of a market" as part of the trust corpus for whom the sole beneficiary was an infant. The trustee sought to renew the lease on behalf of the infant-beneficiary, but the lessor refused. Then, with the lessor's agreement, the trustee took on the renewal for himself personally. An action was brought against the trustee on the infant's behalf for an accounting of profits obtained by the trustee from the lease.

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[70] Brudney & Clark, *supra* note 51, at 1025.

[71] *See, e.g.*, Perlman v. Feldmann, 219 F. 2d 173, 177 (1955) ("Only if defendants had been able to negate completely any possibility of gain by [their corporation through the adoption of an alternative business plan] could they have prevailed [and not been found liable].").

[72] Keech v. Sandford (1726) 25 Eng. Rep. 223, 223; (1726) 2 Eq Cas Abr 741 (U.K.).

The court found in favor of the infant-beneficiary, holding that the trustee must hold the new lease in trust for the infant, notwithstanding the lessor's refusal to deal with the infant. The court enunciated the strict rule that "wherever a lease is renewed by a trustee or executor, it shall be for the benefit of *cestui que* use[.]" The court premised the rule not on a finding of fraud or lack of good faith on the part of the trustee but on the hypothetical negative consequences that should follow from the adoption of the opposite rule:

> [I]f a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que* use; though I do not say there is a fraud in this case, yet he [the trustee] should rather have let it run out, than to have had the lease to himself.[73]

In other words, if the court permitted trustees to obtain personally renewals of leases originally held by their beneficiaries, then we should expect that few leaseholds would be renewed on behalf of beneficiaries. This explanation is vague, although we can probably say that, similar to the temptation rationale, it presumes that trustees will act on their self-interested motives in the hypothetical situations.

Perhaps as a consequence of the vague rationale offered by *Keech*, some cases have emphasized the improper interference of the "tenant's right of renewal."[74] Cases have occasionally characterized the renewal as a "graft upon the old stock,"[75] a "graft on the original interest,"[76] or, less metaphorically, as an "extension or continuation of" the original lease.[77] Such cases seem to employ a property-based analysis, differing from the incentives-based rationale seemingly espoused in *Keech v. Sandford*. Judicial reliance on these alternative characterizations suggests that the temptation rationale and attendant concerns about illicit motive are not exclusive of other concerns.

The rule prohibiting trustees from taking on renewals was extended to non-trust fiduciary situations.[78] For example, in *Mitchell v. Reed* (1874),[79] the court held that the defendant must account to his co-

[73] *Id.*

[74] *See, e.g.*, Lee v. Vernon_[1776] 2 Eng. Rep. 500; 5 Bro. P.C., 10 [Eng. ed., 1803]; Mitchell v. Reed, 61 N.Y. 123, (1874) (discussing *Lee v. Vernon*).

[75] Anderson v. Lemon, 8 N.Y. 236, 237 (1853).

[76] Griffith v. Owen, [1907] 1 Ch. 195 at 204 (Eng.).

[77] Bevan v. Webb, [1905] 1 Ch. 620 at 625-26 (Eng.). ("renewed lease is treated as a graft or addition to the trust property and itself forms part of the trust property").

[78] *See Mitchell*, 61 N.Y. 123; *In re* Lord Renelagh's Will, (1884) 26 Ch. D. 590 (Eng.).

[79] *Mitchell*, 61 N.Y. 123.

partners in a limited term real estate partnership for the value of renewal leases personally obtained by him prior to the expiration of the partnership. It reminded the defendant that the "relation of partners with each other is one of trust and confidence"; hence, each partner "is bound to act in entire good faith to the other." Accordingly, "[e]very advantage which he can obtain in the business of the firm must enure to the benefit of the firm. . . . [W]hen one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm as to the renewed lease."[80]

The court then proceeded to imagine what would happen if the court were to adopt the opposite rule and the defendant were not so restricted. It envisioned a scenario in which the defendant obtained the renewal leases immediately after the commencement of the partnership:

> There would thus have been, during the whole term, in making permanent improvements and in furnishing the hotel, a conflict between his duty to the firm, and his self-interest. Large investments and extensive furnishing would add to the value of his lease, and defendant would be under constant temptation to make them. While he might not yield to the temptation, and while proof might show that he had not yielded, the law will not allow a trustee thus situated to be thus tempted, and therefore disables him from making a contract for his own benefit.[81]

The court thus conceded that there was no evidence to support that the defendant had *yielded* to the temptation to make bad choices for the partnership, noting that the lower court found all lease improvements to be "judicious and prudent." Nonetheless, it insisted that "the law will not allow a trustee thus situated to be thus tempted[.]" Tellingly, it emphasized the slyness of the defendant's acts, noting *seven* times that he acted "secretly" and *six* times that he was "clandestine" or had acted "clandestinely." The court concluded that the "plaintiff was entitled to the unbiased judgment of the defendant as to such improvements, uninfluenced by his private and separate interest." In short, the court favored a blanket rule prohibiting renewals as a way of foreclosing temptation.

In *Meinhard v. Salmon* (1928),[82] the court extended the rule against renewals to cover joint ventures. The defendant, the managing joint venturer for a business that held a lease, surreptitiously and personally entered into a new lease with the landlord to begin at the expiration of the joint venture's lease term. The new lease covered a much larger footprint than and contained substantially different terms from the joint

[80] *Id.* (citations omitted).
[81] *Id.*
[82] 164 N.E. 545 (1928).

venture's lease. Therefore, it was not "strictly a renewal" of the original lease.[83] Nonetheless, the situation warranted the application of the anti-corruption norm because there was a clear nexus between the defendant's entrusted position and the new opportunity. As the court put it, "the subject-matter of the new lease was an extension and enlargement of the subject-matter of the old one."[84] As a result, the court found the defendant to have breached the fiduciary duty owed to his co-adventurer and imposed a constructive trust on the profits to be gained during his new leasehold. Judge Cardozo, writing for the majority, famously noted:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.[85]

This passage reveals the court's assessment that the defendant's conduct was not particularly reprehensible for parties bargaining at arm's length. Indeed, the court clarified that it was not holding that the defendant was "guilty of a conscious purpose to defraud" and that it was "very likely" that he acted in "all good faith."[86] Still, the passage suggests that the defendant's conduct fell below the standard *expected* of one occupying an entrusted position. By highlighting the clandestine manner of the defendant's actions, the court suggested that the defendant had acted wrongfully: the defendant "had not told [the plaintiff] anything about [the lease]. Whatever his motive may have been, he had kept the negotiations to himself."[87] The defendant "appropriate[d] to himself [the preemptive opportunity] in secrecy and silence."[88] He "had acted slyly."[89]

[83] *Id*. at 547.
[84] *Id*. at 548.
[85] *Id*. at 546 (citations omitted).
[86] *Id*. at 548.
[87] *Id*.
[88] *Id*. at 547.
[89] *Id*.

Originally, the opportunities rule did not apply to reversions, and courts in the U.S. and England generally treated a fiduciary's purchase of a reversion with greater flexibility than renewals. For example, in *Bevan v. Webb* (1905),[90] the court held that where there is no custom or contract by which the lease in question is renewable, a trustee of an existing lease may buy the reversion for his own benefit, absent a showing of fraud.[91] The asserted reason was that reversions were not regarded as grafts or additions to the leasehold trust property[92] but rather "a totally different subject"—one for which the original tenant would not have had a reasonable expectancy in acquiring.[93] Stated another way, the connection between the purchase of the reversion and the original leasehold is more remote than the connection between a renewal leasehold and the original leasehold. However, as courts gradually realized, both renewals and reversions have an equally strong potential for abuse arising from the fiduciary's greater access to information about the property not generally available to the public. Eventually, the more flexible approach to reversions gave way to a stricter application.[94]

Maas v. Goldman (1924)[95] is an example of the stricter approach to reversions in the U.S. In *Maas*, the defendant, without disclosure to his partners, purchased from the landlord (and subsequently sold) an undivided one-half interest in the premises on which the partnership held a lease. The court held the defendant liable to account to the partnership for his profits. It reasoned that the purchase of a reversion imperiled the possibility of future renewals much in the same way that a taking of a renewal would.[96] As the court noted, "the partner may . . . intercept and cut off the chance of future renewals, and consequently make use of his situation to prejudice the interests of his associations."[97] Citing the need to avoid the "possibility of conflict" between the self-interest of the fiduciary (as the new landlord) and the interest of the beneficiary (the partnership) and observing that the conflict was

[90] [1905] 1 Ch. 620 (Eng.).

[91] *Id.* at 620 (stating the rule handed down in Longton v. Wilbsy (1897) 76 LT at 770 (Eng.)).

[92] *Id.* at 631 (". . . even if the reversion could be treated as a graft or an addition to something possessed by the firm, or by the cestuis que trust, there is not in this case anything to which it could be grafted").

[93] *Id.* at 626 ("But the fee is a totally different subject, which the testator had it not in his contemplation to acquire or dispose of.").

[94] *See, e.g.*, Protheroe v. Protheroe [1968] 1 WLR 519 (C.A.) (Eng.); *Thompson's Trustee in Bankruptcy v. Heaton*, [1974] 1 WLR 605 (Eng.).

[95] 203 N.Y.S. 524 (Sup. Ct. 1924).

[96] *Id.* at 525-26 (citations omitted).

[97] *Id.*

basically the same for both renewals and reversions, the court seemed to have espoused the temptation rationale:

> It seems to me that decidendi expressed in [earlier opinions] applies with equal force to a purchase of a reversion in fee as to the purchase of a reversionary lease. The hope or the probability or the possibility of continuing the business is the same. The *possibility* of conflict between a partnership interest and a landlord interest is not essentially different. Every reason for requiring the utmost good faith in one case is present in the other.[98]

To be clear, the court believed that the prophylactic nature of the rule was not inconsistent with the wrongfulness of the defendant's purchase. Notably, the court opined, "One is greatly shocked by a clandestine purchase as by a clandestine renewal."

In sum, for a subset of opportunities relating to property interests, we see a gradual expansion in the opportunities rule from trust situations to non-trust situations and from renewals to reversions. This expansion seems entirely consistent with the broad but vague incentives-based rationale adopted by *Keech*.

IV. CONFIDENTIAL INFORMATION

In some situations, the beneficiary is not entitled to exploit the profit-making opportunity. Hence, the complaint is not so much that the fiduciary has diverted an opportunity that should have been offered to the beneficiary in the first instance but, rather, that the fiduciary has simply misused confidential information that was entrusted to him for the exclusive benefit of the beneficiary. Still, as with opportunities, the misuse of confidential information is objectionable because the fiduciary has used her entrusted position for self-regarding gain, without disclosing this fact to the beneficiary.

But there are two reasons why the conduct *may* be less objectionable than the typical opportunities scenario. First, information can be consumed nonrivalrously; hence, its exploitation by the fiduciary for personal gain does not necessarily undermine its value for the beneficiary. By contrast, when a fiduciary has taken an opportunity belonging to the corporation, that lost opportunity's value to the corporation may be zero. Second, there is a strong competing policy interest in avoiding restraints on trade and competition. Although this same concern also applies to opportunities, it is arguably much more intrusive to tell the fiduciary he cannot personally benefit from the information residing in his head than to tell him that he cannot pursue a profit-making opportunity that would affirmatively benefit the

[98] *Id*. at 526 (emphasis added).

beneficiary. Perhaps for these reasons, courts appear to be more cautious about invoking the anti-corruption norm and imposing liability in the absence of harm. Still, some courts have refrained from requiring a showing of *economic* harm and have held fiduciaries liable in situations where the supposed harms were unquantifiable or even amorphous.

In *Snepp v. United States* (1980),[99] the Supreme Court imposed liability for the misuse of confidential information in the absence of quantifiable harm. In *Snepp*, a former CIA agent published a book about certain CIA activities in South Vietnam without submitting the manuscript to the agency for prepublication review in violation of the agency's policy and the agent's employment agreement. The U.S. sued the agent, seeking to impose a "constructive trust for the Government's benefit on all profits that former agent might earn from publishing book in violation of his fiduciary obligations to the CIA." The Supreme Court held that the agent breached his fiduciary obligation and impressed the profits arising from the breach with a constructive trust. According to the court, it made no difference that the book contained no classified information. Indeed, the Government conceded the absence of classified material.[100]

Although the agent's blatant violation of CIA policy contributed to the court's perception of wrongfulness, the court emphasized that the agent had committed a breach of trust in a *fiduciary* capacity rather than merely breached a contract or disobeyed a policy as an employee. The employment agreement "was no ordinary contract; it gave life to a fiduciary relationship and invested in Snepp the trust of the CIA."[101] And while the court agreed with the conclusions of the lower courts that Snepp's breach inflicted *irreparable* harm on intelligence activities,[102] it ultimately conceded that "the actual damages attributable to a publication such as Snepp's generally are unquantifiable."[103] Nonetheless, a constructive trust requiring the agent to "disgorge the benefits of his faithlessness" was deemed appropriate and "tailored to those who would place sensitive information at risk."[104]

[99] 444 U.S. 507 (1980).
[100] *Id*. at 511.
[101] *Id*. at 510 (quoting Judge Hoffman, who cited the Restatement (Second) of Agency, §§ 395-396).
[102] *Id*. at 513.
[103] *Id*. at 514.
[104] *Id*. at 515.

In *Diamond v. Oreamuno* (1969),[105] shareholders filed a derivative action in New York state court against the officers and directors of the company to account for gains (in the form of losses avoided) generated from trades in the company's stock based on material non-public information "acquired by them solely by virtue of their positions."[106] In denying the defendants' motion to dismiss, the court suggested that the rule proscribing the use of confidential information for one's own personal benefit derived from the rule "that prohibits a trustee or agent from extracting secret profits from his position of trust."[107] Importantly, unlike Delaware's *Brophy v. City Service Co.* (1949),[108] the *Diamond* defendants were not competing with their company, as the company was not trading in its own shares;[109] hence, the defendants had not deprived their company of any concrete gains. Nevertheless, the court declined to require a showing of damages to state a claim based on breach of fiduciary duty. To require damages would be inconsistent with the prophylactic nature of such a claim, whose function it was "'to *prevent* [wrongs], by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates.'"[110]

While the court aimed to *prevent* wrongs, it clarified that the trading itself was wrong: "[The defendants] were assertedly able in this case to profit solely because they had information which was not available to any one else–including the other shareholders whose interests they, as corporate fiduciaries, were bound to protect."[111] Even the defendants conceded that it was "wrong for an officer or director to use his position to obtain trading profits for himself in the stock of his corporation" and that they "possess[ed] an unfair advantage over other shareholders."[112] It also clarified that while a showing of damages was unnecessary, the defendants' actions caused harm to the company's ability to maintain "a reputation of integrity, an image of probity, for its management and in

[105] 248 N.E.2d 910 (N.Y. 1969).
[106] *Id.* at 911.
[107] *Id.* at 912 (citations omitted). *But see* Freeman v. Decio, 584 F.2d 186, 196 (7th Cir. 1978) (not liable); Schein v. Chasen, 313 So. 2d 739, 749 (Fla. 1975) (not liable).
[108] 70 A.2d 5 (Del. Ch. 1949).
[109] *See* STEPHEN BAINBRIDGE, SECURITIES LAW: INSIDER TRADING 19 (2nd ed. 2007).
[110] *Diamond*, 248 N.E.2d at 912 (citations omitted).
[111] *Id.* at 913.
[112] *Id.* at 912.

insuring the continued public acceptance and marketability of its stock."[113]

In sum, *Snepp* and *Diamond* show that a fiduciary's exploitation of confidential information acquired by virtue of the entrusted position in pursuit of self-regarding gain without the consent of the beneficiary can be deemed a breach of the duty of loyalty. The fiduciary may be called to account for the profits even when the harm in question is unquantifiable or amorphous.

CONCLUSION

As a review of the anti-corruption norm demonstrates, the range of improper conduct that could be associated with corruption is broad. Courts have broadly but inconsistently proscribed the fiduciary's use of an entrusted position for self-regarding gain where the fiduciary failed to disclose the gain to his beneficiary. Courts have done so by adopting a number of proscriptive conduct rules in different contexts in an attempt to foreclose the temptation of the fiduciary to disloyally exercise his fiduciary judgment. In adopting such rules, courts have often embraced the explanation that fiduciaries ought to avoid placing themselves in situations where there is a conflict between their duty and their self-interest, lest the temptation be too great to resist. At the same time, courts have occasionally regarded the breach of the prophylactic rule itself is wrongful.

[113] *Id*. at 912-13 (citations omitted).