Justifying Fiduciary Law

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• Paul B. Miller, *A Theory of Fiduciary Duty*, 56 **McGill L.J.** 235 (2011), *available at* SSRN. • Paul B. Miller,*Justifying Fiduciary Duties*, 58 **McGill L.J.** 969 (2013), *available at* SSRN. • Paul B. Miller, *Justifying Fiduciary Remedies*, 63 **U. Toronto L.J.** (forthcoming 2013), *available at* SSRN.

Fiduciary law is pervasive. The distinctive duty of loyalty that is the hallmark of fiduciary law arises in myriad private relationships, including guardianships, employment relationships, trusts, business organizations, and professional relationships in law, medicine, and other fields. Recently legal scholars and courts have extended the logic of fiduciary law to public servants and nation states.

Despite its manifest importance, fiduciary law has not achieved the same stature as the other pillars of private law – torts, contracts, property, and unjust enrichment. Fiduciary law has been described as "messy," "atomistic," and "elusive," and one commentator recently observed, "fiduciary law has been characterized as one of the least understood of all legal constructs." Perhaps as a result of these conceptual challenges, law professors traditionally have taught fiduciary law in small portions, complicating the law student's search for overarching principles.

Paul Miller is among a small group of legal scholars attempting to advance private law theory by justifying fiduciary law. In a series of recent articles – *A Theory of Fiduciary Liability*, *Justifying Fiduciary Duties*, and *Justifying Fiduciary Remedies*, Miller builds on the increasingly accepted notion that fiduciary relationships are distinctive, but offers a novel account of fiduciary law.

Miller's account begins with the conception of a fiduciary relationship, which he defines as "one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary)." Miller develops this concept in *A Theory of Fiduciary Liability*, which draws heavily on prior work of other fiduciary law scholars.[1]

In *Justifying Fiduciary Duties*, Miller asserts, "the key implication of the definition is that the exercise of *power* by one person over another is the object of the fiduciary relationship." (P. 1012.) Miller describes this fiduciary power as a form of authority, which the fiduciary exercises over the affairs of the beneficiary. Although the fiduciary is effectively an extension of the beneficiary, the parties to a fiduciary relationship cannot specify all actions of the fiduciary in advance. Thus, fiduciaries exercise discretion.[2]

In exercising discretion, the fiduciary is expected to operate within the scope of the fiduciary authority, and any discretionary actions "must be presumptively conducted for the sole advantage of the beneficiary." (P. 1020.) The justification for the fiduciary duty of loyalty follows naturally: "The conflict rules constitutive of the duty of loyalty constrain fiduciaries in the exercise of fiduciary power…. The duty of loyalty secures the beneficiary's legitimate expectation that fiduciary power … will be used only to achieve her ends." (P. 1020-21.)

In *Justifying Fiduciary Remedies*, Miller adds to his account of fiduciary law by examining remedies for fiduciary breach, which he calls "notoriously potent." The standard remedy of disgorgement measures damages by reference to the unfaithful fiduciary's gain, rather than the beneficiary's loss. As a result, fiduciary remedies are often viewed as inconsistent with notions of corrective justice. In this paper, Miller relies on his earlier justification of the duty of loyalty to challenge the conventional wisdom about disgorgement, arguing that disgorgement is consistent with formal corrective justice because it "vindicate[es] the exclusive claim beneficiaries hold over fiduciary power…." (P. 4.) Stated another way, "No one is entitled to gain from the execution of a fiduciary mandate save the beneficiary; to the extent that there are such gains, they belong to the beneficiary." (P. 61.)

This brief summary of Paul Miller's trilogy of articles necessarily bypasses much of the nuance in the papers, but even this quick overview reveals Miller's account of fiduciary duty as a substantial contribution to the fiduciary canon.

1. *See, e.g.,* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 **Vand. L. Rev.** 1399, 1402 (2002) ("fiduciary relationships form when one party (the 'fiduciary') acts *on behalf of* another party (the 'beneficiary') while exercising *discretion* with respect to a *critical resource* belonging to the beneficiary"). [?]
2. *See* D. Gordon Smith & Jordan C. Lee, *Discretion*, 75 **Ohio St. L.J.** __ (forthcoming 2014). [?]

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