

A Narrow View of Transnational Fiduciary Law

Andrew F. Tuch*

3.1 INTRODUCTION

Fiduciaries frequently confront transnational situations. Lawyers – an archetypal class of fiduciary – have long counseled participants in cross-border transactions and conducted their own activities transnationally.¹ Financial institutions – firms that often act in a fiduciary capacity² – have provided products transnationally for centuries.³

Yet, even as people, products, and capital have become more mobile, scholars have until recently given little attention to the transnational dimensions of fiduciary law. Instead, they have focused on activities occurring within the borders of legal systems.⁴ Scholars have explored fiduciary obligations by examining when they arise, what they require, and how they apply and have applied in various substantive fields

* For helpful comments and discussions, I thank Jens-Hinrich Binder, Seth Davis, Martin Gelter, Kirsty Gover, Jennifer Hill, Thilo Kuntz, Moritz Renner, Gregory Shaffer, Brian Tamanaha, Rebecca Wexler, and participants at the Transnational Fiduciary Law Conference, convened by UCI Law and Bucerius Law School in 2019.

¹ For example, innovations by lawyers in the eighteenth and nineteenth centuries facilitated cross-border trade between Britain and America. See ALAN D. MORRISON & WILLIAM J. WILHELM, JR., *INVESTMENT BANKING: INSTITUTIONS, POLITICS, AND LAW* 97–120 (2007). US lawyers were instrumental in creating the Panama Canal. See JOHN OLLER, *WHITE SHOE: HOW A NEW BREED OF WALL STREET LAWYERS CHANGED BIG BUSINESS AND THE AMERICAN CENTURY* 72–75 (2019).

² Andrew F. Tuch, *The Weakening of Fiduciary Law*, in *RESEARCH HANDBOOK ON FIDUCIARY LAW* 354, 356–60 (D. Gordon Smith & Andrew S. Gold eds., 2018).

³ During the eighteenth century, investment houses operating on both sides of the Atlantic raised funds from parties located in multiple national systems to finance railroads and wars. See, e.g., VINCENT P. CAROSSO, *INVESTMENT BANKING IN AMERICA* 29–42 (1970); CHARLES R. GEISST, *WALL STREET: A HISTORY FROM ITS BEGINNINGS TO THE FALL OF ENRON* 35–63 (2004).

⁴ See *infra* notes 26–28 and accompanying text.

and legal systems,⁵ but they have rarely examined how fiduciary law applies to conduct spanning national systems or to disputes that transcend national frontiers. Even the application of private international law principles to fiduciary law, an exercise that examines problems with transnational dimensions, has largely gone unexplored by fiduciary scholars.

This chapter conceptualizes “transnational fiduciary law,” a term that marries the fields of fiduciary and transnational law. Transnational fiduciary law warrants attention because of the growing frequency and significance of transnational business problems and the inevitability that many such problems have fiduciary dimensions. This chapter identifies two primary understandings of the concept and explores their scope and possible content.

Under the first interpretation of this composite concept, the term “transnational” qualifies what fiduciary scholars have conventionally understood as fiduciary law. Transnational fiduciary law, on this view, encompasses the application of fiduciary law to transnational problems and situations. The directors of a Delaware corporation that does business in Venezuela may face such problems. A US mutual fund advisor who invests in UK companies on behalf of US investors fulfills a fiduciary role. In the course of their work, these actors will owe fiduciary duties under US law, even though their operations may occur outside the United States. This sense of transnational fiduciary law further encompasses the global spread of fiduciary laws, as jurisdictions learn from each other or perhaps reform or develop their laws, converging with those of another system.

Under the second interpretation, transnational fiduciary law refers not to fiduciary law as applied in transnational contexts but rather to transnational law governing the conduct of fiduciaries. Transnational law lacks a universally accepted definition.⁶ Nevertheless, here we seek some wider notion of a “legal order” that is said to govern the behavior of parties operating within it. This order incorporates formal laws but also “regulatory instruments and mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of

⁵ See, e.g., *THE OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan J. Criddle et al. eds., 2019) (examining fiduciary law under numerous classifications).

⁶ See Roger Cotterrell, *What Is Transnational Law?*, 37 *LAW & SOCIAL INQUIRY* 500, 500–02 (2012); Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 *ANN. REV. L. & SOC. SCI.* 231, 232 (2016). See also *infra* notes 20–27. For instance, transnational law has been understood not simply as a corpus of law, but as the production and transmission of legal norms. Another point of divergence concerns whether the notion of transnational law refers to the law’s scope of application or the legal sources implied. See Ralf Michaels, *State Law as a Transnational Legal Order*, 1 *U.C. IRVINE J. INT’L TRANSNAT’L. AND COMP. L.* 141, 145–46 (2016). Efforts to identify transnational law or legal orders are often tentative, arguing only that such law or legal orders may be emerging. See, e.g., Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 *L. & CONTEMP. PROBS.* 15, 16 (2005); Ross Cranston, *Theorizing Transnational Commercial Law*, 42 *TEXAS INT’L L. J.* 597, 616 (2007).

formal sanctions.”⁷ As such, this understanding largely encompasses the first interpretation but extends more broadly to include norms, contractual constraints, customary practices, official guidance, and assorted voluntary schemes, all of which might achieve similar objectives to fiduciary law.⁸

In this chapter, I argue that scholarly attention to the transnational dimensions of fiduciary law ought, in most instances, to be bounded by the first interpretation. Fundamentally, I question whether transnational law governing fiduciaries generally can be equated with fiduciary law at all without causing significant confusion. Fiduciary duties are distinctive in ways that prevent non-fiduciary law – to say nothing of vague and shifting norms – from serving as substitutes. Keep in mind that much of the law that governs fiduciaries is not fiduciary law; nor does it purport to be fiduciary law. Similarly, many of the duties fiduciaries owe are not fiduciary duties.⁹ What makes them fiduciaries, then, is precisely fiduciary law, not the wider range of laws and norms to which they may also be subject.¹⁰

Another difficulty with the second interpretation is that legal norms and practices that appear to serve similar functions as fiduciary law may be rarely stated and therefore difficult to verify. When they are stated, they may be vague and provisional. It is, therefore, hard to determine whether transnational fiduciary law in this second sense exists at all in practice. The chapter provides case studies illustrating the difficulty of isolating the second interpretation in practice, except as it reduces to the first through its incorporation of fiduciary law applied in transnational contexts.

To be clear, I do not claim that the transnational dimensions of fiduciary law are irrelevant. Far from it: Fiduciaries find themselves more and more involved in deals across jurisdictions, which can raise thorny questions about how they must behave in order to meet fiduciary obligations. Nor do I reject the importance of transnational law or transnational legal ordering. However, I suggest that we treat transnational fiduciary law as an application of fiduciary law rather than as a field deserving independent study, at least until we can establish that transnational fiduciary law – in the first interpretation – is itself distinct from fiduciary law.

3.2 DEFINITIONAL ISSUES

Although transnational fiduciary law simply marries the concepts of fiduciary law and transnational law, defining the term poses challenges. Scholars in each of these

⁷ Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 499 (2006). See also Carrie Menkel-Meadow, *Why and How to Study “Transnational” Law*, 1 U.C. IRVINE L. REV. 97, 103 (2011).

⁸ On one definition, fiduciary law aims “to prohibit fiduciaries from misappropriating or misusing entrusted property or power.” TAMAR FRANKEL, *FIDUCIARY LAW* 240 (2011).

⁹ See *infra* notes 88–105 and accompanying text.

¹⁰ *Id.*

fields conceive of law differently, with transnational law scholars adopting a more capacious understanding.

To fiduciary scholars, fiduciary law means “hard” law. Hard law imposes “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”¹¹ First, fiduciary law imposes legally enforceable obligations, requiring loyalty and, under American law, due care.¹² Second, fiduciary obligations are precise or capable of being made precise through adjudication or rulemaking. As Seth Davis notes, fiduciary “duties of loyalty and care can be specified in these relationships by reference to a specific maximand and a discernible set of decision rules.”¹³ Third, authority for interpreting and implementing fiduciary law is delegated to courts. It is an oft-stated principle that parties themselves do not determine whether a fiduciary relationship exists; courts do.¹⁴

To scholars of fiduciary law, therefore, fiduciary law is state-enforced law, the product of common law or legislative principles.¹⁵ This is so even when fiduciary law is applied to non-fiduciaries functioning in a fiduciary-like manner or to duties that are analogous to fiduciary duties.¹⁶ Of course, fiduciary law may reflect various

¹¹ Cf. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421 (2000).

¹² See Matthew Conaglen, *Fiduciary Principles in Contemporary Common Law Systems*, in Criddle et al., *supra* note 5, 565, 574–75.

¹³ Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1170 (2014); *id.* at 1158 (discharging fiduciary duties requires the fiduciary to “pursue one or a set of agreed-upon ends, which are measured by a specific set of doctrinal maximands”).

¹⁴ See, e.g., RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006) (“Whether a relationship is characterized as agency in an agreement between parties . . . is not controlling”). For applications of this general principle, see *Veleron Holdings, B.V. v. Morgan Stanley*, 117 F. Supp. 3d 404 (2015) (citing *Ne. Gen. Corp. v. Wellington Adver., Inc.*, 82 N.Y. 2d 158, 163 (N.Y. 1993)) (“we must look past the labels that [the parties] placed on their relationship and instead plumb the real character of the services that [the bank] provided . . . because ‘Ultimately, the dispositive issue of fiduciary-like duty or no such duty is determined not by the nomenclature [used by the parties] but instead by the services agreed to under the contract between the parties’”); *In re Merrill Lynch Auction Rates Securities Litigation*, 758 F. Supp. 2d 264, 282 (S.D.N.Y. 2010) (refusing to give effect to a disclaimer of fiduciary duties because “it is the facts and circumstances of the relationship of the parties that governs whether a [fiduciary] duty existed,” not how the parties characterize the relationship).

¹⁵ Prominent scholarship examining fiduciary law focuses on legal doctrine, usually case law. See, e.g., MATTHEW CONAGLEN, *FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES* 7–31 (2011); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 37 DUKE L. J. 879 (1988); PAUL FINN, *FIDUCIARY OBLIGATIONS* 1–5 (1977); J. D. HEYDON ET AL., *MEAGHER, GUMMOW & LEHANE’S EQUITY DOCTRINES & REMEDIES* 141–85 (5th ed. 2015).

¹⁶ See, e.g., Martin Gelter & Genevieve Helleringer, *Fiduciary Principles in European Civil Law Systems*, in Criddle et al., *supra* note 5, 583, 584 (referring to “fiduciary-like duties”); Chaim Saiman, *Fiduciary Principles in Classical Jewish Law*, in Criddle et al., *supra* note 5, 545, 546 (referring to “the nearest analogue to a modern fiduciary”). See also Nicholas C. Howson, *Fiduciary Principles in Chinese Law*, in Criddle et al., *supra* note 5, 603, 603 (referring to “something like fiduciary obligations”).

policies and rationales,¹⁷ enable the development of social norms,¹⁸ and be seen as codifying moral intuitions or reasoning.¹⁹ But no matter what is contained in the larger sphere of goals and justifications surrounding fiduciary law, it is conventionally understood as state-enforced law.

In contrast to fiduciary law as conventionally understood, transnational law is both hard – state-enforced – and “soft.” It need not be the product of legislative, regulatory, or judicial determinations but can instead result from “customary practices, norms, and patterns of behavior regulation.”²⁰ These are enforced not by the state but “through such social and political processes as economic sanctions, ‘shaming,’ and reputational effects.”²¹ Transnational law may also be created in an ad hoc manner by the parties through private legal ordering, which they can accomplish through private contract or standard-setting.²² Such law is transnational because it applies to parties located in multiple national systems,²³ or targets events or situations that occur in more than one national system,²⁴ or “regulates actions or events that transcend national frontiers.”²⁵

This is one way to conceptualize transnational law: as a substantive body of law – with the notion of law broadly conceived – applied in transnational contexts. Another focus of study is transnational legal ordering, which focuses upon processes of normative settlement across national borders, which can occur through “hard” or “soft” law as the result of interactions among actors and institutions in multiple jurisdictions.²⁶ Developed by Terence Halliday and Gregory Shaffer, this theoretical framework addresses how legal norms are produced transnationally and migrate across borders, shaping legal practice.²⁷ Here the focus of study is the transmission of

¹⁷ For example, fiduciary law may reflect “the need to maintain public confidence in the integrity and utility of a range of socially important relationships in which loyal service is properly to be expected.” *Hughes Aircraft Sys Int’l v. Air Servs Austl* (1997) 76 FCR 141, 237 (Austl.).

¹⁸ See, e.g., Matthew Harding, *Fiduciary Law and Social Norms*, in Criddle et al., *supra* note 5, 797, 808–10.

¹⁹ See Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829–30 (1983). (“Courts regulate fiduciaries by imposing a high standard of morality upon them.”)

²⁰ Menkel-Meadow, *supra* note 7, at 103.

²¹ See *id.* at 113.

²² See Chapter 1.

²³ Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQ. 229, 232 (2012). (Transnational law can be interpreted to “generally comprise legal norms that apply across borders to parties located in more than one jurisdiction.”) See also Cotterrell, *supra* note 6, at 500–02.

²⁴ Shaffer, *supra* note 23, at 233. (Transnational law “refers to law that targets transnational events and activities – that is, transnational situations which involve more than one national jurisdiction.”)

²⁵ PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956). (Transnational law includes “all law which regulates actions or events that transcend national frontiers.”)

²⁶ See Michaels, *supra* note 6, at 143–45.

²⁷ See Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3, 5 (Terence C. Halliday & Gregory Shaffer eds., 2015). See also Shaffer, *supra* note 6.

laws “across borders, regardless of whether they address transnational activities or purely national ones” and the roles of networks and institutions in constructing them.²⁸

How to fuse these disparate notions of law into a single composite concept? In fact, I believe it is necessary to develop more than one composite, as no one sense of transnational fiduciary law fully embraces what is traditionally understood as fiduciary law alongside both approaches to transnational law. I therefore develop two interpretations of transnational fiduciary law.

In the first, the term “transnational” qualifies what fiduciary scholars have conventionally understood as fiduciary law. Here, transnational fiduciary law encompasses the application of fiduciary law to transnational problems and situations. A scholar exploring transnational fiduciary law in this sense will seek to understand how particular fiduciary laws operate across national boundaries or jurisdictions, as parties transact in multiple national systems or create business arrangements that implicate parties in multiple national systems. This scholar may also take interest in the changing practice of fiduciary law within a given national system as its legislators, regulators, jurists, and practitioners learn from their experiences in contact with other national systems or find their domestic business environments altered by foreign laws governing parties doing business in an increasingly globalized financial milieu. For instance, scholars may note the extension of US fiduciary practices to other parts of the world where US fiduciaries, such as mutual fund managers, are required to follow US fiduciary law even as they operate abroad. Halliday and Shaffer’s theoretical framework of transnational legal orders provides a framework for studying these processes. Section 3.3 examines transnational fiduciary law on this understanding: hard law as applied in transnational contexts.

Under the second interpretation, transnational fiduciary law encompasses transnational law understood as a corpus of law or as the production and transmission of law that governs fiduciaries. Law may be hard or soft. Section 3.4 considers this interpretation and explains why I regard it as overinclusive.

3.3 FIDUCIARY LAW WITH TRANSNATIONAL DIMENSIONS

Among fiduciary law scholars, fiduciary law has a decidedly national orientation. Assumed prototypes for the accepted or status-based categories of fiduciary relationship – those between partners, agents and principals, lawyers and clients, trustees and beneficiaries, and directors or officers and the corporations they serve – are rarely considered to exhibit transnational dimensions. If they do, those dimensions rarely feature in the questions that fiduciary scholars address. Other relationships, though not fiduciary relationships by default, may also have fiduciary character

²⁸ Shaffer, *supra* note 23, at 8–9.

because, say, a party reposes trust or confidence or is vulnerable to opportunism.²⁹ These, too, rarely have transnational legal dimensions. Questions that tend to concern fiduciary scholars – fiduciary standards of conduct; how those standards vary across relationships, jurisdictions, and time periods; and the remedies available for fiduciary breach – usually do not involve transnational activities or situations. And while comparative fiduciary law attracts strong scholarly attention, it too lacks transnational dimensions, since it tends to consider the law of one national system alongside that of another rather than the law that spans those systems or that governs actors located in or problems arising in both national systems. One measure of this scholarly indifference is the recently published *Oxford Handbook of Fiduciary Law*. Its forty-eight chapters offer one of the most comprehensive accounts of the subject, but none of them deals substantively with transnational fiduciary law.³⁰

Yet fiduciary law, understood in its conventional sense, often has transnational dimensions. A fiduciary's activities may span borders, or a fiduciary may face problems arising in multiple national systems. A fiduciary itself may reside in multiple national systems. The fiduciary law governing fiduciaries may apply across national borders. And scholars undertaking comparative studies of fiduciary law examine how fiduciary law in one national system may migrate to and influence law in other systems.³¹ In Section 3.3.1, I explore circumstances such as these, in which fiduciary law has transnational character.

3.3.1 *The Effect of Conflict-of-Laws Principles*

Under conflict-of-laws principles, fiduciary law can apply transnationally, such as to parties whose conduct occurs across national borders. One instance in which fiduciary law was applied transnationally under these principles was *Sinclair Oil Corp. v. Levien*,³² an iconic corporate law case. Sinclair Oil was a New York-

²⁹ See Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 940–51 (2006); Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, in Criddle et al., *supra* note 5, 3, 6–11; Andrew F. Tuch, *Fiduciary Principles in Banking*, in Criddle et al., *supra* note 5, 125, 127–37.

³⁰ See Criddle et al., *supra* note 5.

³¹ See, e.g., Martin Gelter & Genevieve Helleringer, *Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law*, 15 BERKELEY BUS. L. J. 92 (2018); Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. ILL. L. REV. 507 (2019); DAVID KERSHAW, *THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW* (2018); David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. 395 (2012); Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, 4 DEL. J. CORP. L. 1 (2020); Amir N. Licht, *Lord Eldon Redux: Information Asymmetry, Accountability, and Fiduciary Loyalty*, 37 OXFORD J. LEGAL STUD. 770 (2017); Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939 (2019).

³² 280 A.2d 717 (Del. 1971).

incorporated oil exploration and production company that operated internationally through various subsidiaries. One of these, the Delaware-incorporated Sinven, was Sinclair's subsidiary in Venezuela.³³ Minority shareholders in Sinven sued Sinclair, alleging that, as the dominant shareholder in Sinven, it had breached its fiduciary duties to minority shareholders. Specifically, the minority shareholders alleged that Sinclair had allowed one of its wholly owned subsidiaries to breach contracts with Sinven and, in turn, as controller of Sinven, had failed to enforce Sinven's rights against that subsidiary. According to the Delaware Supreme Court, Sinclair owed fiduciary duties to the Sinven minority shareholders as a controlling shareholder and, having failed to establish the fairness of the relevant transactions, had breached those duties. The court rejected other claims brought by minority shareholders, including the claim that Sinclair had breached its duties by allocating opportunities for developing oil fields in Alaska, Canada, and Paraguay to the company's other subsidiaries.

The case illustrates the reach of Delaware corporate fiduciary law to activities occurring in multiple national systems. The key under conflict-of-laws principles was the status of Sinven as a Delaware corporation. According to Delaware law's internal affairs doctrine, corporate governance matters – such as disputes between directors and shareholders – are governed by the law of a company's state of incorporation.³⁴ This meant that Sinven was subject to Delaware law, even though its activities were in Venezuela. The same would be true of any Delaware-incorporated company; the doctrine applies Delaware law to directors' conduct occurring in other national systems or in multiple national systems, giving transnational character to Delaware fiduciary law. Similar conflict-of-laws principles apply in other states,³⁵ as well as in England.³⁶

However, apart from the internal affairs doctrine, conflict-of-laws principles apply with some uncertainty to fiduciary questions. The *Restatement (Second) of Conflict of Law* gives no explicit guidance about the applicable law for resolving disputes under fiduciary law, except for agency relationships, in which case the *Restatement* would determine the parties' rights and duties using the law of the jurisdiction with the most significant relationship to the parties of the transaction.³⁷ Leading treatises have little substantive discussion of conflict-of-laws principles for fiduciary questions, except tangentially in discussing choice-of-law clauses for contract claims.³⁸ Nor does legal scholarship appear to address these conflicts-of-laws questions as regards fiduciary disputes.

³³ *Levien v. Sinclair Oil Corp.*, 261 A.2d 911, 913 (Del. Ch. 1969).

³⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1971); STEPHEN M. BAINBRIDGE, CORPORATE LAW 8–9 (3d ed. 2015).

³⁵ See BAINBRIDGE, *supra* note 34, at 9.

³⁶ PETER HAY ET AL., CONFLICT OF LAWS 1342 (6th ed. 2018).

³⁷ RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 291 (1971).

³⁸ See, e.g., HAY ET AL., *supra* note 36, at 1076–80.

To the extent courts do consider choice-of-law in resolving fiduciary disputes, they often characterize such disputes as either tort or contract cases. Because fiduciary duty has been characterized as a tort, we would expect choice-of-law principles *for torts* to resolve fiduciary claims.³⁹ According to the *Restatement (Second) of Conflict of Laws*, the relevant law is that with “the most significant relationship to the occurrence [of the tort] and the parties.”⁴⁰ However, instead of applying first-principles analysis to determine the governing law to resolve a fiduciary claim, courts may follow the law specified in a choice-of-law clause in a contract between parties to a fiduciary relationship. Before taking this approach, courts must determine whether the relevant choice-of-law clause governs noncontractual issues – such as fiduciary breach – arising from the contractual relationship to which the clause applies.⁴¹ Courts have taken different positions on whether such clauses govern fiduciary issues.⁴² According to a leading treatise, “the most logical inference” from the *Restatement (Second) of Conflict of Laws* is that such clauses apply only to contractual issues and therefore not to fiduciary breach.⁴³ But the legal position is unsettled.⁴⁴ Still, because cases often turn on interpretations of the contract in question,⁴⁵ clauses are often given their intended effect. The result is that clauses written to apply to disputes “whether based on contract, tort, or otherwise” – an increasingly common formulation in some business contexts – apply to claims of fiduciary breach. Even in the absence of such clear language, Delaware courts have been willing to apply the law specified in a choice-of-law clause to tort claims in order to avoid “uncertainty of precisely the kind that the parties’ choice of law provision sought to avoid.”⁴⁶

For a recent case involving a transnational situation, consider *Veleron Holdings, B.V. v. Morgan Stanley*.⁴⁷ In resolving an insider trading claim, the question arose of when a fiduciary relationship existed between the French bank BNP Paribas and its contractual counterparty, the US bank Morgan Stanley. Morgan Stanley had undertaken to act as BNP’s agent in a transaction involving the acquisition of Magna

³⁹ RESTATEMENT (SECOND) OF TORTS § 874, cmt. A (1979).

⁴⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

⁴¹ HAY ET AL., *supra* note 36, at 1073. (The relevant question is whether “a choice-of-law clause may, or does, encompass non-contractual issues arising from, or connected to, the same contractual relationship that is the object of the clause.”)

⁴² *Id.* at 1074. (“The Restatement is silent on whether the parties may agree in advance on the law that will govern the parties’ non-contractual rights, especially those arising from a future tort between them.”)

⁴³ *Id.*

⁴⁴ *Id.* at 1076. (“The case law on this issue in the United States is still unsettled.”)

⁴⁵ See, e.g., *Thomas v. Fidelity Brokerage Services, Inc.*, 977 F. Supp. 791 (W.D. La. 1998) (rejecting defendant’s argument that a choice-of-law provision in a contract extended to a breach of fiduciary duty claim, reasoning that the parties intended that the provision apply to issues of contract construction and enforcement only); HAY ET AL., *supra* note 36, at 1076–78.

⁴⁶ *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1048 (2006).

⁴⁷ 117 F. Supp. 3d 404 (2015).

International, a Canadian entity listed on the New York Stock Exchange and Toronto Stock Exchange, by Russian Machines (RM), an entity owned by a Russian oligarch. To facilitate the acquisition, RM formed Veleron B.V., a Dutch special-purpose vehicle. BNP agreed to lend \$1.2 billion to Veleron; in turn, Veleron purchased some 20 million shares of Magna, pledging them to BNP as security for the loan. BNP appointed Morgan Stanley as an agent under an “Agency Disposal Agreement” (ADA); Morgan Stanley was to sell Veleron’s Magna shares if Veleron defaulted on the loan from BNP. The French bank also entered into a credit default swap with Morgan Stanley under which Morgan Stanley assumed some risk of BNP’s loan to Veleron.

In September 2008, during the turmoil of the global financial meltdown, BNP informed Morgan Stanley that Veleron was experiencing financial difficulties and needed to restructure its loan from BNP. Using this information, Morgan Stanley decided to “short sell” Magna stock, allowing it to profit if Magna’s stock price fell. When Veleron later defaulted, BNP sold the pledged Magna stock, Magna’s price fell, allowing Morgan Stanley to profit under its short sale arrangement.

Veleron commenced suit against Morgan Stanley, raising the question whether Morgan Stanley was a fiduciary of the French bank under the ADA. The US District Court for the Southern District of New York denied in part Morgan Stanley’s motion for summary judgment, finding that there was a genuine issue of material fact on the fiduciary question. Observing that New York law governed the ADA, the court applied New York law in examining the fiduciary question, effectively applying the choice-of-law test for contract cases.⁴⁸ Fiduciary law thus applied to a situation implicating actors in multiple national systems.

3.3.2 *Fiduciary Law with Transnational Application: Extraterritoriality*

Fiduciary law, as conventionally understood, may also have extraterritorial effect and therefore apply to transnational problems. This is thanks in part to the enormous global influence of US mutual funds.⁴⁹ The managers of mutual funds owe fiduciary duties, according to the Investment Advisers Act of 1940.⁵⁰ These duties govern their conduct even if it spans national systems or occurs in another national system.⁵¹

In practice, that conduct will often be transnational because mutual funds may, and commonly do, vote in corporate elections held by their portfolio companies – companies that are often based outside the United States. Frequently fund

⁴⁸ *Id.* at 451.

⁴⁹ As to the size and expected growth of these enterprises, see Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B. U. L. REV. 721 (2019).

⁵⁰ Investment Advisers Act, 15 U.S.C. §§80b-1 to b-21(2012).

⁵¹ As to the imposition of fiduciary duties, see SEC v. Capital Gains Research Bureau, 375 U.S. 180, 191–92 (1963). For an overview of fiduciary principles in investment management, see Arthur Laby, *Fiduciary Principles in Investment Advice*, in Criddle et al., *supra* note 5, 145, 146–48.

managers will “vote by proxy.” In 2003, the Securities and Exchange Commission adopted Rule 206(4)-6 of the Investment Advisers Act,⁵² making clear that investment advisors are fiduciaries even when deciding whether and how to vote their funds’ proxies and creating powerful incentives for advisors to vote their proxies.⁵³ Indeed, investment advisors vote virtually all of their shares, usually voting in-line with the recommendations of proxy advisors.⁵⁴ Indeed, investment advisors vote virtually all of their shares, usually voting in-line with the recommendations of proxy advisors. The largest US mutual fund families – Blackrock, Vanguard, and State Street Global Advisors – have significant holdings in foreign corporations. For example, BlackRock, the largest US manager of mutual funds, invests some \$1.6 trillion in Europe, the Middle East, and Africa and a further \$428 billion in the Asia Pacific,⁵⁶ together representing around 30 percent of BlackRock’s total assets under management.⁵⁷ Data from the United Kingdom illustrates the increasingly transnational nature of investment advisors’ activities. Figure 3.1 shows the holdings of UK public companies from 1963 to 2020 by various categories of shareholder, including individuals/households, insurance companies, pension funds, mutual funds, and foreign shareholders (labelled “rest of the world”). Over this period, individual/household ownership decreased as ownership by institutional investors increased. Foreign ownership rose from 7 percent in 1963 to 56.3 percent in 2020, giving foreign investors significant influence over UK companies through voting and other stewardship activities.⁵⁸ Of these international investors, US mutual funds are the largest category, accounting for some 30 percent of all foreign investor holdings in UK public companies.⁵⁹ When the investment advisors of these US mutual fund advisors vote their shares in UK companies, US fiduciary law governs their decisions.⁶⁰

⁵² Proxy Voting by Investment Advisers, 17 C.F.R. § 275.206(4)-6 (2018).

⁵³ See Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 B.U. L. REV. 1499 (2019).

⁵⁴ See BROADRIDGE & PWC PROXY PULSE: 2018 PROXY SEASON REVIEW 2–4 (2018), https://www.broadridge.com/_assets/pdf/broadridge-2018-proxy-season-review.pdf [<https://perma.cc/AA39-4XDK>].

⁵⁶ See Blackrock, Inc., Form 10-K for 2018, at 10.

⁵⁷ *Id.* at 4.

⁵⁸ OFFICE FOR NAT’L STATISTICS, OWNERSHIP OF UK QUOTED SHARES: 2020 (Mar. 3, 2022), <https://www.ons.gov.uk/economy/investmentpensionsandtrusts/bulletins/ownershipofukquotedshares/2020#:~:text=The%202020%20estimate%20for%20unit,underlying%20ownership%20by%20unit%20trusts>.

⁵⁹ See *id.* at table 3 (showing that in 2020 stockholdings of mutual funds (known in the United Kingdom as unit trusts) accounted for GBP 315.9 billion out of total foreign stockholdings of GBP 1,220.5 billion). For more detailed analysis of investor holdings and voting, see Suren Gomsian, *Voting Engagement by Large Institutional Investors*, 45 J. CORP. L. 659 (2020).

⁶⁰ Recognizing the application of US law to voting decisions in non-US companies, the SEC in its 2003 guidance to investment advisers observes that proxy voting may not serve clients’ interests, and therefore not be required, if the cost of such voting exceeds its benefits. It gives the example of “casting a vote on a foreign security may involve additional costs such as hiring a translator or traveling to the foreign country to vote the security in person.” Proxy Voting by

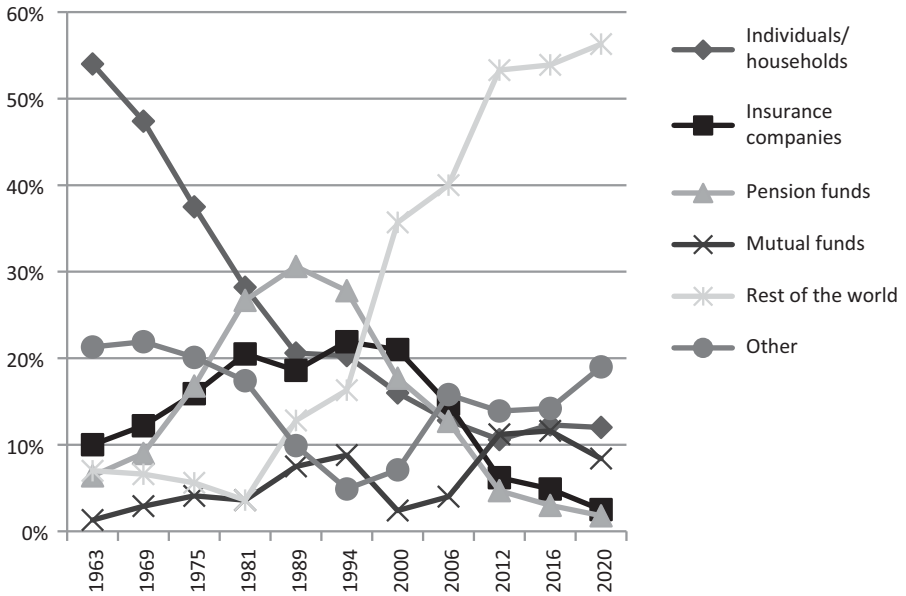


FIGURE 3.1. Share ownership patterns in the United Kingdom, 1963–2020⁶¹

The same applies to US investors voting on boards of companies outside the United Kingdom. US fiduciary law follows US investors across the globe, ensuring that US fiduciary law has considerable transnational presence and effect.

Investment Advisers, Investment Advisers Act Release No. IA-2106, 68 Fed. Reg. 6585, 6587 (Feb. 7, 2003). The voting by US advisors in UK companies has influenced voting behavior by their British counterparts. See Bernard S. Black & John C. Coffee, *Hail Britannia?: Institutional Investor Behavior under Limited Regulation*, 92 MICH. L. REV. 1997, 2004 (1994). (“American influence may also have an impact. British institutions have observed the American voting practices and also realize that if they do not vote, the votes of American institutions, who own a significant fraction of British equities, could dictate the outcome of shareholder votes.”)

⁶¹ OFFICE FOR NAT’L STATISTICS, OWNERSHIP OF UK QUOTED SHARES: 2020 (Mar. 3, 2022), <https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2020#:~:text=The%202020%20estimate%20of%20unit,underlying%20ownership%20by%20unit%20trusts>; OFFICE FOR NAT’L STATISTICS, OWNERSHIP OF UK QUOTED SHARES: 2016 (Nov. 29, 2017), at figs. 3–8 <https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2016> [<https://perma.cc/672V-YD52>]. The “Rest of the world” category includes foreign investors, among them mutual funds, pension funds, insurance companies, banks, private non-financial companies and public sector entities (including sovereign wealth funds). *Id.* at table 5. Note that these data may exaggerate the influence of investment advisors because they classify a shareholder as foreign if its parent is foreign-domiciled, even if the shareholder is a locally managed UK subsidiary. Tuch, *supra* note 53, at 1459, 1502–03. But see Brian R. Cheffins, *The Stewardship Code’s Achilles’ Heel*, 73 MOD. L. REV. 1004, 1008–09 (2010) (emphasizing the implications of foreign ownership of UK public company stock).

3.3.3 *Fiduciary Law as Process*

This first interpretation of transnational fiduciary law also encompasses the spread of fiduciary laws across national boundaries, as national laws develop, converging with those of another system. Fiduciary law is often transmitted across boundaries and evolves by reference to fiduciary law in other national systems. These sorts of influences across jurisdictions are explicitly studied in comparative law work on fiduciary law.⁶² Examples of this sense in which fiduciary law has transnational character are given below.⁶³

3.4 TRANSNATIONAL LAW GOVERNING FIDUCIARIES

Section 3.3 focused on fiduciary law that is transnational in character. In Section 3.4, the analysis widens to encompass transnational law governing fiduciaries and therefore applies broader conceptions of law. Here, law means not just the hard law of legislation, regulation, and judicial decisions, but also private legal ordering through contract and standard-setting by parties. Terence Halliday and Gregory Shaffer theorize what they call a “transnational legal order” (TLO), defined as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”⁶⁴ Halliday and Shaffer explain that “state law . . . becomes TLO law in subject areas when transnational legal norms are adopted and practiced in a settled, concordant way so that a new normal arises regarding the social understanding of the legal norms that apply.”⁶⁵ And, as we saw, the focus of transnational law also can be on the production of norms and their transmission across borders – not just the body of law or the legal order, but the ways in which interaction across jurisdictions affects the development of laws and legal norms within national jurisdictions.⁶⁶

Under this interpretation, transnational fiduciary law is not so much the application of fiduciary law across borders as transnational law that governs the conduct of fiduciaries or the transnational legal ordering of fiduciaries. Conceiving of transnational law in this way would bring a broader range of legal instruments within transnational fiduciary law than does the first interpretation⁶⁷ and would attend

⁶² See *supra* note 32

⁶³ See Section 3.4.4.

⁶⁴ Halliday & Shaffer, *supra* note 27, at 11.

⁶⁵ Gregory C. Shaffer, *Theorizing Transnational Legal Ordering of Private and Business Law*, 1 U.C. IRVINE J. INT’L TRANSNAT’L. AND COMP. L. 1, 9 (2016).

⁶⁶ See *supra* note 27–29 and accompanying text.

⁶⁷ This understanding overlaps with the first understanding and may encompass it. Transnational law may be conceptualized as transnational law that “address[es] transnational activities and situations,” Shaffer, *supra* note 23, at 7. The term can include “the application of *national law* to events that occur outside a state’s borders but have effects within it.” *Id.* at 8 (emphasis added).

more to the role of transnational institutions and networks in the development of legal norms. Below I explore these understandings of transnational law by sketching a few brief examples of transnational norms, practices, and patterns of behavior that may govern the conduct of fiduciaries. These examples exclude cases that would also fall within the first interpretation through their incorporation of fiduciary law applied in transnational contexts.⁶⁸ I then consider whether these arrangements are firmly enough established across borders to amount to transnational law and, more fundamentally, whether they may sensibly be described as fiduciary law at all. The framework of TLO theory helps us assess the extent to which such norms have settled transnationally from a socio-legal perspective.

3.4.1 Examples

3.4.1.1 Private Ordering and Standard-Setting

Firm-Level Conflict-of-Interest Management. In performing various functions, financial conglomerates often act as fiduciaries.⁶⁹ Although they are loathe to admit this, they readily claim to have extensive internal procedures and controls for “addressing” conflicts.⁷⁰ In fact, financial conglomerates inevitably face conflicts of interest, a function of their business model, which sees them “act[ing] for numerous clients across a broad and diverse range of financial activities, all the while acting as principals in a similarly broad and diverse range of activities.”⁷¹ These firms seek to address conflicts to avoid potential fiduciary liability but they do so also to avoid reputational harm, which may be severed, and these measures therefore go further than fiduciary law would require.

⁶⁸ For examples, in addition to those in Part II, concerning hard law that may fall within both interpretations, see Chapters 4 and 5.

⁶⁹ When they act as investment advisors, they are fiduciaries under the Investment Advisers Act of 1940. Section 206(1)-(2). They are also often fiduciaries also under principles of agency and trust law. See Deborah A. DeMott & Arthur B. Laby, *The United States of America*, in *LIABILITY OF ASSET MANAGERS* 411, 415 (Danny Busch & Deborah A. DeMott eds., 2012). When they act as broker-dealers, they may be fiduciaries, particularly if they manage discretionary accounts or exercise control over customer assets. See SEC. & EXCH. COMM’N, *STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS: AS REQUIRED BY SECTION 913 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT* 50–73 (Jan. 2011). On rare occasions financial conglomerates will be fiduciaries when accepting deposits or making loans. See Tuch, *supra* note 29, at 127–30.

⁷⁰ The Goldman Sachs Group, Inc., Annual Report on Form 10-K, for year ended Dec. 31, 2021, at 45. (“We have extensive procedures and controls that are designed to identify and address conflicts of interest, including those designed to prevent the improper sharing of information among our businesses.”)

⁷¹ Andrew F. Tuch, *Financial Conglomerates and Information Barriers*, 39 J. CORP. L. 563, 564 (2014). See also Alan D. Morrison & William J. Wilhelm Jr., *Trust, Reputation, and Law: the Evolution of Commitment in Investment Banking*, 7 J. LEG. ANAL. 363, 391 (2015).

Major financial conglomerates operate transnationally. Their activities span the globe, often involving transactions involving actors and capital flows that span national borders. Their internal procedures and controls governing conflicts would seem to apply firm-wide.⁷² The objective is often to “mitigate” conflicts of interest, rather than necessarily to avoid them.⁷³ Firms do not publicize their internal policies, other than to describe them in general terms, and deal on a client-by-client basis, leaving observers uncertain about the precise norms applicable to addressing conflicts. In addition to internal controls, common measures include the disclaimer of liability for conflicts (to the extent possible) and the disclosure of actual and expected conflicts.⁷⁴ Policies also include information barriers to stem internal flows of information.⁷⁵ A strict fiduciary regime requiring conflict avoidance appears not to govern; rather, through a combination of measures, primarily internal limits and controls on conflicts but also the elimination or waiver of fiduciary duties, firms hold themselves to a standard of conflict “mitigation” or “management.”

These various norms and practices governing fiduciaries’ conduct may well span national systems, having transnational dimensions. Still, these norms and practices are difficult to identify and verify outside these firms.

Advice on Mergers and Acquisitions. The field of firms advising on mergers and acquisition (M&A) transactions provides another concrete example of private legal ordering by parties that may be fiduciaries. Highly lucrative, these services are provided by financial conglomerates or smaller financial firms dedicated to providing advice. These transactions can have transnational elements since the companies involved often operate transnationally and may be in different national systems from their counterparty in a transaction. M&A transactions have high-stakes for the corporations involved, each of which will typically be advised by a financial advisor and legal advisor, and often several of each. M&A advisors may be ad hoc fiduciaries of their clients.⁷⁶ In light of the risk of fiduciary characterization, financial advisors

⁷² Firms’ public disclosures do not suggest otherwise.

⁷³ See, e.g., Morgan Stanley, Annual Report on Form 10-K, for year ended Dec. 31, 2021, at 17.

⁷⁴ Tuch, *supra* note 71, at 576–77.

⁷⁵ See, e.g., Goldman Sachs, *supra* note 70. See also Law Commission, Fiduciary Duties and Regulatory Rules, 1992, Consultation Paper 124, 61–163 (United Kingdom).

⁷⁶ See, e.g., *Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 351 F. Supp. 2d 79, 102 (S.D.N.Y. 2004); Official Committee of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Securities Corp., No. 00 Civ. 8688 (WHP), 2002 WL 362794 (S.D.N.Y. Mar. 6, 2002); *Baker v. Goldman Sachs & Co.*, 656 F. Supp. 2d 226 (D. Mass. 2009). Similarly, financial firms acting as securities underwriters may owe fiduciary duties. See *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 21–22 (2005). More generally see William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1 (2014) and Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079 (2016). Courts in the United Kingdom have not specifically addressed the question, but Australian law, which is likely to be persuasive, suggests that the M&A advisor-client relationship has have “all the indicia of a fiduciary relationship.” See *Australian Sec & Invs Comm’n v. Citigroup Glob Mkts Austl Pty Ltd* [No. 4] (2007) 160 F.C.R. 35 (Austl.) and Andrew Tuch, *Investment Banks as Fiduciaries: Implications for Conflicts of Interest*, 29 MELB. U. L. REV. 478 (2005).

routinely disclaim the existence of fiduciary duties in their client engagement letters.⁷⁷ As a further measure, they disclose the possibility that they will face conflicts of interest, an attempt to establish informed consent by their clients for conduct that would otherwise violate fiduciary duties.⁷⁸ Nevertheless, financial advisors adopt internal procedures and controls to mitigate conflicts of interest. Though not publicly disclosed, these policies typically include obtaining client consent to conflicts arising during the course of an engagement. Moreover, engagement letters attempt to insulate financial advisors from liability “except to the extent that any losses, claims, damages, liabilities or expenses incurred by the Company result from the willful misconduct, gross negligence or bad faith of [the financial advisor] in performing the services that are the subject of [the engagement] letter.”⁷⁹ Put simply, rather than needing to act in their client’s sole or best interests, M&A advisors and their clients have crafted a regime that purports to impose liability on advisors only for “willful misconduct, gross negligence or bad faith.”⁸⁰ Such engagement letters are common in developed markets internationally.⁸¹

Other norms of conduct have developed among financial advisors and their M&A clients beyond those required to avoid fiduciary liability. These practices are observable in financial advisors’ conduct but firms have no reason to publicly explain their conduct or disclose their policies. M&A advisors advise a single “side” to the transaction; they virtually never advise both parties in a deal. An M&A advisor will not lend to its client’s counterparty to finance a transaction without its client’s informed consent. When advising a buyer, a financial advisor will not trade on its own account in the stock of the target corporation.

Though the norms are rarely stated, difficult to verify, and somewhat vague, in practical effect they protect clients from more severe conflicts of interest, conflicts that fiduciary law might not prevent. They thereby protect financial advisors from reputational harm as well as potential fiduciary liability. This especially benefits financial conglomerates because they adopt a structure in tension with strict fiduciary doctrine. Given the cross-border nature of many M&A deals, these norms and practices may be shared across borders. By and large, these norms and practices are not legally enforceable. Nor are they capable of being made precise through adjudication or rulemaking.

Law Firms’ Restrictions on Insider Trading. Another norm intended to curb conflicts of interest, which may be regarded as transnational law governing

⁷⁷ Andrew F. Tuch, *Disclaiming Loyalty: M&A Advisors and Their Engagement Letters*, 93 TEXAS L. REV. SEE ALSO 211, 212 (2015).

⁷⁸ *Id.* at 220–21.

⁷⁹ See Letter from Goldman Sachs & Co. LLC to United Natural Foods, Inc., July 20, 2018, at 9.

⁸⁰ *Id.*

⁸¹ Indeed, investment banks operating outside the U.S. often use their U.S. style engagement letters. For an example, see *Australian Sec & Invs Comm’n v. Citigroup Glob Mkts Austl Pty Ltd* [No. 4] (2007) 160 F.C.R. 35 (Austl.).

fiduciaries, is the use of firm-level policies to prevent lawyers from engaging in insider trading. Because major law firms advise public companies on important transactions, lawyers working for these firms may obtain nonpublic information about their clients and other companies, information they can use to trade public securities in violation of their fiduciary duties or other laws, including insider trading law. Firms therefore routinely require their lawyers to seek approval from an internal “conflicts committee” before buying or selling stock or other securities. Such approval policies guard against risks of conflicted transactions and violations of duties owed to clients. A guide for lawyers describes the routine law firm practice as follows:

Most [law] firms will have a clear securities trading policy outlining the steps you need to take to clear a trade... [The policy] will probably involve you conducting a search through a database to see whether the firm believes it has any relationship with the security that you wish to trade. If it does, you’ll likely need to submit a form to the conflicts department where they will vet the relationship. If you can trade in the security, they’ll let you know. If you can’t, they’ll let you know that as well.

Once you receive approval, you’ll usually get a small window where you can execute the trade.⁸²

The practice of imposing this layer of firm approval likely arose at US law firms, given the intensity with which US regulators and market participants enforce insider trading laws. The practice may have spread as US law firms and lawyers ventured abroad. This would be an example of legal norms being exported and imported across borders as law firms in non-US jurisdictions observed the practices of US firms in an effort to meet the expectations of US clients. While norms requiring lawyers to get firm approval for trading in client stock are rarely publicly stated (law firm policies typically remain nonpublic) and therefore difficult to verify, they probably have broad acceptance among major law firms internationally. They serve similar functions to fiduciary law in promoting lawyers’ loyalty toward their clients.

3.4.1.2 International Organizations and Standard-Setting

Transnational law governing fiduciaries may also arise from the work of International standard-setters and organizations. The Organisation for Economic Co-operation and Development (the OECD) first published its Principles of Corporate Governance in 1999, intending these nonbinding principles of “good” corporate governance to serve as benchmarks for improved corporate practice.⁸³ In 2004, the OECD updated these principles, which by then had become an “international benchmark for policy

⁸² *Insider Trading and Dumb Lawyers*, BIGLAW INVESTORS, Apr. 3, 2017, available at <https://www.biglawinvestor.com/insider-trading-and-dumb-lawyers>.

⁸³ See Organisation for Economic Co-operation and Development (OECD), *OECD Principles of Corporate Governance 5–6* (1999), available at [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN\(99\)6&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN(99)6&docLanguage=En). For a discussion of the

makers, investors, corporations and other stakeholder worldwide,”⁸⁴ having been designated by the Financial Stability Forum as key standards for sound financial systems and used by the World Bank and IMF in their reports assessing countries’ compliance with internationally recognized standards.⁸⁵ Companies, especially those in developing economies, may apply the principles voluntarily or be subject to provisions under local law modeled on them.⁸⁶ The current iteration of the Principles of Corporate Governance, published in 2015 in collaboration with G20 countries, is of immediate relevance because it purports among other things to govern the conduct of directors, an established category of fiduciary.⁸⁷

The OECD and G20 identify seven broad principles for boards, which it states as recommendations or guidelines that “should” be followed.⁸⁸ One principle provides that board members “should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.” The accompanying comments suggest that the principle reflects practices in many, but not all, jurisdictions. The discussion is general, failing to articulate the rule in the sort of detail one would expect to resolve disputes. The discussion also avoids certain basic issues (on which jurisdictions may disagree), such as to whom duties are owed, leaving some ambiguity as to the content and application of the principle.

Other OECD principles of corporate governance formulate board responsibilities that would typically be on the fringes of or clearly beyond the substance of fiduciary law. These principles are also stated as recommendations while purporting to reflect existing “good” governance practices in many (unspecified) jurisdictions.⁸⁹ The preamble explains that “there is no single model of good corporate governance.”⁹⁰ They are similarly non-prescriptive. For example, the board “should apply high ethical standards,” “should take into account the interests of stakeholders,” “should fulfil certain key functions,” such as guiding corporate strategy and overseeing major expenditures, “should be able to exercise objective independent judgement on corporate affairs,” and “should have access to accurate, relevant and timely

development and evolution of these principles, see Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765, 1781–84 (2021).

⁸⁴ OECD, OECD Principles of Corporate Governance, Foreword (2004).

⁸⁵ *Id.*

⁸⁶ See Matthias M. Siems & Oscar Alvarez-Macotella, *The G20/OECD Principles of Corporate Governance 2015: A Critical Assessment of the Operation and Impact*, J. BUS. L. 310 (2017).

⁸⁷ OECD, G20/OECD Principles of Corporate Governance, 2015, available at <http://www.oecd.org/corporate/principles-corporate-governance/>, at 51–61.

⁸⁸ *Id.* at 51.

⁸⁹ For example, the commentary regarding the sub-principle that boards should align director and officer remuneration with long-term corporate and shareholder interests, asserts that it is “regarded as good practice” for companies to develop remuneration policy statements and refers briefly to the terms that these statements “generally tend” to include and others that they “often specify.” *Id.* at 54.

⁹⁰ *Id.* at 10.

information.” Other principles broadly guide directors on matters concerning the treatment of shareholders, account for the interest of stakeholders, oversight of risk management and other systems, and board accountability.⁹¹ These principles are broadly expressed, lacking the specificity or clarity one would expect to see in a statute or in judicial opinions. The principles are nonbinding on member and nonmember countries alike, and nowhere do they purport to be fiduciary law.

The International Organization of Securities Commissions, IOSCO, an association of national securities regulatory agencies and other organizations, promulgates principles and standards to govern capital markets. It is well known for its Objectives and Principles of Securities Regulation, first published in 1998 after the Asian financial crisis and updated in 2010.⁹² These objectives and principles state high-level principles that IOSCO asserts “need to be practically implemented under the relevant legal framework” to achieve certain specified objectives.⁹³ Representatives of national regulators populate the organization’s committees, giving these committees considerable industry credibility and subject matter expertise. However, like the OECD, the organization lacks state-level rule-making authority and its principles and standards are unenforceable except to the extent they are enshrined in state laws, in which event one would expect the principles to be expressed with greater specificity and precision. The principles are wide-ranging, applying to regulators, self-regulatory organizations, issuers, auditors, credit rating agencies, collective investment schemes, and market intermediaries.⁹⁴ The principles most closely related to the conduct of fiduciaries concern corporations in their activities as issuers and therefore implicate the conduct of directors. These principles provide that issuers “should” disclose financial, risk and other information that is “full, accurate, and timely”; that they “should” treat their shareholders “in a fair and equitable manner”; and that the accounting standards they use in preparing financial statements “should be of a high and internationally acceptable quality.”⁹⁵ These principles indirectly concern directors’ conduct; they are, in fact, expressed to govern the conduct of corporations issuing securities, a role in which actors owe fiduciary duties.

3.4.2 Certainty

Although I have attempted in these examples to show how norms and practices governing various categories of fiduciaries have transnational dimensions, I question

⁹¹ *Id.* at 51–61.

⁹² INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS (IOSCO), OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (2017), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>.

⁹³ See Cally E. Jordan, *The New Internationalism? IOSCO, International Standards and Capital Markets Regulation* (Sept. 19, 2018, CIGI Papers No. 189, available at <https://ssrn.com/abstract=3257800>).

⁹⁴ IOSCO, *supra* note 92.

⁹⁵ *Id.* at 8.

whether these norms and practices comport with theories of transnational law from a legal positivist perspective. Although broad agreement seems to exist among market participants and policymakers in numerous national systems that financial institutions should “manage” or “mitigate” conflicts of interest and that corporate directors should engage in various matters of “good” governance, it is unclear precisely what these norms mean and whether they are so firmly established across borders as to amount to transnational law. As Shaffer explains, it is “when norms become concordant and settle transnationally” that “one can speak of a TLO.”⁹⁶ At least in the financial services industry, norms governing fiduciaries’ conduct are rarely clearly stated by firms and difficult to identify and verify, which may prevent this sort of settlement from emerging. And when norms do operate, they may be provisional, developed in response to particular, shifting regulatory concerns. Moreover, it may be that the norms described above can only be formulated in broad terms.

3.4.3 Distinguishing Fiduciary Law

More fundamentally, even if the dissemination of these norms and practices comports with theories of transnational law, it is reasonable to question whether they may be rightly regarded as fiduciary law, or even as functional substitutes for fiduciary law. Not any law is fiduciary law. As explained above, fiduciary law is conventionally understood by scholars and courts as “hard” law, as binding obligations “that delegate authority for interpreting and implementing the law.”⁹⁷ Fiduciary law is precise, or capable of being made so.⁹⁸ The obligations it imposes are legally enforceable since they are the product of the state, typically the common law or legislative principle.⁹⁹ And authority for interpreting and implementing fiduciary law is delegated to courts.¹⁰⁰

Fiduciary scholars take the fiduciary concept seriously.¹⁰¹ They regard fiduciary law as distinct from other fields of law. This has been clearly recognized in Australia, where “[i]t is essential to bear in mind that the existence of a fiduciary relationship

⁹⁶ Shaffer, *supra* note 65.

⁹⁷ Cf. Abbott & Snidal, *supra* note 11. Accordingly, it is possible that transnational law governing fiduciaries may “harden” as fiduciary law. Thilo Kuntz, *Transnational Fiduciary Law: Spaces and Elements*, 5 UCI J. INT’L, TRANS., & COMP. L. 47, 53 (2020). (Soft law may “enter and settle down as hard fiduciary law.”) EU legislation governing financial intermediaries in Europe may constitute such an example. See Chapter 4, at 100.

⁹⁸ See *supra* note 11 and accompanying text.

⁹⁹ See *supra* note 12.

¹⁰⁰ See, e.g., Paul B. Miller, *The Identification of Fiduciary Relationships*, in Criddle et al., *supra* note 5, 367, 369. (“It is, ultimately, for the courts to decide whether a relationship is fiduciary. . . .”)

¹⁰¹ This is consistent with the approach of new private law, which is to “take[] private law concepts and categories seriously.” Andrew Gold et al., *Introduction*, in *THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW*, xv, xvi (Andrew S Gold et al. eds., 2021).

does not mean that every duty owed by a fiduciary . . . is a fiduciary duty.”¹⁰² In the law of corporations, for example, directors owe distinct fiduciary duties and statutory duties. Discussing directors’ duties, Matthew Conaglen cautions that “[t]he fiduciary principles themselves can only be soundly understood if one differentiates carefully between differences kinds of duties owed by fiduciaries. In other words, it is important to acknowledge that not all of the duties owed by a fiduciary, such as a company director, are necessarily fiduciary duties.”¹⁰³ The reason is that the fiduciary duties of directors “spring from the general principles, developed in courts of equity, governing the duties of all fiduciaries – agents, trustees, directors, liquidators and others.”¹⁰⁴ And keeping the duties distinct is important because they interact in complex ways with non-fiduciary duties.

In England, courts are similarly clear that not any law is fiduciary law. In *Bristol & West Building Society v. Mothew*, Lord Justice Millett cautions that “[T]his branch of law has been bedeviled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one’s terms. The ‘fiduciary duty’ is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties.”¹⁰⁵ The House of Lords has endorsed this approach, with Lord Walker observing in *Hilton v. Barker Booth & Eastwood* that “not every breach of duty by a fiduciary is a breach of fiduciary duty.”¹⁰⁶ Reviewing these and other authorities, Professor Conaglen observes that this careful or “refined” use of “fiduciary” label is “wide-spread”;¹⁰⁷ it is “entrenched” in England¹⁰⁸ and has been broadly endorsed in Australian courts.¹⁰⁹

While fiduciary doctrine has developed differently in the United States from other jurisdictions, there is broad agreement that fiduciary law has distinctive characteristics.¹¹⁰ To be sure, fiduciary principles have been considered “subsidiary elements” of other non-fiduciary fields of law;¹¹¹ for example, the fiduciary duties of agents or trustees may be considered under the categories of agency law or trust law, respectively. Nevertheless, scholars generally, and increasingly, recognize that fiduciary law is distinctive. Deborah DeMott observes that “fiduciary law is distinctive because it imposes a duty of loyalty that ‘supports the main purpose of fiduciary law: to prohibit

¹⁰² *Permanent Building Society v. Wheeler*, 11 West. Aust. Rep. 187 (1994).

¹⁰³ Matthew Conaglen, *Interaction between Statutory and General Law Duties Concerning Company Director Conflicts*, 31 CO. & SEC. L. J. 403, 403 (2013).

¹⁰⁴ *Levin v. Clark* [1962] New South Wales Reports 686, 700–01.

¹⁰⁵ *Bristol & West Building Society v. Mothew*, [1998] Ch. 1, 16.

¹⁰⁶ *Hilton v. Barker Booth & Eastwood* [2005] UKHL 8 at [29].

¹⁰⁷ Conaglen, *supra* note 103, at 405.

¹⁰⁸ CONAGLEN, *supra* note 15, at 21.

¹⁰⁹ *Id.* at 22–23.

¹¹⁰ Fiduciary doctrine in the United States developed differently from that in England and Australia. See *id.* at 25–26.

¹¹¹ Evan J. Criddle et al., *Introduction*, in Criddle et al., *supra* note 5, xix, xix. (“Until recently, fiduciary principles have been treated as subsidiary elements of a broad array of fields.”)

fiduciaries from misappropriating or misusing entrusted property or power.”¹¹² Focusing on the duty of care, John C. P. Goldberg asserts that “[t]he role of fiduciary is defined in part by the distinctive duties that attend it.”¹¹³ In particular, duties of care – owed by fiduciaries and non-fiduciaries alike – “have special dimensions in the fiduciary context.”¹¹⁴ To similar effect, Daniel Markovits distinguishes between fiduciary and contract law, arguing that a fiduciary’s orientation after being engaged is necessarily other-regarding and must adjust open-endedly to the interests of the other as circumstances develop, whereas a contract promisor’s posture is based on self-interest, depends on the terms of the contract, and need not adjust open-endedly.¹¹⁵ Robert Clark has similarly argued that the fiduciary relationship has “major distinctive attributes,” among other things, judicial enforcement of affirmative duties to disclose and open-ended duties to act.¹¹⁶

Some scholars see fiduciary duties through an economic lens and regard them as gap-filling terms in incomplete contracts.¹¹⁷ The contractarian approach has become a pervasive influence in scholarly analysis of fiduciary doctrine and has influenced certain judges,¹¹⁸ but it is not a mainstream view among judges generally.¹¹⁹ In any case, even scholars who do not regard fiduciary law as distinct from, say, contract law, suggest it is nothing other than “hard” law. Consider the case studies above. The private ordering adopted by financial firms may involve practices and norms adopted in response to prevailing fiduciary and other rules, but they are

¹¹² Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851, 852 (2011) (citing FRANKEL, *supra* note 8)

¹¹³ John C. P. Goldberg, *The Fiduciary Duty of Care*, in Criddle et al., *supra* note 5, 405.

¹¹⁴ *Id.* at 407.

¹¹⁵ Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, 209, 212–16 (Andrew S. Gold & Paul B. Miller eds., 2014); *see also* D. Gordon Smith, *Contractually Adopted Fiduciary Duty*, 2014 U. ILL. L. REV. 1783, 1784. (“My thesis is that the fiduciary duty of loyalty, properly understood, cannot be adopted contractually.”)

¹¹⁶ Robert C. Clark, *Agency Costs versus Fiduciary Duties*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55, 71–76 (J. W. Pratt & R. J. Zeckhauser eds., 1985).

¹¹⁷ *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 702 (1982); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1264 (1982).

¹¹⁸ *See, e.g.*, *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 436 (7th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1067 (1988) (referring to the fiduciary obligation as “a standby or off-the-rack guess about what parties would agree to if they dickered about the subject explicitly”).

¹¹⁹ *See, e.g.*, Joel Seligman, *Sheep in Wolf’s Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 350 (1986). (“The judiciary analyzing litigated controversies has essentially ignored this academic debate in favor of the application of traditional fiduciary duty concepts.”) In extrajudicial writing, members of the Delaware judiciary regard fiduciary doctrine more in-line with classical views. *See, e.g.*, Leo E. Strine & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in HANDBOOK ON PARTNERSHIPS, LLCs AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS (Robert W. Hillman & Mark J. Lowenstein eds., 2015).

not themselves fiduciary law. Even if the procedures and controls are intended to apply to fiduciaries, they cannot be said to impose anything like fiduciary duties.

One might refer to these norms and practices as transnational law governing fiduciaries or the transnational legal ordering of fiduciaries. But they cannot be described as transnational fiduciary law without denuding fiduciary law of its distinctiveness and without causing significant confusion.

3.4.4 *Transnational Fiduciary Law as Process*

Transnational law also encompasses the process by which legal norms and practices flows across national boundaries. As the case studies suggest, it does not seem controversial that legal norms and practices do indeed flow – that interaction occurs between lawmakers, practitioners, and others across legal systems, influencing legal development. Fiduciary laws may converge or diverge, be exported or imported, imposed or received. As hard law, fiduciary law is often transmitted across boundaries, in the sense that fiduciaries may be bound by their home law when operating abroad. Fiduciary law also evolves by reference to developments in other national systems. For example, American fiduciary law evolved from English law. Australian and English jurists routinely make references to each other's judicial decisions on fiduciary law.¹²⁰ Policymakers are sometimes more explicit in learning from other system's legal norms and practices. In the 1990s, Australian rule makers made clear that they were revamping directors' duties and other corporate law principles on the basis of fiduciary principles borrowed from the United Kingdom and United States.¹²¹ In the United Kingdom, recent commissions of inquiry formed to consider corporate-law reforms examined corresponding fiduciary laws in the United States.¹²² One does not need a broad interpretation of fiduciary law to accept that such law may flow across state borders in this way, potentially resulting in a degree of convergence among jurisdictions.¹²³

These sorts of influences across jurisdictions are often remarked upon in fiduciary scholarship. They are explicitly studied in comparative law work on fiduciary law. They also sensibly fall within the first interpretation of transnational fiduciary law, in which the term describes hard law applied similarly in varying jurisdictions, or the

¹²⁰ Prominent Australian examples including *Hospital Products Ltd. v. United States Surgical Corp.* (1984) 156 CLR 41; *Westpac Banking Corporation v. Bell Group (in liq)* (No. 3), [2012] WASC 157. Prominent English examples include *Hilton v. Barker Booth & Eastwood* [2005] 1 WLR 567 (H.L.); *Kelly v. Cooper* [1993] AC 205.

¹²¹ See, e.g., Commonwealth of Australia, *Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors: Corporate Law & Economic Reform Program Proposals for Reform: Paper No. 3* (1997) at paras. 7.1 and 7.3.

¹²² See, e.g., PAUL MYNERS, *LONDON HM TREASURY, INSTITUTIONAL INVESTMENT IN THE UNITED KINGDOM: A REVIEW* 92 (2001).

¹²³ See *supra* note 27 and accompanying text.

transmission of hard law by virtue of its application to international deals or by virtue of exchanges among rule makers.

3.5 CONCLUSION

Although fiduciaries frequently confront transnational situations, the topic of transnational fiduciary law has attracted little scholarly attention. This chapter identifies two primary interpretations of the term, one limited by a conventional understanding of fiduciary law, the other taking a broad understanding of transnational law and applying it to fiduciaries. I prefer the former meaning since it is more attentive to the distinctiveness of fiduciary relationships and duties. The interpretation is broad enough to capture the process by which fiduciary law develops, including by reference to developments in other systems. However, I would not equate the second interpretation – transnational law that governs fiduciaries – with transnational fiduciary law. Doing so would overlook the distinctive character of fiduciary law. It would also create confusion. And it is not apparent how much that interpretation would advance analysis beyond the first interpretation. A better term for scholars interested in transnational law governing fiduciaries may be the transnational legal ordering of fiduciaries or transnational fiduciary legal orders, as theorized by Halliday and Shaffer, since these terms are less apt to lead to confusion. A further benefit lies in reliance on the term “legal order,” which is often used in transnational law scholarship and has a fairly settled meaning.

I do question the merit of investigating transnational law governing fiduciaries as an independent field, as distinct from, say, transnational law in commerce, unless we can first establish whether there is something distinctive about transnational law as it applies to fiduciaries. Instead, I would regard transnational fiduciary law as a particular application of fiduciary law that must develop in a manner consistent with general principles of fiduciary law and with the substantive legal areas in which fiduciaries operate.