Borko Mihajlovic*

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THE JUSTIFICATION FOR THE EXISTENCE OF FIDUCIARY DUTIES IN COMPANY LAW

Abstract

Fiduciary duties are a widely recognized legal institution, and they present one of the most important attempts in law to solve the first agency problem and to constrain broad management powers. The subject of this paper is the issue of the justification for the existence of fiduciary duties, which has been present almost since the inception of this institution. At the beginning, the author presents a short overview of the emergence of fiduciary duties in the Anglo-Saxon law and the legal transplant of these duties to continental Europe. In the next part of the paper the author considers the first aspect of the main issue of the paper that is the justification for the existence of fiduciary duties. The first aspect deals with the various theories dedicated to reason, purpose, and rationale for the existence of fiduciary duties in company law. The second aspect of the issue deals with the modern views, which strive to determine whether the fiduciary duties' existence in company law is justified at all. Finally – in the conclusion – the author tries to determine the relevance of the questions raised in this paper for Serbian company law.

***Key words**: fiduciary duties, justification, company law, duty of care, duty of loyalty.*

1. INTRODUCTION

Fiduciary duties towards the company (and/or members/shareholders) are an essential part of the company law regulations all around the world. It is widely recognized that fiduciary duties represent perhaps the most significant part of American corporate law. The same applies, to a somewhat lesser extent, to European countries as well. The principle of loyalty and the principle of the interest of the company are considered now as the basic company law principles.[1] In the most general terms, fiduciary duties present one of the most important attempts in law to solve the first agency problem

* LLM (Loyola University NO), Teaching Assistant, University of Kragujevac, Faculty of Law (e-mail: bmihajlovic@jura.kg.ac.rs).

[1] M. Vasiljević, *Kompanijsko pravo – pravo privrednih društava*, Beograd, 2013, 29.

and to constrain broad management powers.[2] Fiduciary duties are distinct legal obligations aiming to regulate the enforcement of entrusted powers.[3]

The issue of the justification for the existence of fiduciary duties (generally and particularly in company law) has been present almost since the inception of this institution. In contemporary company law this issue has two meanings and both of these meanings will be the subject of this paper. The ordinary, traditional meaning of the issue of the justification for the existence of fiduciary duties deals with the reason, purpose, and rationale for the existence of fiduciary duties in company law. This inquiry for the justification of fiduciary duties does not question the necessity of the fiduciary duties' existence, but only strives to determine the specificities of fiduciary duties and their legal nature. A recent meaning of this issue does not stem from an irrefutable presumption on the fiduciary duties' existence. Instead it strives to determine whether the fiduciary duties' existence is justified in company law at all or if their purpose may be determined in another, simplified, and more efficient way.

2. A SHORT OVERVIEW OF THE EMERGENCE OF FIDUCIARY DUTIES AND OF THE TWO REGULATORY APPROACHES TO FIDUCIARY DUTIES IN COMPANY LAW

Fiduciary duties towards the company ensued in the countries of Anglo-Saxon legal origin[4] as a part of fiduciary law. In these legal systems, fiduciary duties may be even today considered as part of the branch of law that forms a response to the existence of a special sort of legal relationships – fiduciary relationships. The emergence and development of fiduciary duties must be contemplated in the context of a differentiation between common law rules and equity rules, which existed, and somewhere still exist, in Anglo-Saxon legal systems. The purpose of equity rules (and special equity courts) was to supplement common law rules, especially in situations when the consequence of applying general legal rules and principles was essentially injustice. Equity rules never directly change common law rules but in certain

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[2] V. Radović, *Uticaj agencijskih problema na pravo akcionarskih društava i korporativno upravljanje*, u: Korporativno upravljanje, Pravni fakultet, Univerzitet u Beogradu, Beograd, 2008, 244-245.

[3] On the notion of fiduciary duties in more detail: J. Lepetić, *Kompanijsko pravni režim sukoba interesa – dužnost lojalnosti*, Beograd, 2015, 96-98.

[4] Fiduciary duties ensued primarily in English law.

types of situations they render additional legal remedies.[5] One of the equity rules developed by the equity courts was the sanction for breach of trust and confidence.[6] The breach of trust and confidence included all relationships that we know today as fiduciary relationships. The judgments and opinions of the equity courts were arranged and systematized in the 19th century in the same way the common law precedents were systematized. As part of the systematization the breach of trust and confidence was developed to the legal institution of trust.[7] However, many relationships, which before were subject to the principle of breach of trust and confidence remained beyond the institution of trust (for instance, the relationship between principal and agent, director and company, and so on). These relationships were initially called "relationships similar to trust" or "quasi-trust", and during the 19th century the term "fiduciary relationships" became common for all these relationships.

Seemingly, few general definitions of fiduciary relationships aim to comprehensively define these relationships. There are several reasons for that. Fiduciary relationships touch upon many situations in life and, more or less, influence them. Therefore the reason for the lack of a universal definition may be that it is impossible to cover all these situations with one definition. Circumstances of life and social relationships relevant for fiduciary relationships are not only diverse and numerous, but also complicated and dynamic. Some authors, however, made attempts to cover all fiduciary relationships with one definition. According to Miller, a fiduciary relationship is one in which one party (the fiduciary) enjoys discretionary power over the significant practical interests of another (the beneficiary).[8] According to Shepherd, a fiduciary relationship exists whenever a person acquires a power of any type on the condition that he also receives with it a duty to utilize that power in the best interests of another, and the recipient of the power uses that power. The essence of this theory of fiduciary relationships is that powers are a species of property, which can be beneficially owned by one person while being exercised by another person, who may be referred to as the legal owner of the power.[9]

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[5] B. Kasolowsky, *Fiduciary Duties in Company Law – Theory and Practice,* Baden-Baden, 2002, 36.

[6] L. S. Sealy, *Fiduciary Relationships*, Cambridge Law Yournal, No. 1/1962, 69.

[7] B. Kasolowsky, *op. cit.*, 37.

[8] P. Miller, *A Theory of Fiduciary Liability*, Mc Gill Law Yournal, No. 2/2011, 262.

[9] J.C. Shepherd, *The Law of Fiduciaries*, Toronto, 1981, 93.

Several elements, common for many different definitions, are considered decisive for determination of the nature and essence of fiduciary relationships: the entrustment of property or powers, the beneficiary's trust to the fiduciary and his/her risk stemming from that trust, the existence of a certain level discretion the fiduciary holds during the enforcement of entrusted powers or management of entrusted property,[10] the impossibility of strict determination of the fiduciary's obligations, the beneficiary's special vulnerability, his/her dependence on the fiduciary,[11] and, related to the latter aspect, the possibility of exercising undue influence on the beneficiary.[12]

There are different classifications of fiduciary relationships.[13] These classifications give us an answer to the question which legal relationships are usually considered as fiduciary, respectively, which legal relationships have such characteristics, the existence of which is followed by the emergence of fiduciary relationships and by the subjecting of one party in the relationship to the fiduciary duties. The answer on this question is pretty clear in company law. The existence of the fiduciary relationship between company and director is undisputable and it is established by statute or court precedent (in common law countries). There are certainly some dilemmas regarding the necessity of the existence of such a relationship in different factual situations, for example: Is there a fiduciary duty of a majority shareholder toward a minority shareholder and what are the duties of the director toward creditors when the company is in the "vicinity" of insolvency, etc.).

Therefore, fiduciary duties ensued in the Anglo-Saxon law as the most important consequence of the existence of fiduciary relationships. Two basic fiduciary duties, recognized also in company law, are the duty of care and the duty of loyalty.

Regarding the emergence of fiduciary duties in the countries of continental legal tradition, the most common assertion is that they were conveyed by the method of legal transplantation from the Anglo-Saxon

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[10] For example, the Supreme Court of Canada repeated several times that the essential characteristic of fiduciary relationships is discretionary powers owned by a fiduciary (a court confirmed this statement in the *Galambos* case).

[11] This element would, however, significantly expand the scope of application of the rules on fiduciary relationships.

[12] T. Frankel, *Fiduciary Law*, New York, 2011, 4; P. Miller, *A Theory of Fiduciary Liability*, 243-245.

[13] For example, Sealy differenciated between four types of fiduciary relatioships. More: L. Sealy, *Fiduciary Relationships*, 74-79.

law.[14] This assertion comes from the assumption that fiduciary duties are an original creation of the Anglo-Saxon law. However, we cannot claim that fiduciary duties are entirely a creature of American and English law. Fiduciary duties are not unknown in the continental law, considering that their relation with numerous general legal principles and institutions is obvious. Based on this fact, we may claim that in the countries of Continental-European legal tradition fiduciary duties ensued from those related general legal principles and institutions. This relatedness exists, primarily, with respect to the general principals of contract law, particularly with the good faith principle, then, with respect to the fiduciary principles recognized by some European countries and ,somewhat, with respect to the general rules on tort liability.[15] The above mentioned relatedness between fiduciary principles and general legal principles is significant not only for historical considerations but also for contemporary legal considerations since mentioned legal principles and rules from different fields of law supplement special company law rules on fiduciary duties or have relevance for the interpretation of these special legal rules.

The institution of fiduciary duties toward the company shows certain conceptual differences between the United States and the countries of Continental-European legal tradition. The position, importance, and ,partially, meaning of the two basic fiduciary duties, as well as the relation between the duty of care and the duty of loyalty are different in the countries of Anglo-Saxon legal origin (primarily the United States) and countries whose tradition is based on attainments of Roman law. In the United States the most important fiduciary duty is the duty of loyalty, and it has a central position not only in the system of fiduciary duties, but also in the entire American corporate law. The primary and generally accepted meaning of the duty of loyalty in the United States is that the fiduciaries' actions must be undertaken in the honest belief that they are in the best interest of the corporation and/or its shareholders.[16] In the European countries the duty of loyalty does not have as much a lofty position as in the United States. Although actions prohibited by this duty are as well recognized in most of the European jurisdictions, the general and broadest conception of the duty

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[14] H. Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, European Company & Financial Law Review, No. 3/2005, 380.

[15] C. G. Beuerle, E. P. Schuster, *The Evolving Structure of Directors' Duties in Europe*, European Business Organization Law Review, No. 2/2014, 196.

[16] L. E. Strine, Jr., L. A. Hamermesh, R. F. Balloti, J. M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, Georgetown Law Journal, No. 3/2010, 640.

of loyalty in European countries is that it deals with conflicts of interest between company and director.[17] In the European legislations the duty of loyalty is often not defined by statute as a special duty or a special legal principle but rules which regulate this duty may be recognized in different statutory provisions aiming to prohibit conflict of interest, use of corporate opportunities, unfair competition, etc. Therefore, those rules are not necessarily based on the prescribed duty of loyalty, but represent a compilation of legal instruments functionally comparable to the duty of loyalty in American law. [18] For instance, in German and French law, the duty of loyalty is not codified but developed in case law. There is no a dilemma that in these countries, although not prescribed by the legislator, the general duty of loyalty toward company applies to company directors (as well as to some other subjects). In terms of the content of the notion of the "duty of loyalty", we may conclude that in American law the notions "fiduciary duty" and "duty of loyalty" are virtually equal and present synonyms while for the Continental-European approach we may say that equation exists between the notions "duty of loyalty" and "conflict of interest". Therefore, the content of the notion "duty of loyalty" is broader in American law. The duty of care has a central position in the countries of Continental-European legal tradition[19] and it is usually defined as a duty to act in the best interest of the company (hence, it has the same meaning as the duty of loyalty in the United States).

Regardless of the mentioned differences and the expectation that these differences, similar to all other systematic differences between the two main legal systems, lead to the essential variations in the approaches to regulate fiduciary duties, those variations sometimes do not exist at all, and even if they exist, they are minimal.[20]

3. AN OVERVIEW OF THE MAIN THEORIES ON THE JUSTIFICATION FOR THE EXISTENCE OF FIDUCIARY DUTIES

The issue of rationale and theoretical justification for the existence of fiduciary duties is one of the most disputable issues in the legal theory of

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[17] C. G. Beuerle, P. Paech, E. P. Schuster, *Study on Directors' Duties and Liabilities*, London, 2013, 118.

[18] *Ibid.*

[19] S. Grundmann, *European Company Law*, Cambridge, Antwerp, Portland, 2012, 265.

[20] C. G. Beuerle, E.P. Schuster, *op. cit.*, 198.

fiduciary duties. Every company law theory relies more or less on fiduciary relationships theories, which deals with a broader spectrum of social relationships, but which inevitably present a point of departure or at least a guidepost for theoretical determination of fiduciary duties toward company. Miller classifies all theories on the emergence of fiduciary duties as reductivist or instrumentalist.[21] According to reductivist concepts, fiduciary duties do not have a special legal basis and legal justification but stem from different bases of private law liability. Contrary to those theories, instrumentalist views are based on the assumption that fiduciary duties have their own peculiarities and contemplate their justification in the existence of an independent, usually socially significant goal.[22] Both concepts are expressed through several different theories on the emergence and rationale for the existence of fiduciary duties.

The most important theory, which comes from reductivist views, is the contractual theory. It is based on the assumption that all fiduciary relationships have a contractual nature. It is the offspring of deliberations of the adherents to the law and economics school of thought. In accordance with the principles of this school of thought, which are the basis of the theory, the objectives, which are supposed to be attained, are formed. The importance of maximization of the company value is emphasized and it has primacy in comparison with the achievement of adequate distribution of value between purported contracting parties (directors and shareholders/members).[23] Classical fiduciary duties and limitations imposed by them to a fiduciary are considered as important obstacles to the achievement of mentioned maximization of the company value. For that reason, this theory advocates for reduction of these limitations and a mechanism to achieve this is "transformation" of fiduciary obligations to mere contractual obligations.[24] Advocates of contractual views emphasize need and importance of reduction of the fiduciaries' costs, which are a consequence of the fiduciary duties' existence.

The contractual theories have two variants. According to the first one, fiduciary duties represent a contractual provision between the company, i.e. its shareholders/members, and directors or other persons who are subject to fiduciary duties. According to another variant, fiduciary duties have a

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[21] P. Miller, *Justifying fiduciary duties*, McGill Law Yournal, No. 4/2013, 973.
[22] *Ibid.*
[23] V. Brudney, *Contract and Fiduciary Duty in Corporate Law*, Boston College Law Review, Vol. 38, 1997, 637-638.
[24] *Ibid.*

contractual rationale because they are based on the consent of will of a fiduciary and a beneficiary to establish a fiduciary relationship. Regarding the first variant of the contractual theory, the best-known view is the one, which comes from the assumption that fiduciary duties are actually default rules. Legal regulation of fiduciary duties is, according to these approaches, necessary only because of the impossibility to cover all contracting parties' rights and obligations by any contract.[25] This is particularly expressed with regard to the agreement on mutual rights, obligations, and responsibilities between director and company. Why? The director's obligations are complex. The objective is clear (achieving profits as high as possible) but means and ways to attain the objective may be different due to market unpredictability.[26] Therefore, these means and ways cannot be entirely prescribed in advance or foreseen by a contract. For these reasons, and in case of occurrence of any disputable situation (conflict of interest, breach of prescribed standards of behaving with the "care of a good businessman", etc.), the legislator "helps" and prescribes norms based on a supposed negotiation. The legislator evaluates interests of both contracting parties in a supposed negotiation on the disputable situation and establishes norms, which they assess as a result of the supposed negotiation.[27] According to some insights, fiduciary duties present incomplete default rules. Those rules are incomplete because there is a gap between the standard of fiduciary conduct agreed upon by contracting parties or reasonably expected by them and relatively limited duties of loyalty and care, which the courts are willing to enforce.[28]

Contractual theory is subject to different critiques. Shepherd deems that this theory is basically unrealistic. The fiduciary principle is more and more being used to provide recovery to plaintiffs in situations when they would not be contractually protected.[29] The essence of fiduciary duties is to overcome manifestly unjust contractual provisions. In terms of the content of the duties, critique is that if fiduciary duties are really default rules, they would depend on the material facts of each concrete case. That is not the case in reality because the content of duties is fixed. Besides that, there are

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[25] F. Easterbrook, D. Fischel, *Contract and Fiduciary Duty*, The Journal of Law & Economics, No. 1/1993, 426.

[26] B. Mihajlović, *Posebne dužnosti direktora prema društvu sa ograničenom odgovornošću i načelo slobode ugovaranja*, Harmonius, br. 1/2015, 163.

[27] F. Easterbrook, D. Fischel, *op. cit.*, 427.

[28] K. A. Alces, *The Fiduciary Gap*, Journal of Corporation Law, Vol. 40, 2015, 367.

[29] J. C. Shepherd, *op. cit.*, 66.

significant differences between contractual and fiduciary relationships. The essential difference is that in a contractual relationship both parties act in their own interest, while in a fiduciary relationship one party acts in the interest of another party (there is no relation of reciprocity). Fiduciary rules are not neutral rules but rules aiming to protect the beneficiary, not the fiduciary.[30] Regardless of the changes present in positive legal regulation, which facilitate the conclusion of transactions or undertaking of businesses with a personal (self) interest, the limitations of self-interested actions must be stricter in fiduciary law than in contract law, even in comparison with the more flexible contractual doctrines whose objective is the protection of a weaker contractual party.[31] Contractual rules generally allow contracting parties to act in self-interest. Finally, the legal theory recognized the problem of a fiduciaries' consent since one cannot always characterize a fiduciary as having consented.[32]

Another theory based on reductivist assumptions is the property theory. According to this theory, a fiduciary relationship exists where one person has a legal title and/or control over property or any other advantage and the other is the beneficial owner thereof.[33] This theory is established on the hypothesis that fiduciary duties are a kind of private property right or necessarily incidental to private property rights.[34] Understood in this way, fiduciary duties enhance ownership by facilitating delegation of power over property and protect ownership interests by dettering misappropriation or misapplication of that property.[35] The justification for fiduciary duties derives from that for ownership and private property rights. This theory has o different variants as well. The most famous definition is the one brought by Ribstein who claims that all fiduciary relationships involve the contractual delegation of broad power over one' property.[36] A significant one is also the critical resource theory, brought by Smith, who defines fiduciary relationship in the following manner: "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[37] belonging to the beneficiary".[38]

[30] V. Brudney, *op.* cit., 627.

[31] *Ibid*, 631.

[32] B. Kasolowsky, *op. cit.*, 87.

[33] J. C. Shepherd, *op. cit.*, 52.

[34] P. Miller, *Justifying fiduciary duties*, 987.

[35] *Ibid*.

[36] L. Ribstein, *Are Partners Fiduciaries?,* University of Illinois Law Review, 2005, 212.

[37] The concept of critical resource serves to avoid theoretical problems, which are a consequence of different views of the concept of property and the impossibility to

Smith's theory is established on the hypothesis that the purpose of existence of fiduciary duties is a reduction of the possibility of opportunistic conduct, which is possible considering the nature and structure of fiduciary relationships. Whether something represents a critical resource and, respectively, justifies the imposition of fiduciary duties depends on whether that "thing" enables the fiduciary to act opportunistically.[39]

Many theories are based on instrumentalist views. The most important result of these views are theories conceived on the moral basis of fiduciary duties. Fiduciary law should provide the fiduciaries' moral conduct, and fiduciary duties should require altruistic behaviour from beneficiaries.[40] It is also said that fiduciary duties have a moral justification because they provide a secure basis for interpersonal trust. They promote trust either directly or by securing conditions of trustworthiness that make it appear rational to place trust in fiduciaries.[41] The basis of reliance theory implies that a fiduciary relationship exists where one person reposes trust, confidence or reliance in another.[42] It is not regular, ordinary trust, but a higher level of trust since there is an addition in the relationship, a characteristic beyond reliance, such as confidentiality, and there is also knowledge of one party that another party relies on him/her.[43] The consequence of the mentioned trust and reliance, according to this theory, is dominance or influence of the fiduciary over the beneficiary and the emergence of fiduciary relationship between them. There is relatedness between the reliance theory, the ideas of the beneficiaries' vulnerability and the contracting parties' (fiduciary and beneficiary) unequal bargaining powers. For that reason, the unequal relationship theory supplements the reliance theory. Boundaries between the two are not entirely clear and sometimes perhaps they do not exist at all. Similar to the reliance theory, the unequal relationship theory has a moral basis and reminds us of the relation between fiduciary duties and morals. According to the unequal relationship theory, a fiduciary relationship exists wherever there is an established inequality of footing between two parties.

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subsume subjects of all fiduciary relationships under the legal concept of property (this problem is particularly expressed with respect to confidential information, business secrets, etc.).

[38] G. Smith, *The Critical Resource Theory of Fiduciary Duty*, Vanderbilt Law Review, Vol. 55, 2002, 1402.

[39] *Ibid*, 1441-1442.

[40] P. Miller, *Justifying fiduciary duties,* 995.

[41] *Ibid*.

[42] J.C. Shepherd, *op. cit.*, 56.

[43] *Ibid*.

This inequality of footing can be of two types: *de jure*, i.e. as a result of particular defined relationships, such as trustee and beneficiary; or *de facto*, i.e. as a result of one person's dominance over another.[44] Although fiduciary relationships often arise because of the natural domination of one party over another this domination does not have to be natural and may originate simply because of the roles the parties have within the relationship.[45] The problem of factual inequality between fiduciary and beneficiary remind us of the principle of protection of a weaker party from consumer law.[46] However, it must be clear that persons who conduct a business operation professionally do not have much in common with consumers and therefore, the mentioned potential inequality in fiduciary law is not equivalent to the inequality in consumer contracts (between consumer and trader).

Beyond reductivist and instrumentalist views – significant due to its originality – stands the commercial utility theory as another product of the law and economics school of thought. According to this theory, a fiduciary relationship will be found by the court in every situation in which the court deems it necessary to hold a person or a certain class of persons to a higher than average standard of ethics or good faith for the sake of protecting the integrity of commercial enterprise.[47] The commercial utility theory stems from an assumption that a certain amount of trust and confidence is necessary in business in order to ensure economic efficiency.[48] For that reason, when solving concrete cases, courts are expected to strive to find the answer on the question whether a person's conduct, which is a subject of dispute (for example, abuse of a position in a company), has the potential to impede effective economic interchange and development. In doing that, the court is supposed to find a right balance, a right approach to the intervention of the state (through a court) in economic relations. A free market implies the existence of instruments for maintaining the integrity of the market place but these instruments must not be too rigid since in that case they would have the opposite – preventing – effect on the free market.[49]

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[44] *Ibid*, 61.
[45] *Ibid*, 62.
[46] B. Mihajlović, *op. cit.*, 170.
[47] J.C. Shepherd, *op. cit.*, 78.
[48] *Ibid*.
[49] *Ibid*, 79.

4. MODERN VIEWS ON THE JUSTIFICATION FOR THE EXISTENCE OF FIDUCIARY DUTIES IN COMPANY LAW

In recent years the issue of the justification for the existence of fiduciary duties in company law receives entirely different connotation. Perhaps it is too early to say that there is a dilemma or a lively scholarly debate but definitely more attention has been paid to modern views, which express doubt towards the necessity of the existence of fiduciary duties in company law.[50] The grounds of these modern views can be found in the conceptions of the free market and the contractual nature of the company (corporation). These views are a continuation of the contractual theories on fiduciary duties but they cannot be subsumed by these theories since the adherents to the new views argue for the absence of fiduciary duties and their removal from the company law. If the duties are to disappear, company's directors (and other persons subject to fiduciary duties according to current solutions in comparative law) should only respect provisions of the articles of association, by-laws, and the agreement on mutual rights, obligations, and liabilities of directors. Hence, ways and forms of protection of the members'/shareholders' interests from the management's opportunistic behaviour would be entirely left to the contracting parties' will and their negotiations during the establishment of their contractual (or labor) relation. The only external mandatory obligation imposed to management members would concern the obligation of conduct in accordance with the good faith principle.

There are several reasons, which serve as a justification for these views. First, the differences in the legal position of members/shareholders and creditors (and generally between debt and equity) are reducing.[51] Considering that creditors have access only to the contractual means of protection and that they use these means successfully in practice, the same contractual principle of protection should apply to members/shareholders. Second, the relationship between director and company – in contemporary conditions – does not fulfill anymore the basic prerequisites, which are necessary to consider a legal relationship to be a fiduciary relationship. As it has been emphasized in this paper and elsewhere, trust, flexibility and open-ended fiduciary's obligation are some of the key elements of any concept of the fiduciary relationship. Therefore, the same applies to the relationship between a company and a person who is subject to fiduciary duties (most

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[50] D. G. Baird, M. T. Henderson, *Other People's Money*, Stanford Law Review. No. 5/2008, 1315.

[51] *Ibid*, 1311.

commonly director). Adherents to modern views assert that the relationship between company and director does not have this kind of characteristics anymore.[52] The concept of trust does not exist anymore and markets, creditors, shareholders, investors and legislators assume that they should not impose trust on directors. Today they do not expect directors to put the company's interests above their self-interests.[53] The system of the directors' remuneration obtains more importance as a mechanism of incentives for their labor and for the equalization of theirs interests with the company's interests. The consequence of a general lack of confidence is a stronger scrutiny over directors' work by the creditors, institutional creditors, and market analysts.[54] Besides that, the government's requirements with respect to reporting as well as the state's supervision over the markets and directors' conduct in general have become more extensive.[55] From all these circumstances resulted the fact that open-endness and unlimitedness of directors' powers do not exist anymore. Flexibility is not a characteristic of fiduciary duties in the contemporary company law either. The scope of application of fiduciary duties is very narrow. Even in Delaware whose Supreme Court had a crucial role in the development of this institution in the company law fiduciary duties have been narrowed down to the point of "irrelevance and obsolescence".[56] It has been noted in the legal theory that the Delaware Supreme Court uses a strong moral rhetoric when describing fiduciary duties, most probably striving to create a stronger social and market conscience about the importance of conduct in accordance with fiduciary duties.[57] However, this rhetoric is entirely in disharmony with the court's willingness to concretely apply fiduciary duties on the basis of determining the breach of duty, and the imposition of legal remedies, which are supposed to be a consequence of a determined breach.[58] The courts avoid finding new cases of liability due to breach of fiduciary duties and for that reason duties lose their basic purpose – sanctioning the conduct which could

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[52] K. A. Alces, *Debunking the Corporate Fiduciary Myth*, Journal of Corporation Law, No. 2/2009, 240.
[53] *Ibid*.
[54] *Ibid*, 267.
[55] *Ibid*.
[56] *Ibid*, 243.
[57] L. A. Stout, *On the Export of U.S. – Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?*, University of California, Los Angeles, Research Paper Series, Research Paper No. 02-11, 31.
[58] K. Alces, *The Fiduciary Gap*, 367.

not have been foreseen in advance.[59] Finally, the authors willing to eliminate fiduciary duties from company law regulations conclude that the doctrine of corporate fiduciary obligation is today little more than fiction.[60]

5. INSTEAD OF A CONCLUSION: IS THERE A NEED TO DEBATE THE ISSUE OF THE JUSTIFICATION FOR THE EXISTENCE OF FIDUCIARY DUTIExS IN SERBIAN COMPANY LAW?

Fiduciary duties were introduced in Serbian law by the method of legal transplant. This statement, however, does not mean that the previous Yugoslavian and Serbian law did not recognize any elements of the institution nowadays widely recognized as "fiduciary duties toward the company", i.e. "special duties toward the company", in terms of the Serbian law.[61] The Companies Act of the Republic of Serbia from 2011[62] (hereinafter: CAS) recognizes five special duties toward the company: the duty of care, the duty to report acts and businesses in which personal interest exists (self-dealing), the duty to avoid conflicts of interest, the duty to refrain from disclosing trade secrets and the duty to refrain from competing with the company.[63]

Do the above-mentioned conceptions of the justification for the existence of fiduciary duties have any relevance in the Serbian company law, and, if so, what is that relevance? Currently special duties in Serbian law are merely another product of legal transplant, which has not been applied in the right manner in the Serbian legal system. In terms of the traditional meaning of the issue of the justification for the existence of fiduciary duties different theories on the emergence of fiduciary duties have a definite relevance for current domestic law. Considering that we are dealing with a legal transplant, various theoretical conceptions, which originate from the "countries' exporters" of this legal institution always present significant support and guidepost to the legal systems of the countries, which "import" foreign legal solutions. But what is the answer to the second – far more difficult and

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[59] K. Alces, *Debunking the Corporate Fiduciary Myth*, 255.
[60] *Ibid*, 240.
[61] In this sense, it is worth to mention provisions of the Yugoslavian Commercial Act 1937 (for example, article 300(1), 303, 304, and so on).
[62] Law on Companies (Zakon o privrednim društvima), Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 36/2011, 99/2011, 83/2014 – dr. zakon, and 5/2015).
[63] CAS, article 63, 65, 69, 72, 75.

provocative – question? Considering the mentioned failure to apply special duties in Serbian law, one can justifiably raise the question whether we need the duties at all. However, we should have in mind that the mentioned problem is typical for various other European countries as well. Among these countries are some that possess a way higher level of social and legal development. The problem can, to a certain measure, even be found in some American jurisdictions. Special duties should exist in the Serbian company law as a legal institution, which proclaims importance of company directors' moral conduct, and as a principle which at least reminds and cautions directors regarding what conduct is expected from them. Although, having in mind the limitations of the application and the enforcement of this institution, the significance of other protective measures against directors' opportunistic conduct and methods for solving the first agency problem must be understood. We may find these measures in some other fields of law (contract law, criminal law, etc.) Sometimes, however, law would not be the proper instrument for solving the problem. The market and social and moral sanctions – properly understood and applied – could often be sufficient measures for the adoption of standards of conduct for company directors.

REFERENCES

Alces, K.A., *The Fiduciary Gap*, Journal of Corporation Law, Vol. 40, 2015.

Alces, K.A., *Debunking the Corporate Fiduciary Myth*, Journal of Corporation Law, No. 2/2009.

Baird, D.G., Henderson, M.T., *Other People's Money,* Stanford Law Review, No. 5/2008.

Beuerle, C.G., Schuster, E.P., *The Evolving Structure of Directors' Duties in Europe,* European Business Organization Law Review, No. 2/2014.

Beuerle, C.G., Paech, P., Schuster, E.P., *Study on Directors' Duties and Liabilities,* London, 2013.

Brudney, V., *Contract and Fiduciary Duty in Corporate Law,* Boston College Law Review, Vol. 38, 1997.

Easterbrook, F., Fischel, D., *Contract and Fiduciary Duty,* The Journal of Law & Economics, No. 1/1993.

Fleischer, H., *Legal Transplants in European Company Law – The Case of Fiduciary Duties,* European Company & Financial Law Review, No. 3/2005.

Frankel, T., *Fiduciary Law,* New York, 2011.

Grundmann, S., *European Company Law,* Cambridge, Antwerp, Portland, 2012.

Kasolowsky, B., Fiduciary Duties in Company Law – Theory and Practice, Baden-Baden, 2002.

Lepetić, J., *Kompanijsko pravni režim sukoba interesa – dužnost lojalnosti,* Belgrade, 2015.

Mihajlović, B., *Posebne dužnosti direktora prema društvu sa ograničenom odgovornošću i načelo slobode ugovaranja,* Harmonius, No. 1/2015.

Miller, P., *A Theory of Fiduciary Liability,* Mc Gill Law Yournal, No. 2/2011.
Miller, P., *Justifying fiduciary duties,* McGill Law Yournal, No. 4/2013.
Radović, V., *Uticaj agencijskih problema na pravo akcionarskih društava i korporativno upravljanje*, in: Korporativno upravljanje, Pravni fakultet, Univerzitet u Beogradu, Beograd, 2008.
Ribstein, L., *Are Partners Fiduciaries?,* University of Illinois Law Review, 2005.
Sealy, L. S., *Fiduciary Relationships,* Cambridge Law Yournal, No. 1/1962.
Shepherd, J.C., *The Law of Fiduciaries,* Toronto, 1981.
Smith, G., *The Critical Resource Theory of Fiduciary Duty,* Vanderbilt Law Review, Vol. 55, 2002.
Stout, L.A., *On the Export of U.S. – Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?,* University of California, Los Angeles, Research Paper Series, Research Paper No. 02-11.
Strine, L.E.Jr., Hamermesh, L.A., Balloti, R.F., Gorris, J.M., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law,* Georgetown Law Journal, No. 3/2010.
Vasiljević, M., *Kompanijsko pravo – pravo privrednih društava,* Belgrade, 2013.