

Fiduciary Law: Where does it come from?

Rules governing fiduciaries are ancient – in fact, various societies have recognized fiduciary relationships for over 3,000 years. Our ideas of law, justice, and fiduciary duty are informed by ancient wisdom. The U.S. Supreme Court courtroom provides us an artistic vision of ancient law-givers through the use of friezes on their north and south walls.

Menes, Hammurabi, Moses, Solomon, Lycurgus, Solon, Draco, Confucius, and Octavian appear on the south wall. Justinian, Mohammed, Charlemagne, King John, St. Louis, Hugo Grotius, William Blackstone, John Marshall, and Napoleon appear on the north wall.

Hammurabi (b. 1,818 – d. 1,750 BCE), sixth king of Babylon and first king of the Babylonian empire, is known as the author of a famous law code. The Code of Hammurabi includes 282 laws, involving such issues as crime, family and property, which were used by the courts of Babylonia.

Rules of agency, reflected in Hammurabi's laws, developed along with commerce in Ancient Mesopotamia. The laws primarily discuss situations in which a *tamkarum*, or principal/merchant, gives a *samallum*, or agent, either money to use for travel and for investments or purchases, or goods for trading or selling. Under the laws, an agent is generally required to keep a written receipt of transactions he performs for the principal and tabulate the loans that are due to present at the return of an expedition. An agent also has a duty to account to the principal for interest on the entrusted money over the period of the agency.

Hammurabi's laws generally required an agent to generate a profit for the principal. An agent who failed to do so had to pay the principal double the amount originally entrusted to him. Another rule stated that an agent who incurred a loss had to return the amount of the capital sum entrusted but not more. In Hammurabi's times, travel and trade could be very dangerous. Therefore, the laws excused agents who had to abandon their goods when attacked by enemies. Basically, an agent would be excused from performing when failure to perform or the losses were not the agent's fault.

The New Testament contains the values underlying fiduciary law today. In this case the principle is the duty to take care of the person who entrusted the fiduciary and exclude the fiduciary's interests from consideration.

In 37 Cal. L. Rev. 539, 539-540 (1949), Austin Scott discusses a story found in the New Testament, *Luke 16:1-8*:

“There was a certain rich man, which had a steward; and the same was accused unto him that he had wasted his goods. And he called him, and said unto him, How is it that I hear this of thee? [G]ive an account of thy stewardship; for thou mayest be no longer steward. Then the steward said within himself, What shall I do? [F]or my lord taketh away from me the stewardship: I cannot dig; to beg I am ashamed. I am resolved what to do, that, when I am put out of the stewardship, they may receive me into their houses. So he called every one of his lord's debtors unto him, and said unto the first, How much owest thou

unto my lord? And he said, An hundred measure of oil. And he said unto him, Take thy bill, and sit down quickly, and write fifty. Then said he to another, And how much owest thou? And he said, An hundred measures of wheat. And he said unto him, Take thy bill, and write fourscore. And the lord commended the unjust steward, because he had done wisely: for the children of this world are in their generation wiser than the children of light.”

Scott comments in his article that the steward was a fiduciary. The steward was entrusted with the management of his master’s property and had a duty dealing with his master’s affairs to act solely in the interest of the master. However, it is clear that the steward relieved the master’s debtors of some of their debts. If the debtors were unable to repay the full debts, and by settling with them the steward could at least collect something, then the steward did not act improperly.

Islamic law (Sharia) recognizes and regulates fiduciaries. For example, under the law, a fiduciary is someone who is deposited (entrusted) with property. A depositor is entrusted with the owner’s property and not presumed to have taken the property of the true owner against the owner’s wishes. A depositor is not responsible for damage to the entrusted property unless he commits trespass or negligence. In the case of trespass or negligence, the deposit turns into a guarantee, that is, into full responsibility. Finally, a fiduciary relationship whose terms provide for a violation of the Koran is not enforceable.

The trust (*waqf*) is an important institution in Islamic law and serves as an alternative to the institution of corporations. While Europe adopted the corporation style, the Islam adopted the *waqf*. The early universities of Europe, such as Paris (1180) and Oxford (1249), were founded as trusts resembling the *waqf*.

In the Jewish law of agency, the person who is serving another as an agent is known as *Shaliah*, or “one who is sent,” and the person who is sending *Shaliah* is known as the *Sholeah*, or “one who sends.” The agency relationship is known as *Shelihut*.

The Jewish law of agency provides that an agent in a for-profit corporation must maximize the principal’s profits. An agent may deviate from profit maximization only if the principal clearly directs the agent to do so. Further, Jewish law of agency is founded upon the principle that “a man’s agent is like himself,” and that a man can generally do through a representative anything that he could do in person.

A major issue in Jewish law is whether actions are moral. Jewish law forbids a person from harming another, either directly or indirectly. People are forbidden from aiding others or allowing others to violate Jewish law. Agents do not escape these rules. Agents may not justify a violation of Jewish law by claiming that they were acting as agents for others.

Roman fiduciary law may have begun with property and inheritance law. Roman law developed the *fideicommissum* and *fiducia* that allowed fiduciaries to hold property for others. The *fideicommissio*, or trust, permitted Roman testators to leave property to a beneficiary who could not legally inherit the property, such as a criminal or a foreigner. The testator would leave a legacy to a legally qualified beneficiary. His obligation to obey the request was moral.

The Twelve Tables – 451 - 449 BCE – were the Roman Republic's earliest attempt at a code of law. They were created in order to prevent patrician public officials, who adjudicated most legal matters, from adjudicating the law based on their own preferences. The Twelve Tables become such a symbol of Roman justice that children are required to memorize them for the next four hundred years. Three examples, which have relevance to a discussion of fiduciary-like concepts, are shown below:

TABLE II, concerning judgments and thefts, contains Law VIII, states, “When anyone accuses and convicts another of theft which is not manifest, and no stolen property is found, judgment shall be rendered to compel the thief to pay double the value of what was stolen.”

TABLE III, concerning property which is lent, contains Law I, which states, “When anyone, with fraudulent intent, appropriates property deposited with him for safe keeping, he shall be condemned to pay double its value.”

TABLE VIII, concerning torts, contains Law IV, which states, “*Patronus si clienti fraudem fecerit, sacer esto*”. In other words, if a patron defrauds his client, let him be outlawed.

If we fast-forward to the 20th century, *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928), offers some of the best known declarations of fiduciary duty. In that case, Justice Benjamin Cardozo, then Chief Judge of the New York Court of Appeals, explored possible fiduciary duties among participants in a joint venture.

Cardozo proclaimed that such “[j]oint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty.” Although the duty of loyalty examined in *Meinhard* represents but one type of fiduciary duty, Cardozo’s language particularly resonates with the reader as it captures the most intuitive notion of a fiduciary—one who by his or her position owes certain others extreme fidelity.

The significance of Cardozo’s proclamations in *Meinhard* extends beyond expertly capturing the basic nature of fiduciaries and their duties. Although Cardozo found no precedent that exactly mimicked the facts of the case before him, he sought to broadly apply existing notions of duties developed from the law of equity. He wrote:

“Equity refuses to confine within the bounds of classified transactions its precept of a loyalty that is undivided and unselfish. Certain at least it is that a man obtaining his locus standi, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his copartners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them. Certain it is also that there may be no abuse of special opportunities growing out of a special trust as manager or agent.”

My favorite piece follows:

“A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising

rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.”

Rules governing fiduciaries may be ancient in origin; however, over thousands of years they were adapted and adjusted to fit the changing circumstances of modern times. I hope that continues to be the case.

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