# Contract, Trust and Corporation: from Contrast to Convergence

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*This Article presents a new theory of fiduciary relationships. Using legal analysis, legal theory and the results of an unprecedented global survey of professional fiduciaries, I show that fiduciary relationships are not now fundamentally different from contractual relationships. I then show how different types of fiduciary relationships are converging. Scholars commonly claim that trusts are very different from corporations, and that the fiduciary obligations imposed on trustees are more severe, and more severely enforced, than those imposed on corporate directors and officers. I show how this view is not borne out by large parts of both current law and current practice. That neither fiduciary relationships generally, nor traditionally distinct types of such relationships, can now be distinguished from other relationship types expresses the current reformulation of most social and economic relationships as short-term, arm's length, commodified transactions. Because it expresses such an overall transformation, the commodification of fiduciary relationships is unlikely to be reversible by law reform returning fiduciary law to its protective roots.*

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## I. INTRODUCTION

According to the classical understanding of fiduciary relationships, they are not contractual: they form a separate category of relationships, essentially different from contracts. Contractual relationships are characterized by complete ex ante specification of the parties' duties, while fiduciary relationships are characterized by the use of pre-existing frameworks of relationship governance, leaving much of the detail for the fiduciary to unilaterally settle ex post, with the beneficiary's interests in mind. While fiduciary duties are imposed on corporate directors and officers as much as on trustees, those imposed on trustees are more severe, and are more severely enforced, than those imposed on corporate directors and officers. This Article presents and justifies a new, empirically grounded theory of modern fiduciary relationships. Using legal analysis, legal theory and the results of an unprecedented global survey of professional fiduciaries I have recently conducted, I show, in Part II, that fiduciary relationships are not now fundamentally different from contractual relationships. The survey results demonstrate that trust drafters are in fact highly likely to replace features of the default law governing the trust with alternative arrangements, specifying many of the parties' rights and duties ex ante in great detail. They are thus highly likely to engage in the very conduct traditionally seen as characteristic of contractual, but not of fiduciary relationships. Trust drafters are equally likely to replace features of the default law governing the trust with alternative arrangements, whether the trust was created by contract or non-contractually, as by a unilateral trust deed or

declaration of trust. I then go on to show, in Part III, how the common view that trusts are very different from corporations, and that the fiduciary obligations imposed on trustees are more severe, and more severely enforced, than those imposed on corporate directors and officers, is not borne out by either current law or current practice. Trusts are converging with corporations by way of the exculpatory and duty-abridging terms trust instruments increasingly contain, as well as by way of statutory reform. That neither fiduciary relationships generally, nor traditionally distinct types of such relationships, can now be distinguished from other relationship types is a result of the commodification of fiduciary services, which have been transformed from an intimate, often long-term relationship to an anonymous, arm's length transaction. Because this reorientation of fiduciary relationships follows and expresses the social alienation and relationship commodification characteristic of current society, reversing it is likely to be difficult. Only harsh reform measures, such as holding fiduciary duty-abridging and exculpatory terms to be void, have some chance of success, and even they are likely to be stymied by current consumer preferences: if jurisdictions return fiduciary law to its protective roots, fiduciaries are likely to demand premium prices, and potential clients to prefer the cheaper, commodified, less protective model of fiduciary relationship.

## II. FIDUCIARY RELATIONSHIPS AND CONTRACT

In this Part, I examine the classical understanding of fiduciary relationships, which holds that fiduciary relationships are very different from contracts: while contractual

parties fully specify their rights and duties at the drafting stage, parties to fiduciary relationships merely elect into a general frame of relationship governance, expecting the fiduciary to unilaterally fill that frame with detail during performance. I find, using legal theory, legal analysis and newly-collected empirical data, that this understanding fails to account both for the nature of modern contracting and for that of current fiduciary relationships. While the common law has traditionally addressed contracts and fiduciary relationships separately, there are currently no reasons, either principled or practical, to maintain this separation. Fiduciary relationships are not now fundamentally different from contractual relationships.

### A. *Fiduciary Contractarianism*

In a 1995 article entitled "The Contractarian Basis of the Law of Trusts", John Langbein argued that while contract law and trust law have long evolved as separate doctrinal fields, "the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts."[1] The fact that "the existence of specifically identified property (the trust res) is necessary for trust formation"[2] merely adds that trusts are contracts having to do with property; it does not prove the identification of

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1 John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995) [hereinafter Langbein, *Contractarian Basis*].
2 Robert Sitkoff, *An Agency Cost Theory of Trust Law*, 89 CORNELL L. REV. 621, 629 (2004) [hereinafter Sitkoff, *Agency Costs*].

trusts as a genre of contracts wrong.[3] Henry Hansmann and Ugo Mattei "agree[d] with Langbein that, so far as the relationships between the settlor, the trustee, and the beneficiary are concerned, trust law adds very little to contract law."[4]

Langbein fleshed out his idea. He "notice[d]" how modern developments in contract law bring it ever closer to trust law, making clear the common elements.[5] Courts have neutralized the rule that specific relief is only available in contract where plaintiff shows that damages are an inadequate remedy, "by defining adequacy in such a way that damages are never an adequate substitute for plaintiff's loss".[6] "Accordingly, the remedial tradition

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[3] Ming-Wai Lau commented that "[t]here really is nothing special about trusts as contracts precisely because trusts do not exist primarily to enforce economic exchanges; this is why the 'contractual elements' of trusts appear so ordinary" (THE ECONOMIC STRUCTURE OF TRUSTS 144 (2011)). The view that many trusts use contractual scaffolding to fulfil purposes unlike those which typically animate contracts appears based on too narrow and stereotypical a view of both trusts and contracts. Many contracts do not "exist primarily to enforce economic exchanges", a prime example being "the modern third-party-beneficiary contract" to which Langbein referred. Trusts, on the other hand, often exist "primarily to enforce economic exchanges", as with commercial trusts, security trusts and pension trusts.

[4] Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 470 (1998) [hereinafter Hansmann & Mattei, *Comparative*]. Trust contractarianism is one branch of a broader academic effort, deeply influenced by the economic analysis of law, to state the law of contracts as a unifying theory of private law (and perhaps of law as a whole, taking into account contractarian theories of criminal law, constitutional law, public international law and so on). See Langbein, Contractarian Basis, *supra* note 1, at 630; Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 305 (1999); David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1677-79 (2009).

[5] Developments in trust law also contribute to the closing of remaining differences between the two bodies of law. The Uniform Trust Code, promulgated in 2000 and since enacted in 30 States, gave settlors of irrevocable trusts, contrary to the common law position, standing to "request the court to remove a trustee": UNIFORM TRUST CODE § 706(a) (2010) [hereinafter U.T.C.]. See references to different states' enacted versions of the U.T.C., until 2012, in the recent RESTATEMENT (THIRD) OF TRUSTS§ 105 reporter's notes to cmt. c (2012). The controversial character of settlor standing is clear in the RESTATEMENT having failed to adopt it: *id.* § 94 cmt d(2). While under contract law, one contracting party cannot ask the court to remove or replace the other, all parties have standing in court, whereas under the common law of trusts, settlors did not have standing once the trust was launched. The granting of standing to settlors under the U.T.C., even if in a specific context only, brings trust law closer to contract law. Unsurprisingly, Lau, being loyal to the traditional common law understanding of trusts as non-contractual, criticized Langbein's support for settlor standing: LAU, *supra* note 3, at 33-34.

[6] Langbein, *Contractarian Basis*, *supra* note 1, at 652-53. The quote, which appears *id.* at 653, note 144, is from Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 691 (1990). See, however, later case law emphasizing that in order to obtain injunctive relief in contract a plaintiff must, according to the

of the trust with its ready facility for specific relief no longer distinguishes the trust importantly from contract law".[7] Contract-focused decisions and scholarship have become sensitized to the particular characteristics of the long-term relational contract, where specifying in the contract the contents of each party's undertaking is harder than as regards short-term deals. Standard donative trusts are similarly long-lived, and trustees cannot be furnished, at creation, with complete guidance for the exercise of their discretion throughout the life of the trust. Langbein recalled how "Goetz and Scott identify various "fiduciary" relations -including those involving attorneys, executors, and partners - that "are properly analyzed as relational contracts because they tend to be characterized by uncertainty about factual conditions during performance and an extraordinary degree of difficulty in describing specifically the desired adaptations to contingencies."[8] He added that "the good faith standard in contract law echoes the norms of trust fiduciary law, which regulate the trustee's embedded discretion in performing the trust deal."[9] While beneficiaries who did not also create the trust often do not voluntarily choose to enter into a relationship with their trustees, their situation is similar to that of contractual third party beneficiaries. Some trust beneficiaries inject a volitional dimension into the trust relationship by modifying it. They may do so, for example, by consenting to trustee

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four-factor test established in equity, supply the court with some sort of positive evidence indicating that damages would not constitute an adequate relief: See eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

[7] Langbein, *Contractarian Basis*, *supra* note 1, at 653.

[8] *id.* at 653-54, note 151, citing Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091, 1127 (1981).

[9] But note the view of John Kidwell (*A Caveat*, WIS. L. REV. 615 (1985)) and Lisa Bernstein (*Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L. J. 59, 76-81 (1994)) that relational contracts should be interpreted with a strict, formalist approach, realizing parties' sharing *ex ante*.

behavior that would otherwise breach duties which are part of the default law of trusts, such as trustees' duties of loyalty and prudence.[10]

B. *The Challenge to Fiduciary Contractarianism*

Langbein's fiduciary contractarianism has recently been challenged by writing on fiduciary relationships which re-emphasizes the classical distinction between contractual and fiduciary relationships. One key current exponent of this traditional distinction is Daniel Markovits.[11]

Markovits believes that fiduciary relationships are deeply different from contracts, in that contracts specify the parties' complete duties ex ante, while fiduciary relationships express a choice of a pre-existing framework of relationship governance, leaving much of the detail for the fiduciary to unilaterally settle ex post with the beneficiary's interests in mind.[12] He notes that contract law permits efficient breaches by making expectation damages the preferred remedy for breach of contract. Fiduciaries, on the other hand, are not permitted to efficiently breach their obligations; disgorgement of their gains is a

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[10] Langbein, *Contractarian Basis*, *supra* note 1, at 660.

[11] Ming-Wai Lau, another opponent of fiduciary contractarianism, emphasizes doctrinal differences between English trust law and contract law, eschewing Markovits' theoretical concerns (*supra* note 3, at 20-35). Lau explains away many of the trust law reforms of the past half-Century which emphasize the contractual dimension of trusts, such as statutory legitimation of trustee duty waivers, that of settlor-reserved powers and the decline of beneficiaries' rights and powers, regarding them as instances of trust law having strayed from the true path (*id.* at 30-34). He distinguishes contract from consensual agreement, noting that "[fiduciary] contractarians would garner more support if they characterized companies or trusts as consensual agreements, rather than insisting on contract law and the narrow and technical doctrines and terminologies it carries" (*id.* at 30). Fiduciary exceptionalism is, of course, not a new phenomenon. For an earlier exponent, see FitzGibbon, *supra* note 4; even earlier, see Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 37 DUKE L.J. 879 (1988).

[12] Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 209 (Andrew S. Gold & Paul B. Miller eds., 2014). Cf. the contractarian view of Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426-27 (1993), that "[A] "fiduciary" relation is a contractual one characterized by unusually high costs of specification and monitoring. The duty of loyalty replaces detailed contractual terms ....".

common remedy for breach of fiduciary duty.[13] Markovits points out that while contracts contain bespoke terms of sharing, fiduciary law's frameworks of relationship governance are creatures of the law.[14] While contractual parties are subject merely to a duty of acting in good faith, fiduciaries are subject to more demanding duties of loyalty and care.[15] While parties to a fiduciary relationship "may select among substantive specifications of fiduciary loyalty and care and indeed (often) waive certain elements of these duties",[16] such waivers, and fiduciary law's frameworks of relationship governance being defaults open to variation, do "not entail any general abandonment of fiduciary sharing ex post in favor of contract sharing ex ante. The terms of fiduciary sharing may be varied in substance, but not in form. Liberalization … is not contractualization."[17] He adds that "both the individual parties to fiduciary engagements and the broader legal order also possess interests in fiduciary relations for their own sakes."[18]

### C. *The Challenge Rebuffed*

Holding that fiduciary relationships are irreducibly different from contractual relationships offers comfort of several kinds. Not least, it fits the doctrinal tradition separating the law

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[13] Markovits, *supra* note 12, at 209. On efficient breach theory in contract law see Robert Birmingham, *Breach of Contract, Damage Measures and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970); the classic RICHARD A POSNER, ECONOMIC ANALYSIS OF THE LAW 55-61 (1972); RESTATEMENT (SECOND) OF CONTRACTS, ch. 16, intro. note (1981). For moralistic-deontological criticism of the theory see, e.g., Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 730-732 (2007). For criticism of the economic analysis involved see, e.g., Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989).
[14] Markovits, *supra* note 12, at 218.
[15] *Id.* at 209-210.
[16] *Id.* at 218-220.
[17] *Id.* at 222-223.
[18] *Id.*

governing fiduciary relationships from that governing contractual relationships. I find, however, that the arguments raised in support of classical fiduciary exceptionalism, outlined above, are fairly easily answered, concluding that fiduciary relationships are not now fundamentally different from contractual relationships.

Markovits attempts to distinguish between fiduciary and contractual relationships by noting that while contracts specify the parties' complete duties ex ante, fiduciary relationships express a choice of a pre-existing framework of relationship governance, leaving much of the detail for the fiduciary to unilaterally settle after the relationship is up and running, with the beneficiary's interests in mind. This characterization of each of the two relationship types appears incomplete, however. To take the fiduciary case first, many fiduciary relationships are expressed in contracts concluded between the fiduciary and his, her or its client or other counterparty. Instruments establishing fiduciary relationships often include clauses ousting features of the applicable pre-existing frameworks of relationship governance and replacing them with alternative provisions.[19] The alleged ex post character of the governance of fiduciary relationships is belied by the extreme detail and prolixity characteristic of many trust instruments: drafters of such instruments often make a considerable effort to specify the parties' complete rights and duties ex ante.

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[19]Trust service providers have been drafting trust instruments so as to waive some of the duties imposed by the default law of trusts since at least the mid-18th Century: see Adam Hofri-Winogradow, *The Stripping of the Trust: a Study in Legal Evolution*, 65 U. TORONTO L.J. 1, 4 (2015). See also Langbein, *Contractual Basis*, supra note 1, at 650: "virtually all of trust law is default law – rules that the parties can reject. The rules of trust law apply only when the trust instrument does not supply contrary terms (citing RESTATEMENT (SECOND) OF TRUSTS §164(a) (1959))". See RESTATEMENT (THIRD) OF TRUSTS§ 4 cmt a(1) (2003): "many (but not all) of trust law consists of default rules as opposed to mandatory or restrictive rules, and is therefore subordinate to the terms (or "law") of the trust".

To find out whether contract drafters tend to oust more of the pre-existing framework of relationship governance, specifying the parties' duties ex ante, than drafters of non-contractual fiduciary instruments, I conducted a survey of professional fiduciaries worldwide.[20] Such surveys are rare, due to the confidential character of much of the trust industry and the relative dearth of regulatory supervision over trustees of donative trusts. While some trustees, such as the institutional fiduciaries Robert Sitkoff and Max Schanzenbach studied,[21] are subject to registration and/or reporting requirements, they make an unrepresentative sample of the fiduciary population. Further, even where reporting requirements exist, data reported can be quite limited. For example, the institutional fiduciaries Sitkoff and Schanzenbach studied report their "trust holdings, including total assets and number of accounts"[22] as well as income earned on their fiduciary holdings, expenses incurred and any losses suffered, to federal banking regulators, but not the administrative or dispositive characteristics of trusts the assets of which they hold.[23] While trustees file tax returns for trusts they administer, those returns

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[20] I conducted the survey by emailing the membership of the three leading organizations of the estate planning profession: the part of the American Bar Association (ABA) Section of Real Property, Trust and Estate Law concerned with estate planning, the American College of Trusts and Estates Counsel (ACTEC), and the Society of Trusts and Estates Practitioners (STEP). All targets were invited to respond to an online survey. The survey, conducted between November 16, 2014 and April 20, 2015, is available here: http://tinyurl.com/ozuqekz (last accessed January 30, 2016). The full survey results, as well as a complete set of descriptive statistics, are available from the author.

[21] Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681 (2007); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006); Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005) [hereinafter Sitkoff & Schanzenbach].

[22] Sitkoff & Schanzenbach, *id.* at 388.

[23] For data the Federal Deposit Insurance Corporation currently requires from reporting institutions regarding fiduciary services they provide, see FEDERAL DEPOSIT INSURANCE CORPORATION, UNIFORM BANK PERFORMANCE

only include such data as is useful for tax collection. The I.R.S. collects and makes publicly available detailed data on income earned, deductions taken and federal tax paid by trusts, but not data on the administrative or dispositive characteristics of reporting trusts.[24] There is no trust equivalent to the large cache of corporate contracts deposited with the Securities and Exchange Commission, which many scholars have used to great profit.[25] My respondent pool of 409 fiduciaries, spread across the globe, is larger, as well as far more diverse, than those accessed in the few previous survey-based research projects focused on fiduciary practice.[26] I found that trust drafters are equally likely to replace features of the default law governing the trust with alternative arrangements, whether the trust was created by contract or otherwise, as by a unilateral trust deed or declaration of trust. Survey

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REPORT USER'S GUIDE: FIDUCIARY & RELATED SERVICES (2015) http://tinyurl.com/pz9d3m7 (last accessed January 30, 2016).

[24] I.R.S., SOI Tax Stats - Income from Estates and Trusts Statistics. http://www.irs.gov/uac/SOI-Tax-Stats-Income-from-Estates-and-Trusts-Statistics (last accessed January 30, 2016). The self-classification of reporting trusts, for income tax purposes, into simple, complex, grantor, split-interest, qualified disability and qualified funeral trusts does provide some rough data on the distribution of reporting trusts across these trust types, which each have their administrative and/or dispositive characteristics.

[25] Theodore Eisenberg and Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1973 (2006); Theodore Eisenberg and Geoffrey Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009); John Coates, *Managing Disputes through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295 (2012); Matthew D. Cain and Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. OF EMPIRICAL LEG. STUD. 92 (2012); Sarath Sanga, *Choice of Law: an Empirical Analysis*, 11 J. OF EMPIRICAL LEG. STUD. 894 (2014).

[26] Exactly four such research projects have reached publication: BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986) (surveyed the 50 largest of each of U.S. bank trust departments, corporate pension funds, foundations and private universities, 200 respondents in all, about their investment practices); Francis J. Collin et al., *A Report on the Results of a Survey about Everyday Ethical Concerns in the Trust and Estate Practice*, 20 ACTEC NOTES 201 (1995) (surveyed 262 members of the American College of Trusts and Estates Counsel (ACTEC) regarding their techniques for coping with the everyday ethical concerns raised by trust and estate practice); Martin D. Begleiter, *Does the Prudent Investor Need the Prudent Investor Act - An Empirical Study of Trust Investment Practices*, 51 ME. L. REV. 28 (1999) (surveyed 239 corporate trustees in Iowa about their investment practices, to examine the impact on those practices of Iowa legislation of 1991 reforming the traditional prudent man rule); THE [ENGLAND AND WALES] LAW COMMISSION, CONSULTATION PAPER NO. 171: TRUSTEE EXEMPTION CLAUSES 30-46 (2002) (surveyed 345 U.K. trustees and U.K. legal advisors to trustees and settlors about the prevalence of trustee exemption/exculpation terms, settlor attitudes towards such terms, and potential techniques for their regulation).

respondents estimated, on average, that 44.6% of the donative trusts they service were created by contract.[27] They further estimated, on average, that 60.57% of the donative trusts they service which were created by contract include clauses replacing features of the default law governing the trust with alternative arrangements,[28] while of the donative trusts they service which were created other than contractually, 61.02% include such clauses.[29] The frequency with which trust drafters rejected features of the default law governing the trust did not significantly differ between trusts created by contract and trusts created otherwise, $p > .1$. Moreover, respondents' estimations of the frequency of default rejection in trusts created by contract were highly correlated with their estimations of the frequency of default rejection in trusts created otherwise, $r_s = .67$, $p < .001$. This result suggests that certain trust drafters tend to replace features of the default law governing the trust more often than others, and that their preferences regarding default rejection remain consistent whether the trust instruments they are drafting are created by contract or otherwise.

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[27] N = 409. Median = 30%. Mode = 0%. Standard Deviation = 39.72%. 25.7% of respondents said that none (0%) of the donative trusts they service were created by contract, while 15.2% of respondents said that all (100%) of the donative trusts they service were created that way. Data were obtained in response to the following question: "Of the trusts you service, how many are created in a contract (rather than by an instrument other than a contract, such as a unilateral declaration)? Estimate using percentages." In order to have responses reflect the entire breadth of each respondent's acquaintance with donative trusts, rather than, for example, merely those trusts under which he or she functioned as trustee, I defined "trust services" broadly, as follows: "any of the following: trust drafting; functioning as trustee; functioning as protector; functioning as trust enforcer; functioning as custodian of trust assets; functioning as another type of trust officer; functioning as trustee delegate, such as an investment manager; advising settlors, trustees, protectors, trustee delegates or beneficiaries on trust affairs."

[28] N = 299. Median = 70%. Mode = 100%. Standard Deviation = 36.88%. Data were obtained in response to the following question: "Of the trusts you service which have been created in a contract, how many include clauses replacing default features of the trust regime (or law) governing the relationship with alternative arrangements? Estimate using percentages."

[29] N = 342. Median = 75%. Mode = 100%. Standard Deviation = 36.9%. Data were obtained in response to the following question: "Of the trusts you service <u>which have NOT been created in a contract</u>, how many include clauses replacing default features of the trust regime (or law) governing the relationship with alternative arrangements? Estimate using percentages." The comparison results are significant at the 0.0105 level.

Where both fiduciaries' duty of loyalty, including that to refrain from conflicts of duty and interest, and their duty of prudence are compromised by contract, as the recent Restatement (Third) of Trusts grants that they may,[30] the relevant pre-existing framework of relationship governance – the default law of trusts - is fundamentally transformed by contract. The common waiver of those duties disposes of another supposed distinction between contractual and fiduciary relationships: that while contractual parties are subject merely to a duty of acting in good faith, fiduciaries are subject to more demanding duties of loyalty and care.[31] Further, as Andrew Gold noted, "a contract can expressly create a duty of loyalty outside the fiduciary relation."[32]

Being aware of the common practice of parties to fiduciary relationships waiving aspects of fiduciaries' default duties, Markovits suggested that such waivers, and fiduciary law's frameworks of relationship governance being defaults open to variation, do "not entail any general abandonment of fiduciary sharing ex post in favor of contract sharing ex ante. The terms of fiduciary sharing may be varied in substance, but not in form. Liberalization … is not contractualization".[33] It is hard to deny, however, that where a settlor and trustee contract to bypass some of trust law's default rules, releasing the trustee,

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[30] Duty of loyalty: RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2007): "[e]xcept as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose". See also Langbein, *Contractual Basis*, supra note 1, at 659: "the duty of loyalty is default law that yields to contrary terms of the trust deal". For the duty of prudence, see RESTATEMENT (THIRD) OF TRUSTS § 77 cmt d (2007): "the normal duty of prudence in matters of administration is default law, the terms of the trust may modify or relax its requirements".

[31] As D. Gordon Smith noted, "[f]iduciary duty and the duty of good faith are variations on a theme. Both are judicially imposed loyalty obligations designed to attack the potential for opportunism in relationships" (*The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1487-88, quoted in Andrew S. Gold, *The Loyalties of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 13, 176, 176).

[32] Gold, *id.* at 176.

[33] Markovits, *supra* note 12, at 222-223.

for example, from its duty to compensate beneficiaries for losses they suffer as a result of its negligence,[34] they engage in contractual sharing ex ante. The more detailed the trust instrument, the clearer the trust relationship's ex ante character becomes. While the instrument may still be entitled "trust deed" or "agreement for the provision of fiduciary services" rather than "contract", and while despite its modification of some of the default law of trusts it may still rely on other parts of that default law, conservation of some of the substance and form of the applicable framework of relationship governance cannot negate the contractual character of the ex ante replacement of parts of that framework by specification of parties' rights and duties. Since a specific proportion of waivers, alterations or qualifications ex ante that would constitute a general abandonment of fiduciary sharing ex post cannot be identified, one cannot claim that the popular practice of waiving or varying parts of the default framework does not undermine the characterization of fiduciary practice as sharing ex post.

The characterization of contractual practice as specifying the parties' complete duties ex ante is as inaccurate as the characterization of fiduciary practice as expressing a choice of a pre-existing framework of relationship governance, leaving much of the detail for the fiduciary to unilaterally settle later on. Contracts concluded in situations not dubbed fiduciary are based on pre-existing archetypes no less often than instruments concluded in fiduciary situations. Non-fiduciary contracts, too, express choices of pre-existing

[34] A common trust precedent provides that "[t]he trustee shall not be personally liable for acts or omissions done in good faith", releasing it from liability for negligent acts and omissions, and possibly grossly negligent acts and omissions too: Northern Trust, Form 201, Revocable Trust Agreement, One Settlor, Fractional Share Marital, ¶ 7.12, available at http://tinyurl.com/mfar9zy (last accessed January 30, 2016) [hereinafter: trust agreement].

frameworks of relationship governance: of, for example, the default framework governing a hire-purchase relationship, that governing a lease relationship, or those governing a sale relationship, a mortgage relationship, a credit swap, and so on. The terms of many contracts are far from bespoke: consider the vast universe of standardized boilerplate, dictated by a firm to thousands or millions of counterparties. Markovits writes that "even boilerplate terms derive their meaning from the parties' expectations";[35] yet this statement seems, with respect, questionable, given that boilerplate recipients are frequently unaware of the boilerplate's existence, or if aware, ignorant of its contents; yet boilerplate terms are enforced, regardless of whether recipients' expectations of their relationship with the boilerplate provider fit, or do not fit, those terms.[36] Further, many contracts not seen as fiduciary are far from complete, belying the image of such contracts as specifying the parties' *complete* duties ex ante: relational contracts are a key example.[37]

Markovits makes some additional distinctions between contractual and fiduciary relationships. He claims that "both the individual parties to fiduciary engagements and the broader legal order also possess interests in fiduciary relations for their own sakes".[38] This claim is hard to parse. In so far as it is intended to mean that parties to engagements seen as fiduciary and the "broader legal order" see some value in the continuing sort of

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[35] Markovits, *supra* note 12, at 218.
[36] For US courts' enforcement of boilerplate terms see MARGARET JANE RADIN, BOILERPLATE (2013) 86. For boilerplate generally see *id.*, as well as OMRI BEN-SHAHAR, BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS (2007); Omri Ben-Shahar, *Regulation through Boilerplate: an Apologia*, 112 MICH. L. REV. 883 (2014).
[37] On relational contracts see Ian R. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974); Goetz and Scott, *supra* note 8; Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom: Thoughts about the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000).
[38] Markovits, *supra* note 12, at 222-223.

relationship, with much of the governing detail supplied by one party ex post, which Markovits calls fiduciary, proof for it is yet to be supplied. Markovits brings two concrete examples of fiduciary engagements seen as valuable "for their own sakes": marriage and "the lawyer-client relation".[39] "Partners value a marriage", he writes, "not simply as a means to ends … but rather as an end in itself".[40] "It would … be quite incredible to think", he adds, "that the positive law governing lawyers might be adequately explained without any reference to the intrinsic value of the rule of law".[41] Even if, as Markovits writes, marriage is valued as an end in itself and the law governing lawyers instantiates the intrinsic value attributed to the rule of law, these points do not prove the more general claim regarding the innate value of fiduciary relations. Marriage is a unique relationship which derives its value, as Markovits states, from the spouses' "obligations to make new sacrifices in the face of unforeseen developments".[42] The lawyer-client relation is uniquely close to the core functioning of the legal order. The same cannot be said, however, of other relationships commonly seen as fiduciary. Take the trustee-settlor and the trustee-beneficiary relations. Settlors and beneficiaries do not generally see trustee control of the administration of trust property and trustee discretion regarding its distribution as valuable "for their own sakes". According trustees great power over the trust property and the beneficiaries may be appropriate due to characteristics of many trust relationships, such as great duration. Many trusts are created when their beneficiaries are minors, or unborn.

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*

Since their capacities for wealth management cannot be forecasted, and the settlor may not endure until such time as distribution of the trust capital becomes appropriate, appointment of an extensively empowered third party – a trustee – as manager becomes necessary. Necessary power, however, is valuable due to its necessity, not for its own sake. Trustee power, in fact, raises great apprehension in both settlors and beneficiaries. That apprehension has recently led to the development of drafted mechanisms for restraining trustee power: powers to veto trustee decisions or replace the trustee are now frequently reserved by the settlor, given to a trust protector, or both.[43]

Finally, the most solid of Markovits' arguments distinguishing contractual from fiduciary relationships is the doctrinal point that contract law permits efficient breaches by making expectation damages the preferred remedy for breach of contract,[44] while fiduciaries are not permitted to efficiently breach their obligations, disgorgement of their gains being a common remedy for breach of fiduciary duty.[45] While as a matter of

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[43] See discussion of settlors of irrevocable trusts reserving powers to control the trustee in RESTATEMENT (THIRD) OF TRUSTS§ 75 cmt c(2) (2007); U.T.C. § 808(b) (2010); AUSTIN WAKEMAN SCOTT & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 8.2 (5th ed. 2010) [hereinafter SCOTT ON TRUSTS]; AMY MORRIS HESS, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 42 (3d ed. 2009) [hereinafter BOGERT]; Lau, *supra* note 3, at 175–78. On protectors see, for example, RESTATEMENT (THIRD) OF TRUSTS§ 64(2) cmt. d and reporter's notes to cmts. b–d (2003); *id.* § 75 (2007); *id.* § 94 cmt. d(1) & reporter's notes (2012); PAOLO PANICO, INTERNATIONAL TRUST LAWS 405–45 (2010); Robert Ham, Emily Campbell, Michael Tennet & Jonathan Hilliard, *Protectors*, *in* THE INTERNATIONAL TRUST 193 (John Glasson & Geraint Thomas eds., 2d ed. 2006); Donovan W.M. Waters, *The Protector: New Wine in Old Bottles?*, *in* TRENDS IN CONTEMPORARY TRUST LAW 63 (A.J. Oakley ed., 1996). *See generally* ANDREW HOLDEN, TRUST PROTECTORS (David Brownbill ed., 2011).

[44] RESTATEMENT (SECOND) OF CONTRACTS §§ 344, 347 (1981); U.C.C. § 1-305 (2001); SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 64:2 (4th ed. 1990).

[45] See now RESTATEMENT (THIRD) OF TRUSTS§§ 99 cmt c, 100(b) cmt c and reporter's note thereto (2012); SCOTT ON TRUSTS, *supra* note 43, at § 24.9; BOGERT, *supra* note 43, at § 862; RESTATEMENT (SECOND) OF TRUSTS § 205 (1959); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 43 (2011); RESTATEMENT (FIRST) OF RESTITUTION § 138 (1937); Irit Samet, *Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-stripping Rule* 28 OXFORD J. LEG. STUD. 763 (2008).

doctrine, this distinction stands,[46] amendments to the law of trust administration have rendered the distinction less significant than it was by reclassifying as acceptable conduct which used to be seen as a breach of trustees' fiduciary duties. Some actions which used to be seen as breaches of trustees' duty of loyalty have now been declared acceptable by statute. Cases in point are the statutes enacted in "nearly all of the States" that allow trustees to invest trust monies "in securities of an investment company or investment trust to which the trustee provides services", for which services it is "compensated out of fees charged to the trust", thus entitling it to two income streams drawn from the same trust fund.[47]

The distinction between contract law's condonation and fiduciary law's prohibition of efficient breaches cannot alone justify the traditional paradigm holding fiduciary relationships to be non-contractual. This Part showed that while fiduciary relationships have their own history and a separate doctrinal tradition, they are not now fundamentally different from contractual relationships. Fiduciary relationships can easily be accommodated as a relatively paternalistic part of the contractual universe. Even this

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[46] See references in the previous two notes. Gregory Alexander hypothesized that courts' harsh treatment of many fiduciaries is a result of their demanding preconceived notions of the fiduciary role, while "in cases of alleged contractual breaches, [courts] employ a bottom-up cognitive method … [which is] data-driven and therefore remain[s] free from the influence of a preconceived theory of the situation": *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 768 (2000). By entrenching the distinction between fiduciary and contractual relationships, fiduciary exceptionalists such as Markovits may contribute to the entrenchment of courts' cognitive bias against fiduciaries.

[47] See U.T.C. § 802(f) (2010). The subsection provides that such an investment "is not presumed to be affected by a conflict between personal and fiduciary interests [if otherwise a prudent investment]": *id.* See further RESTATEMENT (THIRD) OF TRUSTS§ 78 cmt c(8) and reporter's note (2007). And see a trust instrument form permitting trustees to invest trust property in "shares of investment companies, real estate investment trusts and other investment funds (including ones that receive services from, and pay compensation to, a corporate trustee hereunder)": Trust Agreement, supra note 34, ¶ 8.a. See further discussion of the watering down of trustees' duty of loyalty, including U.T.C. § 802(f) and the equivalent Restatement text, in *infra* Part III.B.

distinction may be questionable, given the law's approval of parties to trust relationships waiving fiduciaries' key protective duties of prudence and loyalty.[48]

## III. TYPES OF FIDUCIARY RELATIONSHIPS: TRUSTS AND CORPORATIONS

It is commonly claimed that trusts are very different from corporations, and that the fiduciary obligations imposed on trustees are more severe, and more severely enforced, than those imposed on corporate directors and officers.[49] In this Part, I show how recent developments in both law and practice have led to an increasing convergence between trusts and corporations. Because this convergence expresses a general social transformation – the conversion of most social and economic relationships to short-term, commodified transactions – it is unlikely to be reversible. Even radical law reform measures, returning trust law to its protective roots, are unlikely to produce a trustee population subject to a heavier burden of obligation than that currently imposed on corporate fiduciaries. Such measures are likely to be thwarted by fiduciaries' demands for higher prices and consumers' preference for short-term, commodified relationships.

### A. *The Supposed Contrast*

Leading scholars have long believed that trusts and corporations are very different.[50]

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[48] See discussion *supra* notes 30-34 and accompanying text; *infra* Part III.B.
[49] See references in *infra* notes 50-54.
[50] There have been a few exceptions: the English Frederick Maitland, an exceptional jurist and legal historian, understood around the turn of the 20th Century that trusts and corporations were often functionally similar, and that

Edward Rock, Michael Wachter and Melanie Leslie, among others, believe that trust law is characterized by a rigorous application and enforcement of trustees' strict duties, while corporate law imposes weaker standards on directors and officers and does not seriously enforce them.[51] Even Robert Sitkoff, doyen of trusts at Harvard, believes that under "canonical law",[52] corporate law and trust law are very different, in that trust beneficiaries are far better protected against trustee defalcations than corporate shareholders are against directors' and officers' duty infringements. He wrote that "trust fiduciary law, especially the duty of loyalty, is stricter and more prophylactic than the fiduciary law of other organizational forms".[53] Sitkoff sees this difference as the law's response to the absence of a market in beneficial interests under donative trusts, on the one hand, and the ubiquity of the share market, on the other.[54]

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the differences between them were technical only: Frederic W. Maitland, Trust and Corporation, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 321, at 397-98 (H.A.L. Fisher ed., 1911). Also see F.J. Stimson, *Trusts*, 1 HARV. L. REV. 132 (1887); RESTATEMENT (SECOND) OF TRUSTS, ch. 1, intro. note (1959); A. A. Berle, Jr., *Corporate Powers as Powers in Trust*¸ 7 HARV. L. REV. 1049 (1931).

[51] Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Inter-doctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 661–3 (2002); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 93 (2005) [hereinafter Leslie, *Trusting*] ("[f]iduciary duties draw brighter lines [in trust law] as compared to corporate or partnership law"). See also, e.g., Easterbrook & Fischel, *supra* note 12, at 437; John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 958-62 (2005); RESTATEMENT (THIRD) OF TRUSTS §§ 5(g), 78 cmt. a (stating that the "duty of loyalty is, for trustees, particularly strict even by comparison to the standards of other fiduciary relationships") (2007); SCOTT ON TRUSTS, *supra* note 43, § 2.3.12; BOGERT, *supra* note 43, § 16.

[52] Email from Robert H. Sitkoff, John L. Gray Professor of Law, Harvard Law School, to author (Oct. 24, 2014, 22:47 EST) (on file with author).

[53] Sitkoff, *Agency Costs*, *supra* note 2, at 680. For other scholars holding equivalent positions regarding trustees' duty of *care*, compared to that owed by other fiduciaries, see A. Joseph Warburton, *Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms*, 36 J. CORP. L. 183, 185-88 (2010); Leslie, *Trusting*, *supra* note 51, at 76-95 (2005). On trust law as a branch of organizational law see Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, in THE WORLDS OF THE TRUST 428 (Lionel Smith ed., 2013).

[54] Robert Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565 (2003) [hereinafter Sitkoff, *Trust Law*]; see also Sitkoff, *Agency Costs*, *supra* note 2, at 645-46.

But are corporate law and trust law, or corporations and trusts, still that different? Sitkoff himself pointed to some points of law and practice where trusts and corporations have been growing closer. As I will now show, transformations in trust law and practice have multiplied these points, joining them into an ongoing process of convergence.

B. *Convergence*

Much like corporate law has evolved from imposing limits on corporate powers to relying on fiduciary obligations to police officer and director conduct, trust law has similarly been evolving from imposing limits on trustee powers to relying on fiduciary obligations to police trustee conduct.[55] According to the traditional position contrasting trusts and corporations, the fiduciary obligations imposed on trustees are more rigorous, and are more rigorously enforced, than those imposed on corporate directors and officers.[56] But even if this position was, at one time, correct, it is correct no longer. Take the duty of care, or prudence, imposed on trustees by the default law of trusts, a duty long described as especially rigorous.[57] This duty is now routinely compromised in trust instruments by provisions exculpating trustees from liability for any loss they caused to beneficiaries, so long as their injurious conduct did not amount to fraud or dishonesty.[58] Occasionally the

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[55] Sitkoff, *Agency Costs*, *supra* note 2, at 677; see also See Langbein, *Contractarian Basis*, *supra* note 1, at 641, note 75.
[56] Rock & Wachter, *supra* note 51, at 661-3.
[57] See U.T.C. § 804 (2010) and related comment; RESTATEMENT (THIRD) OF TRUSTS § 77 and reporter's notes (2007); BOGERT, *supra* note 43, § 541; SCOTT ON TRUSTS, *supra* note 43, § 17.6.
[58] Sitkoff notes, in *Agency Costs*, *supra* note 2, at 678, that "the fiduciary duties imposed by the law of trusts are simply majoritarian default rules." On trust parties' limited power to waive or alter trustees' duty of care see, e.g., First Alabama Bank of Huntsville, N.A. v. Spragins III, 475 So.2d 512 (Ala. 1985); New York State Medical Care

liability threshold is raised slightly, so that a finding that trustees engaged in grossly negligent behavior would lead to liability being imposed. Respondents to my recent survey of professional fiduciaries worldwide believe, on average, that 71.1% of donative trusts include a term exculpating the trustee. 33% of respondents believe all trusts include trustee exculpatory terms.[59] Respondents also believe, on average, that only 10.4% of settlors of trusts which include trustee exculpatory terms demand and receive some quid-pro-quo for the inclusion of such clauses, such as a fee reduction.[60]

The Uniform Trust Code of 2000, now enacted into law in 30 states and the District of Columbia, specifically states that such exculpatory clauses are enforceable unless they excuse trustees from liability "for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries".[61] The law of the remaining states is likely to be influenced by the Restatement (Third) of Trusts, which provides that trustee exculpatory clauses are enforceable "except to the extent that [they] purport… to relieve the trustee (a) of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries, or (b) of accountability for profits derived from a

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Facilities Fin. Agency v. Bank of Tokyo Trust Co., 621 N.Y.S.2d 466, 551 (1994); Donato v. BankBoston, N.A., 110 F.Supp.2d 42 (D.R.I, 2000).

[59] N = 391. Median = 90%. Mode = 100%. Standard Deviation = 32.77%. Data were obtained in response to the following question: "What share of trusts include a trustee exemption/exculpation clause of any kind?".

[60] N = 382. Median = 0%. Mode = 0%. Standard Deviation = 20.34%. Data were obtained in response to the following question: "[w]hat share of settlors of trusts including trustee exemption/exculpation clauses demand and receive some quid-pro-quo for the inclusion of such clauses, such as a fee reduction?".

[61] U.T.C. § 1008 (2010).

breach of trust".[62] The resulting liability threshold, both under the Uniform Code and under the slightly more protective Restatement, is often more permissive than that applied to corporate directors and officers by "the business judgment rule, [which] requires deference to the ordinary business decisions of management unless they … are so unreasonable as to amount to gross negligence".[63] The Uniform Trust Code and Restatement (Third) liability thresholds are also lower than that the Revised Uniform Partnership Act applies to partners, according to which "[a] partner's duty of care to the partnership and the other partners … is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law".[64] The treatment of trustee exculpatory provisions under the Uniform Trust Code and Restatement (Third) echoes most states' authorization of "articles of incorporation … protect[ing] directors from liability for damages for grossly negligent acts".[65] Trust law and practice have joined the rush towards fiduciary exculpation which now characterizes the structures of business organization. The traditional distinction between active businesses, where the risk-taking necessary for success is seen to justify rolling back liability out of respect for business judgment, and donative trusts, where beneficiaries' vulnerabilities traditionally made for the imposition of a particularly heavy liability burden on trustees, has disappeared.

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[62] RESTATEMENT (THIRD) OF TRUSTS § 96(1) (2012).
[63] Sitkoff, *Agency Costs*, *supra* note 2, at 656, citing Brehm v. Eisner, 746 A.2d 244, 264 & n.66 (Del. 2000).
[64] REVISED UNIF. PARTNERSHIP ACT § 404(c) (1997). See discussion in Frederick R Franke Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517, 539 (2010).
[65] JAMES COX & THOMAS HAZEN, BUSINESS ORGANIZATIONS LAW § 25.6 (3d ed. 2011) [hereinafter: COX & HAZEN].

Trustees' other duty seen as fiduciary is their duty of loyalty. Like others, Sitkoff believes that "trust fiduciary law, especially the duty of loyalty, is stricter and more prophylactic than the fiduciary law of other organizational forms".[66] Trust law's formerly strong duty of loyalty is, however, gradually being watered down. Classically, transactions the trustee personally conducted with trust property were voidable by the beneficiaries if affected by a conflict between the trustee's fiduciary and personal interests, as where a trustee purchased a trust asset for his personal account. Such transactions remained voidable even where the trustee could show that the transaction benefitted the beneficiaries, as where he or she purchased a trust asset at a fair, or even favorable, price. Sitkoff noted that under this so-called "no-further inquiry rule", "even if the self-dealing transaction is objectively fair, the beneficiaries need only show the existence of the trustee's self-interest in order to prevail."[67] The Restatement (Third) appears to preserve the classical severity of this rule, holding that "[e]xcept in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests",[68] and adding that "[t]ransactions in violation of [this duty] are not void but may be affirmed or set aside by the beneficiaries, except as the rights of bona fide purchasers intervene".[69] While this rule has been retained in the Uniform Trust Code as regards "transaction[s] involving the investment or management of trust property entered into by the trustee for

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[66] Sitkoff, *Agency Costs*, *supra* note 2, at 680.
[67] Sitkoff, *Trust Law*, *supra* note 54, 573.
[68] RESTATEMENT (THIRD) OF TRUSTS § 78(2) (2007).
[69] RESTATEMENT (THIRD) OF TRUSTS § 78 cmt a (2007).

the trustee's own personal account",[70] the Code's drafters have transformed the rule into a rebuttable presumption as regards transactions with trust property entered into by the trustee with his or her spouse, relatives, agent, attorney, or "a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment".[71] As regards these latter transactions, the Code's drafters have transformed trust law's application of the duty of loyalty to self-interested transactions into a form traditionally identified with corporate law: "a liability rule under which a self-dealing manager must show that the transaction was fair. If so, then it will be upheld, sometimes even if the manager failed properly to disclose his or her conflict in advance".[72] Another Code provision waters down the strict "no further inquiry rule" by allowing trustees to invest trust monies "in securities of an investment company or investment trust to which the trustee provides services", for which services it is "compensated out of fees charged to the trust".[73] The Restatement (Third)

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[70] U.T.C. § 802(b) (2010).

[71] U.T.C. § 802(c) (2010). Even more radically, Langbein believes that the "no further inquiry rule" should be abolished, and "transaction[s] in which there has been conflict or overlap of interest should be sustained if the trustee can prove that the transaction was prudently undertaken in the best interest of the beneficiaries": Langbein, *Contractarian Basis*, *supra* note 1, at 665-67; Langbein, *supra* note 51, at 932 (2005). Langbein's suggestion extends the U.T.C. reform of the "no further inquiry rule", turning its classical prophylactic rigidity into a presumption, to cases where the trustee deals directly with his or her trust. Pennsylvania has in fact extended its transformation of the "no further inquiry rule" into a presumption to transactions involving trust property entered into by the trustee with "the trustee personally": 20 PA. CONS .STAT. §7772(c)(6) (2015).

[72] Sitkoff, *Trust Law*, *supra* note 54, 573. As Gregory Alexander noted in email correspondence, courts may blunt the edge of the transformation by treating the presumption of conflicted action as very strong: email from Gregory S. Alexander, A. Robert Noll Professor of Law, Cornell Law School, to author (May 5, 2015, 1:56 EST) (on file with author). Whether courts will do so is yet to be seen.

[73] U.T.C. § 802(f) (2010). A minority of enacting states modified this provision to protect beneficiaries from trustees drawing two simultaneous income streams from the trust account. New Hampshire, Virginia, Ohio, West Virginia, Maryland and Minnesota omitted, in enacting this section of the U.T.C., the reference to the trustee's compensation for services it gave to the investment company or investment trust being "charged to the trust": see N.H. REV. STAT. ANN. 564-B:8-802(f) (2015); VA. CODE ANN. § 64.2-764(f) (2015); OHIO REV. CODE ANN.

provides a comparable "statutory exception for corporate trustees' participation in what are generally called "proprietary mutual funds", warning that "the use of proprietary mutual funds for a trust's investment program must not result in the trustee receiving more than the reasonable overall compensation appropriate to its services to the trust, taking account of the trustee's mutual-fund duties and compensation".[74] In its newly compromised form, trustees' duty of loyalty appears less strict than at least some formulations of the corporate business judgment rule, which "requires deference to the ordinary business decisions of management unless they are tainted by a conflict of interest".[75] Further, even the relatively strict Restatement (Third) notes that "the … fiduciary duty of loyalty is a *default rule* that may be modified by the terms of the trust".[76] The decline of trustees' fiduciary obligations belies claims positing the law of trusts as the legal discipline most "asymmetrically biased against one particular party".[77]

The canonical position holding trustees' fiduciary duties to be stricter than those applied to corporate directors and officers explained this purported state of affairs by noting that reliance on fiduciary standards can be less complete in the corporate case than

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§5808.02(E) (LexisNexis 2015); W. VA. CODE § 44D-8-802 (2015); MD. CODE ANN., Estates and Trusts, § 15-106 (LexisNexis 2015); MINN. STAT. § 501C.0901 (2015). The equivalent section of the Pennsylvania Statutes, not based on the U.T.C., also does not refer to the trustee's compensation being charged to the trust: 20 PA. CONS .STAT. § 7209 (2015).

74 RESTATEMENT (THIRD) OF TRUSTS § 78 cmt c(8) (2007).

75 Sitkoff, *Agency Costs*, *supra* note 2, at 656, citing Brehm v. Eisner, 746 A.2d 244, 264 & n.66 (Del. 2000). In an email to the author, Sitkoff noted that "it is indeed canonical law that the fiduciary duty of loyalty is stricter in trust law, and the duty of prudence (care) is not insulated by a business judgment rule. But that is not the same as saying that the canonical default law is in fact what applies in most cases in practice, owing to opt outs or otherwise". Email message, *supra* note 52. As I show in these pages, the convergence of the fiduciary standards applied to trustees with those applied to corporate officers and directors is evident not only as a matter of practice, but also in many states' statutory trust regimes, as well as in the U.T.C. and Restatement (Third).

76 RESTATEMENT (THIRD) OF TRUSTS § 78 cmt c(2) (2007).

77 Lau, *supra note* 3, at 153.

in the trust case, as the share market and the market for corporate control provide an additional check on director and officer conduct, which does not exist for trustees.[78] Sitkoff emphasized that the share market provides shareholders with an exit from their agency relationship with the corporation's directors and officers, while there is no equivalent market in beneficial interests under private donative trusts.[79] He noticed, however, that this description of beneficiaries' position is true for some trusts, but not for others. As regards many types of trusts, such as investment trusts and business trusts, there is, in fact, a market in beneficiaries' interests. Sitkoff noted that "the governance of numerous commercial manifestations of the common law private trust, at least when the residual claims are sold to outsiders, … more closely resembles the governance of the public corporation than it does the governance of the donative trust".[80]

The prevalence of terms restricting fiduciaries' duties and liabilities may be explained by those terms being hidden, in classic boilerplate fashion, deep inside protracted documents, away from trust users' – settlors' and beneficiaries' – view. The ubiquity of such terms may render even users who are aware of a term's existence slow to realize that it is not an inevitable part of every fiduciary relationship. Even those clients who are aware of the existence of the term, understand its consequences and realize that it is at least potentially subject to modification may be prone to accept, rather than challenge,

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[78] See John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228, 1271-2 (2014); Melanie B. Leslie, *Helping Nonprofits Police Themselves: What Trust Law Can Teach Us About Conflicts of Interest*, 85 CHI. KENT. L. REV. 551, 557 (2010).
[79] Sitkoff, *Trust Law*, *supra* note 54, 566.
[80] Sitkoff, *Agency Costs*, *supra* note 2, at 681; and see his reference, *id.* at note 310.

it: fiduciary exculpatory terms have become a common baseline from which it is expensive to deviate. Further, cognitive limitations, such as the tendency "to equate "low probability" risks with "zero probability" risks",[81] may prevent even informed clients from concluding that the term's potential consequences in case of fiduciary-created loss may justify active negotiation over its curtailment, removal or the receipt of some quid-pro-quo.[82] The ubiquity of fiduciary exculpatory terms may also derive from clients' preference to stay out of court, whether because clients trust their fiduciaries not to conduct the relationship negligently more than they trust courts to correctly adjudge fiduciaries' behavior, or because the trust property originates in ill-gotten gains.

My survey findings that fiduciary exculpatory terms, without clients demanding and receiving any quid-pro-quo for their inclusion, are a conventional, nearly universal standard in donative trusts serviced by professionals[83] show that legislative reform making the validity of such terms, if "drafted or caused to be drafted by the trustee", conditional on the term being disclosed to the settlor[84] has not checked the popularity of such terms. Recent scholarship on the ineffectiveness of disclosure as a means for driving individuals to make informed, competent decisions[85] rules out, as remedies for value erosion by way of exculpatory terms, both simple disclosure requirements and Leslie's stronger

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[81] Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 83, 85 (Omri Ben-Shahar ed., 2007).

[82] For these limitations, see, e.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); OREN BAR-GILL, SEDUCTION BY CONTRACT (2012); OMRI BEN-SHAHAR & CARL SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 59-78 (2014).

[83] See text to *supra* notes 59-60.

[84] U.T.C. § 1008(b).

[85] BEN-SHAHAR & SCHNEIDER, *supra* note 82.

recommendation that for an exculpatory term to be enforced, trustees would have "to prove that [the] settlor expressly agreed to the [term]".[86] Given human cognitive abilities, many clients are likely, having heard or read an explanation of the exculpatory term along with a statement that the term was part of the fiduciary's standard conditions, to expressly agree to the term without having properly cognitively processed its potential implications. Successfully countering exculpatory terms which transfer value from clients to the service providers serving them appears to require heavier normative machinery, such as a legislative provision holding terms which curtail fiduciaries' duties to beneficiaries and/or the liability consequent on their infringement to be void, combined with choice of law rules sufficiently restrictive to prevent service providers from successfully subjecting the relationship to the law of a jurisdiction which has not prohibited duty-abridging and exculpatory terms.[87]

A perhaps less drastic approach is granting clients, by legislation, credible powers to sanction fiduciaries for negligent conduct, as by removing and replacing them or by withholding their fees for a predetermined period of time. Once clients have such powers, are aware of them and understand them, fiduciaries may invest more effort in refraining from negligent conduct. Clients' awareness and understanding of such powers may depend, however, on fiduciaries introducing and explaining those powers to their clients. While the effectiveness of duty-abridging and exculpatory terms may be made conditional on such an

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[86] Leslie, *Trusting*, *supra* note 51, 109.

[87] For the current law regarding the choice of law to govern trusts, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Ch. 10 (1971); 5 SCOTT ON TRUSTS, *supra* note 43, §§ 44-46; 16 BOGERT, *supra* note 43, §§ 291-301.

explanation being provided, cognitive limitations may again undercut the effectiveness, as a means for curtailing fiduciaries' negligence, of powers given clients to remove or fine fiduciaries they deem to have been negligent. The drastic solution of legislatively holding fiduciary duty-abridging and exculpatory terms void is not subject to such cognitive limitations. Even that solution may not, however, successfully return the trust to its protective roots, since as I show below, the current commodification of the fiduciary-client relationship simply conforms it to an overall social and economic cultural transformation, which is turning most relationships into short-term transactions. Should trusts be legislatively remodeled on the traditionally protective trust paradigm, consumers, used to a transactionally-oriented socio-economic landscape, may react by eschewing them.

Beyond the reform of trustees' fiduciary duties, other recent changes to the law of trusts also bring about a convergence of trust law's default framework of relationship governance with that of corporate law. One of the key longstanding differences between the two frameworks is that while a corporation is a legal person, a trust is not. However, this classical difference is being eroded by several recent changes to trust doctrine, which express an "entification" of the trust, treating it as if it were, like a corporation, a legal person. New York law allows a trust to acquire property in its own name, "as [that] name is designated in the trust instrument. It is not necessary that there be a conveyance to, or registration in the name of, the trustee. Legal title as a matter of law, however, would still

pass to the trustee".[88] Many U.S. states have limited trustees' personal contractual liability to trust creditors to cases where trustees' fiduciary capacity was not disclosed, and their personal liability for torts committed in the course of administering a trust and obligations arising from ownership or control of trust property to cases where trustees were personally at fault.[89] In other cases, trust creditors' sole recourse is against the trust fund, much like corporate creditors' sole recourse is against the corporation.[90] Another modification to trust doctrine which tends to transform the trust into an entity-like legal construct is many jurisdictions' abolition of the rule against perpetuities and other jurisdictions' prolongation of the permitted perpetuity period to several hundred or a thousand years. The decline of the rule against perpetuities, having so far affected the trust regimes of 29 states and 14 non-U.S. jurisdictions, created opportunities for trusts to stay in existence forever, joining corporations and LLCs as another form of permitted perpetuity.[91]

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[88] CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK § 2.1.1 (2014) [hereinafter LORING], analyzing N.Y. Estates, Powers and Trusts Law § 7-2.1 (McKinney 2015).

[89] See U.T.C. § 1010 (a)–(b) (2010). The Uniform Probate Code, having been substantially adopted by nineteen states, provides similarly in Section 7-306, adding a requirement that for trustees to be personally liable "on contracts properly entered into in [their] fiduciary capacity," they must fail to identify the liable trust estate in the contract. UNIF. PROBATE CODE § 7-306 (1997); *see also* 4 SCOTT ON TRUSTS, *supra* note 43, § 26; Hansmann & Mattei, *Comparative*, *supra* note 4, at 459–61. The British Virgin Islands have since 2003 provided a similar regime as an option: Trustee Ordinance, (1961), § 97(3), THE LAWS OF THE VIRGIN ISLANDS c. 303 (British Virgin Is.).

[90] *See* U.T.C. § 1010(c), (2010); UNIF. PROBATE CODE § 7-306(c) (2010); RESTATEMENT (THIRD) OF TRUSTS §§ 105–106 (2012). For the traditional law, limiting trust creditors' recourse to the trust fund to an indirect approach by way of subrogation into the trustee's right to indemnity from that fund, see Kalev J. Crossland, *Unsecured Creditors and the "Uncorporation": Issues with Trading Trusts Post Global Financial Crisis*, 17 TR. & TRUSTEES 185, 194–98 (2011); Paul Heath, *Bringing Trading Trusts into the Company Line*, 16 TR. & TRUSTEES 690, 692–99 (2010). Under that law, in order to limit their liability to the trust fund, trustees must expressly contract "as trustee and not otherwise." Crossland, *id*.at 190.

[91] For references to U.S. perpetuity-friendly trust regimes, see *Dynasty Trust States*, LAW OFFICE OF OSHINS & ASSOCIATES, http://www.oshins.com/dynastytruststates.html (last visited January 30, 2016). Outside the U.S., see, e.g., Perpetuities and Accumulations Act, C.C.S.M. 1983, c. P33, § 3 (Can. Manitoba): "The rules of law against perpetuities… are no longer the law of Manitoba"; Trustee Act, S.S. 2009, c. T-23.01, § 58 (Can.

The entification of the trust, stripping it from rules which characterized the older trust-as-relationship, reaches its zenith in the commercial, or business, trust. The use of trusts under general trust law as a structure for business organization having declined across the twentieth century,[92] most business trusts are now formed according to bespoke statutory business trust regimes. While the most popular such regime is that contained in the Delaware Statutory Trust Act,[93] the Uniform Law Commission has recently adopted a Uniform Statutory Trust Entity Act (USTEA).[94] The two regimes replicate all the features of the 'entified' trust discussed above, adding formal entity status.[95] The Delaware Act reverses two further traditional trust law rules: the "no further inquiry rule", which rendered transactions between the trustee individually and trust property voidable at the instance of the beneficiaries, and the rule providing that persons empowered to direct the trustees in the exercise of their functions owe, as a matter of default law, fiduciary duties to

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Saskatchewan): "The rules against perpetuities are no longer the law of Saskatchewan"*;* Perpetuities Act, S.N.S. 2011, c. 42, § 3 (Can. Nova Scotia): "The rules of law against perpetuities are abolished"; Land and Conveyancing Law Reform Act 2009 (Act No. 27/2009) § 16(d) (Ireland): "… the following rules are abolished: … (d) the rule against perpetuities".

92 UNIF. STATUTORY TRUST ENTITY ACT prefatory note, at 1 (2012) [hereinafter USTEA]. Robert Flannigan wrote that business trusts, having enjoyed popularity only sporadically during the twentieth century, became very popular with Canadian investors in the early years of the present century; Robert Flannigan, *The Political Path to Limited Liability in Business Trusts*, 31 ADVOCATES' QUARTERLY 257, 281 (2006) (Can.).

93 DEL. CODE ANN. tit. 12, §§ 3801–24 (1995 & Supp 2014) [hereinafter Delaware Act]. See discussion in Flannigan, *supra* note 92, at 271. For the Delaware regime's popularity, see USTEA, *supra* note 92, 1–2; *cf.* Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law* 23 CARDOZO L. REV. 325, 337–9 (2001–2) finding that, as of 2001, the Delaware regime has not acquired a significant following among business owners.

94 *Supra* note 92. The USTEA has, to date, been adopted by the State of Kentucky and the District of Columbia alone: Kentucky Uniform Statutory Trust Act, KY. REV. STAT. ANN. § 386A (amended 2012); Uniform Statutory Trust Entity Act of 2010, D.C. CODE §§ 29–1201-29–1209 (2011).

95 For entity status see Delaware Act, *supra* note 93, § 3801(g); USTEA, *supra* note 92, § 302. For the positing of trust assets as the exclusive fund from which trust creditors' debts are to be satisfied, see Delaware Act, *supra* note 93, §§ 3803(a)–(c), 3804(a); USTEA, *supra* note 92, § 303. For restriction of trustee liability to beneficiaries to a good faith standard, see Delaware Act, *supra* note 93, § 3806(c); USTEA, *supra* note 92, § 505(a). For perpetual duration, see Delaware Act, *supra* note 93, § 3808(a); USTEA, *supra* note 92, § 306(a).

the beneficiaries.[96] USTEA also reverses both of those rules and goes further by reversing the doctrine holding a trust the sole trustee of which is also its sole beneficiary to terminate by way of merger of the legal and equitable interests.[97]

Trust law's convergence with corporate law is expressed at additional doctrinal foci, including issues where a significant difference remains between the two fields of law. One such issue is trust modification and termination. Nineteenth Century U.S. law has made them difficult: absent the settlor's consent, beneficiaries could not modify or terminate the trust so as to offend a material purpose the settlor set for it.[98] The last few decades, however, have seen a liberalization of trust modification and termination at the behest of the beneficiaries.[99] While the second Restatement of 1959 provided that "[t]he court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance [with the terms of the trust] would *defeat* or *substantially impair the accomplishment of* the purposes of the trust" [my emphasis],[100] making this remedy available only as regards the administrative provisions of

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[96] For conflicted transactions, see Delaware Act, *supra* note 93, § 3806(h). For trustee 'directors,' see *id.* at § 3806(a).

[97] For conflicted transactions, see USTEA, *supra* note 92, § 507. For trustee 'directors,' see *id.* at § 510. For abolition of the merger doctrine, see *id.* at § 306(d). For criticism of the "entification" trend in trust law and practice, see Lionel Smith, *Mistaking the Trust*, 40 HONG KONG L.J. 787, 793–802(2010) (Hong Kong). And see discussion of the merger doctrine in LORING, *supra* note 88, § 8.7 (2014)

[98] Claflin v Claflin, 20 N.E. 454 (Mass. 1889). See discussion in Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1208, 1242 (1985); Gregory Alexander, *The Transformation of Trusts as a Legal Category, 1800-1914*, 5 L. & HISTORY REV. 303, 326 (1987); Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES IN L. 355, 360, 374-81 (2009) (Isr.).

[99] Sitkoff, *Agency Costs*, *supra* note 2, at 658-663.

[100] RESTATEMENT (SECOND) OF TRUSTS, § 167(1) (1959).

trusts,[101] the third Restatement of 2003 provides that"[t]he court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will *further* the purposes of the trust" [my emphasis].[102] The Uniform Trust Code contains similar wording.[103] While the second Restatement provided that a court "will not … direct the trustee to deviate from the terms of the trust merely because [the] deviation would be more advantageous to the beneficiaries",[104] under the third, courts are likely to direct trustees to deviate from the terms of their trusts precisely for that reason. While the law governing amendment of articles of incorporation and voluntary corporate dissolution is more liberal still – the board of directors and a majority of the shareholders entitled to vote can, together, take both steps absent any court involvement[105] - the liberalization of the law governing trust modification and termination has reduced the difference between the trust rules and those applicable to corporations.

The rules applicable to trustee removal have been similarly liberalized. Recent amendments in Uniform Trust Code states have made removal by the court easier: no longer is a serious breach of trust necessary to have a court remove a trustee. Courts can now be convinced to remove trustees by a showing that there has been "a substantial

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[101] RESTATEMENT (SECOND) OF TRUSTS § 167(1) cmt. (1959).
[102] RESTATEMENT (THIRD) OF TRUSTS, § 66(1) (2003).
[103] U.T.C. § 412(a) (2010). See In Re Moeder, 978 N.E.2d 754 (Ind. App. 2012); In Re Chapman, 953 N.E.2d 573 (Ind. App. 2011); In Re Nobbe, 831 N.E.2d 835 (Ind. App. 2005); In Re Fee Trust, No. 92,928, 2005 Kan. Unpub. LEXIS 72 (Kan. Apr. 22, 2005).
[104] RESTATEMENT (SECOND) OF TRUSTS § 167(1), cmt. (1959).
[105] Cox & Hazen, *supra* note 65, §§25.1, 25.4, 26.2.

change of circumstances" or that "removal is requested by all of the qualified beneficiaries", so long as the court also finds "that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available".[106] While corporate law is characterized by still greater facility of removal - the board can remove officers and shareholders can remove directors, with or without cause[107] – the recent reform of the trust rules has again abbreviated the distance separating them from their corporate parallels.

Finally, much as trust doctrine has increasingly come to approximate corporate law, the practice of trust drafters has come to approximate corporate drafting practices. One example is trust drafters' having developed an analogue to the corporate poison pill. Poison pills are rights, distributed to existing shareholders, to receive additional shares once the rights are triggered by events such as a tender offer. Pills serve to dilute the offeror's holdings, making a takeover more difficult and thus entrenching the current management.[108] The trust equivalent is the "event of duress" mechanism: a trust instrument clause providing that the occurrence of specified events would automatically operate to effect changes in the trust structure. For example, the issuance of an injunction against a

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[106] U.T.C. § 706(b)(4) (2010). See In re McKinney,67 A.3d 824 (Pa. 2013) ("A family's movement over time from northwestern Pennsylvania to the Tidewater region of Virginia, coupled with the fact that the original trustee institution has gone through approximately six corporate mergers leading to entirely different bank officers involved in administering the trusts [than those the settlors chose, was held to] represent … a change of circumstances substantial enough to come within the no-fault statutory provisions": *id.* at 826). See also Rapela v. Green, 289 P.3d 428 (Utah 2012); Davis v. U.S. Bank Nat. Ass'n, 243 S.W.3d 425 (Mo. Ct. App. 2007); In re Fleet Nat. Bank's Appeal from Probate, 267 Conn. 229, 837 A.2d 785 (Conn. 2004); Fleet Bank v. Foote, No. CV020087512S, 2003 Conn. Super. LEXIS 3313, 2003 WL 22962488 (Conn. Super. Ct. Dec. 2, 2003).

[107] Cox & Hazen, *supra* note 65, §§ 8.4, 9.13.

[108] On poison pills and their development see Michael J Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQ. 423 (1993); Cox & Hazen, *supra* note 65, § 23.6-7.

trustee, ordering him or her to pay over the trust assets other than in accordance with the trust instrument, could automatically operate to remove and replace the trustee. Having been replaced, the person who used to be trustee could truthfully say that he is unable to obey the injunction. "Event of duress" provisions have become popular in so-called "asset protection trusts", or self-settled spendthrift trusts, as they effectively insulate the trust assets against court orders obtained by the settlor's creditors.[109]

Many aspects of the convergence of trusts and corporations appear regrettable. Beneficiaries are now less protected from fiduciary duty breaches than they have been until the recent reforms, while trustees have become better protected against trust creditors: they no longer effectively insure beneficiaries against trust debts. More positively, court removal of trustees has become easier, enabling beneficiaries to exit an unsatisfactory relationship with their fiduciaries. This reformulation of the legal background to the fiduciary-client relationship conforms to the transformation of that relationship in practice from a long-term, fairly intimate relationship between family members of different generations and a friend or service provider who provided the family with decades of fiduciary services, to a shallower, transaction-based relationship focused on the sale of

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[109] See discussion of "event of duress" provisions in Federal Trade Commission v. Affordable Media LLC, 179 F.3d 1228 (9th Cir. 1999) ("Under the trust agreement, an event of duress includes "the issuance of any order, decree or judgment of any court or tribunal in any part of the world which in the opinion of the protector will or may directly or indirectly, expropriate, sequester, levy, lien or in any way control, restrict or prevent the free disposal by a trustee of any monies, investments or property which may from time to time be included in or form part of this trust and any distributions therefrom." … Upon the happening of an event of duress, the trust agreement provides that the [settlors-cum-beneficiaries] would be terminated as co-trustees, so that control over the trust assets would appear to be exclusively in the hands of a foreign trustee, beyond the jurisdiction of a United States court"; *id.* at note 9). See also Lawrence v. Goldberg, 279 F.3d 1294 (11th Cir. 2002); In Re: Stephen Jay Lawrence, Debtor, 251 B.R. 630 (U.S. Dist. Ct., S. D. of Florida, 2000); S.E.C. v. Brennan, 230 F.3d 65 (2nd Cir. 2000).

well-defined services by one party to the other. Like other service providers, many professional fiduciaries have become socially and geographically distant from their clients. Institutional service providers' sales of their fiduciary activities, mergers and other transformations on the provider side of the fiduciary relationship have reduced the typical duration of such relationships. The fiduciary situation has morphed from a relationship to a transaction, with fiduciaries only prepared to bear well-defined and clearly priced risks, rather than the open-ended protective commitment characteristic of the classical fiduciary. Clients' relationships with their fiduciaries have come to approximate shareholders' unsentimental, fully commodified relationships with corporate directors and officers. The transformation of fiduciary practice resembles that of other social institutions, such as marriage, which were classically characterized by a long-term, open-ended commitment of each party to the other, as well as by exit difficulties. It expresses the social alienation and relationship commodification characteristic of current society.

Whereas the long-term trust-as-relationship of yesteryear could optimally provide clients with some economic and inter-personal stability, the new trust-as-transaction is merely one more economic exchange for clients to carefully scrutinize. It joins the long and mounting list of economic transactions each individual must choose, formulate or avoid. Given the limitations of human information processing abilities, the mounting pile of transacting opportunities increases the likelihood of consumer errors.

Theoretically, a return to classical fiduciary law's more protective conception of the fiduciary-client relationship could provide a desirable shelter from the commodification of

social and economic life. Again theoretically, fiduciaries could compensate themselves for the additional risk consequent on offering a service on classical, protective terms by charging a premium fee, which clients would gladly pay given the stability and peace of mind resulting from those terms. Realistically, however, modern consumers have grown used to their lives being composed of a great number of short-term purchase transactions, concluded with an anonymous, constantly changing crew of vendors and service providers and financed by credit extended by an equally fluctuating collection of providers. Most consumers have adjusted to social and economic anonymization and commodification. Most consumers are also economically over-extended, and so put a premium on low costs. A high-cost, classically protective trust service is thus unlikely to meet with high demand.

## IV. CONCLUSION

This Article has demonstrated that the traditional distinctiveness of fiduciary relationships has been eroded: fiduciary relationships are not now fundamentally different from contractual relationships. While fiduciary-client relationships are one type of contractual relationship among many, claims that they escape contractualism entirely are not borne out by either modern fiduciary law or modern fiduciary practice. The Article has also shown how different types of fiduciary relationships are converging: while the traditional claim that trustees' fiduciary duties are more severe, and more severely enforced, than those of corporate directors and officers may have been true at one time, it is, under many states' statutory trust regimes, true no longer. Trust law and practice, including those of trustees'

fiduciary duties, are converging on the law and practice of corporations.[110] This convergence, carried out in trust instruments and the exculpatory and duty-abridging terms they contain, as well as in statutory reforms, expresses the commodification of fiduciary services and their transformation from an intimate, often long-term relationship to an arm's-length transaction. Because this reorientation of fiduciary relationships follows and expresses the social alienation and relationship commodification characteristic of current society, reversing it is likely to be very difficult, if not impossible. Only radical reform measures, such as holding fiduciary duty-abridging and exculpatory terms to be void, have some chance of success, and even they are likely to be stymied by current consumer preferences: if jurisdictions return fiduciary law to its protective roots, fiduciaries are likely to demand premium prices for their services, and consumers to balk at these demands, preferring cheaper, commodified fiduciary services.

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[110] I am not claiming that trusts and corporations have become identical. Lau, *supra* note 3, at 66-70, patiently teased out the remaining differences, while admitting, at 97, that "trusts and corporations sometimes appear to be the same thing and the difference is just a matter of degree".