FIDUCIARY DUTIES/
CONFLICTS OF INTEREST

Co-Chairs:
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Manitoba Court of Queen’s Bench
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not settled as the majority did not explore the matter and allowed for consideration of it in "an ordinary doctor-client case." Where a physician-patient relationship does exist, counsel should carefully review McKee v. Hines' reasons. 

Misuse/abuse of the relationship is not restricted to sexual improprieties. As noted earlier, the current economic stress on our health insurance schemes has resulted in an increasing number of services being paid for by patients. In Manitoba, cosmetic surgery, psychoanalysis, in vitro fertilization, breast implants and unproven sex changes are among a growing number of uninsured services. A breach of a fiduciary obligation may entitle a patient to recover the fees paid to the physician (see Henderson v. Johnson). As well, if a physician obtains a collateral benefit for services rendered to a patient, counsel should review Raddum v. Tanner which provides that the fiduciary nature of the relationship may give rise to a presumption of undue influence. Sandly fees which are often the subject of patient complaints may be characterized as collateral benefits.

As a result of the significant information and discussion which was generated by the Task Force on Sexual Abuse of Patients, the College of Physicians and Surgeons of Ontario, among others, have been proposed by Canadian medical licensing bodies and some provincial governments for the governance of the healthcare professions. As an example, on November 29, 1992 the Attorney General of Ontario introduced an amendment to The Limitations Act which amendment, if passed, will entirely eliminate the limitation period for civil suits for sexual assault by a person in a position of trust. The apparent tendency of the courts to view fiduciary obligations in a closed, commercial context is in stark contrast to the ethical precepts enunciated by medical licensing bodies. The medical licensing authorities in Canada are unanimous in their position that any sexual involvement between a physician and patient is a serious breach of trust by the physician. The significant increase in disciplinary actions for breach of trust will likely result in many appeals to the courts. One may also anticipate a corresponding increase in the number of civil actions by patients. It is only a matter of time until the Supreme Court considers and determines the issue of fiduciary obligation in the context of what it regards as "an ordinary doctor-client case." 

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In this paper I discuss the judicial process regulating the duty of care of fiduciary managers. In particular, I discuss the recent developments with respect to the managers' duty of care. These developments present a puzzle. Increasingly, American courts broadened the functions and attendant powers and discretion of managers. Usually, as the powers of fiduciaries broaden, so do their duties. Yet, with respect to fiduciary managers' duty of care, the recent movement has been the reverse. While the courts have recognized broader functions and discretionary powers for managers, they have more stringently regulated corporate, court and legislatures have refined and clarified fiduciary managers' substantive duties under the duty of care. Courts have resorted to the threshold, causation and substantive issues that have attached to fiduciary duties. For example, in the American Law Institute's Principles of Corporate Governance has pointed corporations to Goodwin v. Copey's "manifesto" for breach of the duty of care. These inconvenient trends appear with respect to the duty of care of fiduciary managers but not the duty to provide skillful services, or to the duty of loyalty, but does this trend apply with respect to other types of fiduciary services, such as investing and health care.

To discuss these peculiar trends, I would like to present them in context. Judges have long exercised broad powers in designing fiduciary law. Fifty years ago, Justice I.A. Berman described the judicial mandate as follows. 

[1] It is to say that a person in a fiduciary only begins to lose its powers for the permission of the author. 

What obligations does the court assign a fiduciary? In what respects has the court failed to discharge these obligations? And how are the losses indicated by this deviation from duty calculated? Traditionally, courts have pursued these inquiries and have undertaken to answer them all. Thus, the courts take three main steps in adjudicating fiduciary matters: they first define the functions which fiduciaries were expected to serve, then they determine the powers which fiduciaries needed in order to perform these functions, and finally, on the basis of the powers and the functions the courts develop the regulatory scheme for the particular situation. Because fiduciary relationships are based upon the underlying legal binding relationships (contracts, trust instruments, wills, statutes, charters, etc.) as well as under non-binding agreements or unilateral consent of a beneficiary to serve, courts determine the fiduciaries' functions by drawing on the instruments, facts and circumstances under which the relationship arose. The principles which guide the courts in determining the fiduciaries' functions are similar to those that guide the courts in determining the parties' interests, but the sources from which the interests are garnered are far more varied (written documents, the parties' actions, the actions of third parties and other circumstantial evidence).

To determine the fiduciaries' powers attendent on fiduciary functions, the courts draw on the parties' interests and on the nature of the functions. Once they establish the fiduciaries' powers in the particular relationship, the courts design rules to regulate their exercise of those powers. Thus, in the area of fiduciary law, the courts engage in three lines of inquiry and draw on somewhat different sources, models and processes to guide and answer the inquiries.

Fiduciary law regulates the providers of a variety of special services. These services can be divided into two groups. The first group consists of services that require entrustment of property or power to the fiduciary. Without such entrustment the services cannot be rendered at all, or they can be rendered with less than maximum efficiency. The second group consists of services requiring skills that are very costly to master, for example, accounting, and some kinds of investment management.

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amenable to judicial standards. To the extent that such standards are available, they are, indeed, imposed. In addition, public policy encourages some kinds of fiduciary roles, such as corporate management, to take entrepreneurial risks, rendering any possible regulatory standards even "drier." Third, as the courts often state, the fiduciary role is not the same as the courts were joined by the estates to perform the services. Therefore, the courts restrain themselves from making business judgments on the merits, or determining the risk levels of investments. Fourth, as their discretionary readers and the unpredictability of the environment increases, fiduciaries may be exposed to liabilities that far exceed the benefits they receive from the services. Consequently, managers may refuse to serve. This last reason has loomed large as litigation and judgments have increased and the cost of insurance coverage for managing fiduciaries has skyrocketed. 8

I predict that the current trends will continue. Managers' discretion will be tempered but their duty of care that one would expect to increase will continue to shrink. I do not expect our business and economic environment to become more predictable in the near future. In fact, I believe that, with the maturing of the cold war 9 and the emergence of powerful global communications technologies, the business and economic environment will continue to change, perhaps at greater speed. Therefore, managers will continue to be venerated with more discretion to deal with unanticipated changes that require immediate decisions. Nonetheless, we can expect that the law as set forth by legislatures and expounded by the courts will continue to limit the managers' duty of care and reduce direct judicial supervision.

This paper is divided into four parts. Part 1 discusses the purpose of fiduciary law. Part 2 examines the multi-dimensional forms of adjudication in fiduciary law. Part 3 illustrates the expansion of the functions and powers of managers in trust law and corporate law. Part 4 describes the techniques which courts have used to relax the duty of care regulating these managers. I conclude with an explanation of these developments.

1. THE PURPOSE OF FIDUCIARY LAW

(a) The Fiduciary Relationships

Fiduciary relationships are unique. They involve service relationships. In general, such relationships are backed by a fundamental and strong

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8 See note 28 infra.

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8 Anyone who has lived a secluded life on the fringes of American society might be excused for believing that the public interest is served by such individuals. Our own view of the matter has been that the public interest is served by protecting the public from such persons. In the case of such individuals, public policy has been and remains the same. However, the same public policy continues to be of concern to us. In the case of such individuals, the public interest is not served by protecting the public from such persons. In the case of such individuals, public policy has been and remains the same.

9 The power may be exercised by statute (public officials), or by statute and executive (corporate directors and officers); or it can be vested by the attorney (agents); or it can be vested by a third party (futuros under trusts or wills).
to the risk that the fiduciaries will appropriate the entrusted property or interest or misuse the power entrusted to them. Such appropriation or abuse of power can result in a loss that far exceeds the power-related gain from the fiduciaries' services. Thus, the strong public policy to encourage specialization with respect to fiduciary services is likely to be defeated.

In most states, there is a strong public policy to encourage close relationships that require skills involving substantial investment of services that require entrustment. Yet these relationships are highly tied to entrustors because the services are either easily to monitor, or better, they pose the risk of misappropriation, or both. Both high-quality services and misappropriation can result in severe losses to entrustors.

(b) Fiduciary Law

Fiduciary law addresses the two unique aspects of this relationship. To reduce the risk from low-quality services, fiduciary law restricts entrustors the legal right to rely on the adequate quality of their fiduciaries' services — it imposes on fiduciaries a duty of care and skill. To restrict entrustors to enter the relationship, the bulk of fiduciary law is designed, in part, to reduce the entrusters' risk of loss of their entrusted property or power from abuse of entrusted power; it vests in entrustors the right to rely on the honesty of their fiduciaries — it imposes on fiduciaries a duty of loyalty. 10

It is notable that fiduciary law is triggered when the relationship arises, regardless at all whether it arises under contract, trust, will, statute, charter, election or without any legally binding arrangement. If Smith agrees to represent me as a legal transaction as an act of friendship and without remuneration, fiduciary law is triggered by his consent, and he becomes my fiduciary. If he is negligent in his representation, he will be liable to me for my losses.

2. THE MULTIDIMENSIONAL FUNCTIONS OF THE COURTS IN FIDUCIARY LAW

In applying fiduciary law, the courts follow these steps. First, they define the functions which fiduciaries were expected to perform. Second, in light of these functions, the courts determine the powers that the fiduciaries needed to perform those functions. Third, the courts design the regulatory regime for the particular situations before them. The functions, powers

10 In addition, fiduciary law imposes specific punitive duties designed to deter misappropriation of entrusted property or interests, such as treasurers' duty to earnmark and segregate use property.
assignment as stated in their written agreement while the dissenting judge argued for classifying the relationship mainly according to the parties' actions in a given situation, as (48) Martin v. Payton,46 the issue was whether an agreement constituted a loan or a partnership. The court stated:

'Partnership results from contract, express or implied. If done, it may be proved by the production of such written instrument, by testimony as to some conversation, by circumstantial evidence. If settling appears, the receipt by the defendants of a share of the profits of the business is enough. And we are to remember that although the intention of the parties to avoid liability in partnership is clear, although in language precise and definite they may declare them to join the firm of K & K; although it may appear from the interests so created or acquired is of the firm as such, although they may profess that they not be held for any losses or in essentials in partners, the question still remains whether in fact they agree to associate themselves with the firm as to 'carry on as co-owners a business for profit.'"

When fiduciary relationships arise without written, or under instruments that do not define the fiduciaries' functions and powers in detail, the courts exercise broad discretion to determine the fiduciaries' functions. One striking example can be drawn from corporate law, at the beginning of this century. During that period, the courts allocated to management the function and power to determine the size of the corporation's enterprise. The case of Ford Motor Company demonstrates this transition.

In the early 1900's, the majority of the shares of Ford Company was owned by Henry Ford and most of the minority shares were owned by the Dodge brothers. Ford controlled the company as majority shareholder and manager. The company did spectacularly well and paid "extraordinary dividends" in addition to the "usual" dividends at 5% per annum. In 1916 Ford declared that the company will cease to pay the extraordinary dividends and continue to pay only the regular dividends. He justified his decision on the ground that the company was earning enough and should retain some of what it received from sources of income. He wished to reduce the price of cars so that more people could own cars, even though the company had a backlog of over five years. Nevertheless, the Dodge brothers sought a court order requiring Henry Ford to distribute all profits to the shareholders except for necessary working capital.

46 246 N.Y. 213, 188 N.E. 77 (N.Y.C.A. 1932) (as to 79-79). See also Kaufman-Brown Fours Co. v. Long, 183 F.2d 594 (9th Cir. 1950).

Legal analysis:

The holding in the case centered around the legitimate purpose of a business corporation: whether such corporations may be managed for the benefit of the public while reducing profits. However, there is an ancillary issue involving the criteria for dividend distribution. Behind that issue lurked a much larger question of who should determine the size of the corporate enterprise. On this point, the lower Court held that management's discretion in declaring dividends is limited to determining the amount of working capital necessary to maintain the enterprise.

The higher Court held that the management of the corporation had discretion to reinvest dividends in the corporate enterprise and expand the size of the enterprise. The Court's views were influenced by the phenomenal success of Ford Company and Ford's contributions to this success. The Court vested in corporate management the function and power to determine the size of the economic enterprise.

In this case, courts establish the functions of fiduciaries by interpreting and enforcing the intent as manifested in the parties' agreements and actions. In absence of such agreements and actions, is as in the case of defining corporate managers' functions, the courts seem to be guided by what they considered desirable functions and powers for managers and the appropriate relationship between the managers and their entrustors.

(b) Determining the fiduciaries' powers

Fiduciaries' powers are attendant to their functions, but the powers do not follow automatically from the functions. A fiduciary may be expected to serve in trust, but the trust instrument may constrain his or her powers, for example, to invest trust assets only in government securities. An agent has the power to purchase on behalf of the principal, but the amounts involved, the expertise required, and the discretion granted to perform these functions may vary greatly. Courts ascertain the fiduciaries' powers from the express or implied language of the instruments that created the relationship or from the actions of the parties and

46 The Court recognized the conflict of interest between management and shareholders, especially in minority shareholders. Management can conserve its income from salaries while the minority shareholders depend for income on dividends.
circumstances of the relationship. In this respect, courts adopt an analysis similar to the one they follow for determining the fiduciaries' functions.17

(c) Design of Rules

Once they determine the powers of a fiduciary in the particular relationship, the courts design rules to regulate the fiduciary in the exercise of those powers. Two main purposes drive the regulatory regime. One is to reduce the entourer's risk from misappropriation of entrusted property and power. These rules are determinant rules, and come under the umbrella of the duty of loyalty. The principles that guide the courts in regulating fiduciaries to deter them from misappropriation are similar to those underlying the concept of 'reasonable care' and the rule of conversion.18 The other purpose that drives the regulatory system is to reduce the costs of monitoring fiduciaries to ensure quality fiduciary services. This regulation comes under the umbrella of the duty of care. The guiding principles in reducing monitoring costs are drawn from the tort of negligence. This regulation is the subject of the discussion here.

Historically, courts determined the duty of care by setting forth the degree of attention that the fiduciary must pay in performance of his functions. Courts also determined the degree of skillful performance, establishing a standard of skills - the degree of proficiency that fiducaries must possess in order to perform their functions. In some cases, such as investment management services, courts established the level of risk which managers may take in investing for their entourers. For example, trustees were required to exercise prudence while corporate directors were allowed to take greater risks.

In sum, historically, the regulation of the quality of fiduciaries' services required a minimal level of attention to performing the service, minimal proficiency in performing the service, and manageable level of exposure to risk in connection with the services.19 Courts also determine the degree of skill that the fiduciary must possess in performing their functions. These skills are rarely, if ever, explicitly stated in the documents creating the relationship. The degree of required skill is derived from the type of services and the information concerning the relationships, such as the responsibility involved in providing the services, the skills which the fiduciary possesses to perform, and the form paid by them.

17 LaFave & Scott, supra, note 5
18 Posner & Kettner, supra, note 5

3. THE EXPANSION OF MANAGERS' FUNCTIONS AND POWERS

Recently, the functions and powers of trust managers and corporate managers have been greatly expanded. Today, most trust documents vest in trustees broad investment discretion. The American Law Institute's Restatement of the Law, Trusts (1990) has granted trustees (subject to the trust instrument) almost unlimited discretion to choose the particular investments in the trust portfolio, and substantial freedom to determine the level of risk of the whole portfolio in light of the needs of the specific trust beneficiaries. The rule imposes on trustees the duty to diversify the trust portfolio according to the level of risk appropriate for the particular trust. This rule was substituted for the old rule that required diversification in a limited number and specified which particular investments were risky (second mortgages and stock) and which investments were safe (first mortgages). The new rule allows trustees to take into account inflation and other economic circumstances, and encourages trustees to delegate some of their managerial authority to others by investing in mutual fund shares, when appropriate.

Similarly, corporate management is increasingly invested with discretion not only to operate and manage the corporate enterprise but also in negotiating with hostile raiders and blocking hostile takeover attempts. When takeovers became prevalent, the functions and powers of management were not clearly defined in legislation or in the corporate constitutions of documents. The courts undertook to fill in the functions and powers of management in order to determine what type of regulation is appropriate for those functions. An avalanche of scholarly advice on the judiciary, ranging from denying management any function of power to encounter hostile takeover attempts in exercising management discretion to negotiate with hostile raiders, representing the shareholders or the
shareholders and other stakeholders, to intermediary positions. The courts experimented; they changed their views about corporate management's functions and powers to react to hostile takeovers in light of the changing environment and new legislation. None of the courts deprived corporate management of discretion in the face of hostile takeovers. Legislatures provided substantive and procedural


corporate managers' duty of care reveals that the process of refining the

duty of care started long ago.13 The quality control of fiduciary managerial

services has been debated in a number of ways.

First, the courts created a presumption that, if the process is inadequate,

a decision on the merits is not negligent, provided no breach of the duty

of loyalty has occurred. This business judgment rule, which shields

managers from liability, has been continuously expanded.14

Second, the courts have reduced their supervision of the fiduciaries' 

substantive decisions by relaxing procedural guidelines that demonstrate

the managers' attention to the decision.15

Third, the courts are more inclined to allow censors to reduce or

waive the duty of care in advance.

Fourth, the courts and the legislatures allowed entities to waive or

reduce the liability of their managers for the breach of the duty of care, 

by informed and independent consent, provided the duty of loyalty has

not been breached.16 Although it is debatable whether shareholders can

give such consent, informed and independent principals, partners

and trust beneficiaries can, and the courts will enforce that consent.

Thus, trustees and tenants may waive the requirement that their managers

and executors will provide a bond, and that waiver will be enforced.

13 H. Marshall, Jr., "Are Directors Trusted? Conflict of Interest and Corporate

Morbidity" (1960) 22 Bus. Law. 35.

14 Ibid.

15 Smith v. J. J. Gorden, 488 A.2d 838 at 843 (Del. Supr. 1985) the Court

held that the board of directors of a corporation failed to perform its duties

with reasonable care in exercising the critical decision about future of the company (the

title of the company, among an approximately two-hour meeting, a minimal

length of time, S. L. 1985, c. 301). This is not the case with the above, which the board

would consider in advance. There are those who argue that such procedural requirements result in empty

"paper tasks," and others have a substantial interest in the quality of the board's decision. 15

16 American Law Institute, Principles of Corporate Governance, supra, note 2,

17 at § 17.1 C. Cofce, Jr., The Board's Qualifying Function in corporate


18 See generally, Coffee, Jr. 15

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Fifth in some cases the courts and legislatures reduced the public

supervision over the managers' duty of care by providing for permits,

explicitly, for example, in takeover situations. These rules indirectly

limited the managers' discretion, but in most respects they have

strengthened the managers' remaining discretion.16

Here, the managers' increased discretion was not accompanied by

increased legal accountability. In fact, fiduciary managers' level of

liability and injuries resulting from taking inappropriate risks (without bad

magic) has increased.

(c) Remedies for relaxation of the managers' duty of care

The managers' duty of care may have been relaxed lately for a number of

reasons.

First, historically, investment managers' duty of care has never been

very strict. Although their services require a measure of skill, managers' 

services are regulated as fiduciaries essentially because they involve

consumers. Neither trustees nor corporate managers are required to

possess or maintain special qualifications; minimal qualifications suffice.15

The fact that investment and business managers are not regulated on the basis of

their skills, but rather on the basis of their motives may explain why the duty

duty of care imposed on these managers is not considered paramount to

regulating their services. In fact, commentators have long argued that

19 See e.g., Act No. 36, Apr. 27, 1990 amending 15 Ps. Corp. Stat. (Business

Corporation Law) enacting §§102, 511-512, and 2502, and adding §§ 2541-

2543, 2571-2575, 2581-2583, 2585-2587, 2589-2590. For descriptions and analyses of

delayed and arguments about, state legislatures' reaction to hostile takeover

movements see Reinstein, supra, note 26; Butler, "Corporation-Specific Anti-

Takover Laws and the Market for Corporate Control," supra, note 26; Black

& Lott, supra, note 26; Rimmer & Netter, supra, note 26; Dodd, supra,

Note 26. Note that some legislation has limited judicial interference in

managements' activities by direct regulation of some aspects of hostile

takeovers.

20 Only if they prove to have special skills, and they do so rarely, or when

they do not perform their services with the special skills, will they be

held liable.

21 Under the Advisers Act, 15 U.S.C. §80b-1 to §80b-22, investment advisers

without respect to securities are not required to have any qualifications. See T.

the duty of care should not apply to these fiduciaries. One commentator assumed that courts would impose liabilities on corporate managers for breach of duty of care they suspected lacked of the duty of loyalty, but there was no clear proof of such breach.89

The historical weaknesses of the managers' duty of care can be also explained by the fact that many managerial functions are not amenable to the imposition of judicial standards. Managerial services have remained an art rather than a science. There are numerous investment strategies and techniques, and most are based on intuition and improved theories. Courts cannot and should not dictate the strategies that investors should adopt. So long as these theories are acceptable to some people, or so long as they are disclosed to investors and they choose the particular investment, managers should not judge their techniques.

Third, there are good arguments for the proposition that directors rather than the courts should establish the level of desirable risk for their managed properties. The future appropriate level of risk of investments cannot be anticipated when the economic environment is volatile. For example, investments in low income, fixed rental income instruments may represent low credit risk. However, in times of inflation, such investments are risky because of the buying power of the currency is reduced to the point that even the capital is not preserved. If the beneficiaries do not expect to draw on the trust fund for many years, and inflation may erode the value of the assets, an investment in stocks will be far wiser and less risky than an investment in debt instruments. It is recognized that these issues should be left to the courts, so long as the trustee can rationalize the choice of risk level for the particular trust.

By far the most important reason for the further relaxation of managers' duty of care is that the number of cases brought against

managers and the amounts involved have increased dramatically.90 As their direction broadens, and the unpredictability of the environment increases, managers may be exposed to liabilities that far exceed their benefits from the services. Fiduciary law is designed to encourage the parties to engage in the relationship. Its main threat is to regulate fiduciaries because they post substantial risks for the entrusters. However, if the boards on managers exceed the expected benefits from the relationship the managers will refuse to engage and provide their services. Corporate directors' fees do not begin to cover the enormous amounts for which directors might be liable. To the extent that they will not be indemnified or insured, one can expect capable people simply to refuse to serve on corporate boards. Similarly, even though corporate officers are highly-contracted, they are limited to the potential liability that will tolerate release. Thus, the more emphasis for reducing or eliminating the duty of care of managers seems to be the concern that high burdens of liability deter capable directors from serving.91

89 "While problems have occurred with respect to other fiduciary services, such as medical services, and as we in the United States are grappling with the possibilities of environmental judgments and higher malpractice insurance premiums. See T. V. McDoough, "Does the Punishment Fit the Crime? The Federal and Some Civil RICO Statutes Transform Accountant Liability" (1992) 26 Sales & Leasing L. 1107, 1108 (litigation continues concerning these matters and the risk exposure to all professionals has increased in higher malpractice awareness costs with premium rising and coverage falling. Anomalies in corporate income taxes have tripled in the last three to four years). Also P. M. DeCorto, "The Frequency and Severity of Medical Malpractice Claims: New Evidence" (1986) 49 Law and Contemporary Problems at 46-70 (note rise in frequency and severity of medical malpractice claims as naming uninsured insurance premiums). H. F. Mooney & L. B. Bloom, "Anatomy of a Medical Malpractice Claim" (1988) 55 Def. Couns. 1, 480 (same).

90 For informations that will decline in services or directors see D. E. Boek, S. A. Rapid & F. Rosevear, "The Role of the Business Judgment Rule in Saleable Litigation at the Tore of the Decade" (1990-91) 45 Bus. Law. 469 at 475, citing Biv v. National Hunter Life Ins. Co., 810 F.2d 509 at 513 (6th Cir. 1987); Joey v. North, 835 F.2d 880 at 888 (2d Cir. 1988) (discussing the courts' concern with the directors' burdens of liability, by relying on their compliance to serve, M. F. DeSoto and E. N. Venezia, "The Role of the Board as Derivative Litigation: Delaware Law and the Current All-Options Controversy" (1989) 44 Bus. Law. 503 ("the functional burden on corporate directors might make directors, subject to risk or severe loss willing to serve") and E. H. Blumberg, et al., "Corporate Litigation" (1988) 44 Bus. Law. 1152 at 1162 (many qualified individuals are reluctant to serve on corporate boards due to a fear of the perceived requirement of the duty of care and the risk of incurring liability). C. Hansz, "The All-Options Governance Project - The Duty of Due Care and the Business Judgment Rule, A Commentary" (1986) 41 Bus. Law. 123 at 123 ("if the directors are to besecond-guessed as to whether their decision, 138
For all these reasons the courts have sought to reduce the level of fiduciary managers' liabilities for lack of care (negligence).

CONCLUSION

I believe that the trends described in this paper will continue on the one hand, the functions of managerial fiduciaries will be broadened and their discretion will expand. On the other hand, judicial supervision of these fiduciaries with respect to negligence in the performance of their services will be reduced and alternative mechanisms will be sought to deal with the problem.

The recent developments expanding managers' functions and discretion are greatly influenced by changes in the business and economic environment in the United States. As the instability of the environment grew, the power and discretion of the fiduciaries had to expand. The courts endeavored the condition negotiated by the parties and the legislative initiative in granting managers expanded discretion. To be effective,

with accompanying liability, was far willow's, "Delaware General Corporation Law (1973) as amended, effective July 1, 1986, permitting a Delaware Corporation to provide its certificate of incorporation or amended thereof to limit or eliminate altogether directors' personal liability to its corporation or its shareholders for breach of its duty as a director under certain circumstances, J. W. Gessner, "Delays: A Ploy of Section 112(b) (7) Delaware Or Sine For Corporate Directors?" (1988) 37 Del. L. Rev. 411 (stating that the purpose of Section 112(b)(7) was the result of restricting liability of qualified disinterested directors in 1983. This severe restriction is valid in scope of coverage and availability of directors and others to insurance, "staggering personal liability" in litigation involving breach of fiduciary duties, and mentioned likelihood of such litigation against directors, L. A. Whitel, "Note: Corporate Directors - A Hopeless Species? An Alternative Reasonably Standard For Director Asli Off's Liability in Illinois" (1987) 37 Ill. L. Rev. 495 (expressing same sentiment "corporations will feel it increasingly difficult to attract onto their boards men and women of business at the liability risks for the work burden of directors imposed by the magnitude of the burden of directors."); R. B. Bednar X. M. J. Gootz, "Elimination of Liability of Director Liability for Delaware Corporations" (1987) 12 Del. J. Corp. L. 3 (the section was "amended to assist Delaware corporations to attract highly qualified individuals to serve as directors. Many corporations have since taken advantage of this section by adopting amendments which limit or eliminate director liability."); J. R. Cofal, "Duty of the Director's Duty to Care: Judicial Abandonment of Standards and Sanctions Through the Brown Judgment Rule" (1983) 62 Tex. L. Rev. 591; D. J. Block & P. J. Penning, "The Director's Judgment Rule and Shareholder Derivative Actions: Visa Zimagati" (1984) 37 Wash. Law. Rev. 37 (increased directorial discretion and elimination of judicial record, precluding encouragement of competent individuals to assume directorship).