A COGNITIVE THEORY OF FIDUCIARY RELATIONSHIPS

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Is there anything special or distinctive about fiduciary relationships? Or is the term “fiduciary” nothing more than a label that obscures more than it clarifies? Recently, law-and-economics scholars, building on the economic literature on agency costs,1 have argued that there is nothing that categorically distinguishes fiduciary from non-fiduciary legal relationships. So-called fiduciary relationships, they argue, are nothing more or less than contractual relationships. Easterbrook and Fischel, for example, state, “Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings.”2 While acknowledging that “[c]ases announcing fiduciary obligations teem with [moralizing] language”3 of the kind found in Cardozo’s famous opinion in Meinhard v. Salmon,4 they argue that, analytically, fiduciary relations are just contractual arrangements characterized by unusually high transaction costs. The high-faluting rhetoric is just that—overblown rhetoric that obscures more than it illuminates.

The contractual approach to fiduciary relations makes a second, more important claim. The claim is behavioral rather than strictly analytical. Contractarians argue that, however courts may talk about fiduciary relations, they don’t act that way. Courts apply the same analysis to fiduciary relationships that they apply to non-fiduciary contractual relationships. The moralizing rhetoric that is so characteristic of judicial opinions involving alleged breaches of fiduciary duties has no substantive effect.

Several scholars have attacked the contractual deconstruction of fiduciary relationships. Sometimes using economic analysis, sometimes not, they have offered various theories of what analytically distinguishes fiduciary relationships from mere contractual relationship.5 This essay takes a different approach. Rather than challenging the analytical point, I focus on the behavioral claim. Applying concepts and insights from cognitive theory, I offer the following hypothesis: Cognitive factors lead courts to analyze fiduciary relationships, at least those that

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1 Professor of Law, Cornell University. I am deeply grateful to my colleague, Jeffrey Rachlinski, for his invaluable help on this paper.


3 Id. at 428 n.6.

4 249 N.Y. 458, 164 N.E. 545 (1928) (“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.”).

are property-based, differently than they do to contractual relationships. In cases involving alleged breaches of fiduciary duties, courts tend to use a “top-down” mode of cognitive analysis whereas in cases of alleged contractual breaches they use a “bottom-up” cognitive method. The difference between the two approaches is that “top-down” processes are theory-driven or image-driven, heavily influenced by the analyst’s preconceived notions and expectations, while “bottom-up” process are data-driven, relatively uninfluenced by a preconceived theory of the situation. The most important consequence of the difference between these two approaches is that fiduciaries are at greater risk of being held liable for losses to beneficiaries than are ordinary contracting parties for losses experienced by their contracting partners.

The source of the tendency to apply top-down cognitive processes in cases involving property fiduciaries is the role of the fiduciary concept plays in judicial reasoning as a distinct schema. A schema is defined in the psychological literature as “a cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes.” A schema is a fuzzy-edged but still relatively clear preconceived image that the observer has of a particular situation or person. The central hypothesis of this paper is that courts possess a fairly well-developed schema of the fiduciary role but do not possess a comparable schema for ordinary contracting parties. The fiduciary role-schema leads courts to overinterpret behavior by fiduciaries more so than in the case of conventional contracts, attributing qualities to fiduciaries that in turn strongly influence judicial analysis of the causes of losses to beneficiaries.

This hypothesis is just that, an untested hypothesis. It requires empirical testing, of course, before, any strong claim to validity is warranted. But it seems to have sufficient plausibility to merit consideration and, to the extent possible, further investigation. Testing the hypothesis would require more than comparisons of outcomes in reported cases involving alleged breaches of fiduciary and non-fiduciary duties, conventionally so-called. It would also require comparison of settlement rates, levels of damages, and other factors. While such an extensive analysis is not impossible, it would be complex and expensive. Short of such extensive case testing, it is possible that an experimental form of testing might be used to evaluate the hypothesis’ validity. I have not engaged in either form of testing. In the final section of this paper, I will discuss, both for purposes of illustration and as modest evidence of the hypothesis’ plausibility, a well-known case involving fiduciary liability, Estate of Rothko. I fully recognize that the hypothesis’ validity ultimately depends on far more empirical work. Nevertheless, it seems worthwhile to introduce the hypothesis out into the literature on fiduciary law even in its current tentative and rudimentary form.

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6 I include here trustees and estate personal representatives (i.e., executors and administrators). I limit my claim to these two types of fiduciaries for two reasons. First, these are the fiduciaries with which I am most familiar. Second, the legal standards regulating these fiduciaries are more onerous than for other fiduciaries.

I. Schemas and attribution in cognitive theory

Recent work in cognitive theory has increasingly emphasized the extent to which our inferences and causal explanations are influenced by schemas. Schemas are knowledge structures comprised of assumptions, expectations, and generic prior understandings. We all carry such prior knowledge around with us. It is literally unimaginable that anyone could get around in society without ever relying on what we believe we already “know.”

Where do schemas come from? Cognitive psychologists generally agree that schemas “develop from encounters with instances or from abstracted communications of the of the schema’s general characteristics.”8 Concrete experiences are perhaps the most obvious way in which role schemas develop. First encounters with physicians, for example, may generate a schema of doctors as caring and attentive persons. Experience is not the only source of schemas, however. What we are taught or told about particular roles or situations frequently creates strong expectations of persons occupying such roles or involved in particular recurrent situations. For example, Americans are taught at an early age that the first President, George Washington, was a strong military leader and a decisive and trustworthy president. This image has likely formed the basis for a kind of “presidential schema” for many Americans who expect their president to possess positive qualities associated with Washington.

Schema research has generated an extensive typology of schemas.9 Fortunately, the type that has been studied most extensively by psychologists is the type with which I am concerned, the so-called “role schema.” This is defined in the psychological literature as “the cognitive structure that organizes one’s knowledge about . . . appropriate behaviors [i.e., “behaviors expected of a person in a particular social position].”10 Role may be either ascribed (e.g., gender, race, age) or achieved. It is the latter with which we are concerned here. People have different behavioral expectations of other depending on the other’s role. For example, we expect a doctor to behave in a warm though professional way, while we expect a trial lawyer to behave in an aggressive fashion.11

Schemas are neither inherently desirable nor undesirable; they simply are. Usually, our schemas serve us well. Generic knowledge like the fact that facing a red traffic light means that it is not safe to cross the street is generally reliable and, obviously, very useful. Other schemas may lead to inaccurate, indeed, insidious causal conclusions. Racial “profiles” used by many police departments as the basis for whom to arrest are an obvious example.

All schemas, but especially role schemas, influence the encoding of information. More importantly, they influence inferences drawn where information is lacking.

8 Fiske and Taylor, p. 147
9 See generally Fiske and Taylor, supra, at 117-121.
10 Id. at 119.
11 Role schemas are closely related to stereotypes. Indeed, as Fiske and Taylor write, “one can think about stereotypes as a particular kind of role schema that organizes people’s expectations about other people who fall into certain social categories.” Id. at 119.
They are in this sense information gap-fillers. As such, they can and frequently do provide important efficiencies to their users. At the same time, though, schemas are apt to be overused and misapplied. Their misuse has been the focus of an increasing body of work in attribution theory. Ross and Anderson summarize attribution theory’s approach this way: “[I]n the perspective of attribution theory, people are intuitive psychologists who seek to explain behavior and to draw inferences about actors and their social environments” As Nisbett and Ross observe, “The intuitive scientist [i.e., the ordinary person] is prone to several major sources of error in causal analysis, including . . . use of simplistic and ‘overly parsimonious’ criteria [e.g., schemas] for causal attribution . . . .” Reliance on stereotypes in causal explanations provides many examples of how schemas lead to erroneous attributions and causal explanations. To pick just one example, many people continue to believe that World Wars I and II were “caused” by the German people’s innate aggressiveness. Or, to cite a more insidious illustration, the higher ratio of poverty among African-Americans compared with white Americans is “caused,” according to a still-prevalent line of racist thought, by African-Americans’ aversion to work. More prosaically, many people are apt to believe that in an accident involving two cars the driver of the larger or more expensive car was responsible.

This last example prompts another important point regarding reliance on schemas in seeking causal explanations. Considerable data indicate that social observers will often go beyond constructing causal explanations by making attributions of blame to individuals. This is most likely to occur when an easily-identified source, commonly a person, is readily available for the blaming. Moreover, as Fiske and Taylor explain, “An attribution of blameworthiness is typically reserved for cases in which a causal agent is regarded as subject to censure or punishment for a negative event.” Blame-attribution presupposes responsibility, and when an agent who is subject to explicit duties the violation of which is considered a serious transgression is available as a responsible causal explanation, people tend to assign blame to that person.

One might suppose that schemas that repeatedly lead to mistaken conclusions about cause and responsibility would gradually disappear through a process akin to natural selection. Experience, the argument might be made, will lead people to distinguish over time between “bad” and “good” schemas and abandon use of the former. In fact, cognitive research suggests otherwise. Schemas are closely associated with the cognitive bias known as the conservatism bias, that is, they are strongly resistant to cognitive change. Indeed, the evidence indicates that schemas,

15 See Fiske and Taylor, p. 83-86.
16 Id., p. 83.
17 Id., p. 84.
as they are more frequently used, become more resilient to inconsistent evidence.\textsuperscript{18} If I have been taught that priests are saintly men who do not indulge in the vices that plague the rest of us sinners, I am not apt to reject or even amend this prior “knowledge” when I encounter a priest who smokes, drinks alcohol, or tells off-color jokes. Rather, I am likely to regard this individual as a deviant from his role. Labeling him as a deviant reinforces the underlying schema.

Experimental research indicates that one principle source of this cognitive phenomenon, known in the literature as the conservatism bias, is ego-involvement.\textsuperscript{19} The ego, acting as an organizer of knowledge, encodes and manages information in a highly selective fashion that confirms that is already “known.” The ego acts to preserve itself by protecting the integrity of its existing organization of knowledge. The conservatism bias to which ego-involvement contributes is evident in a wide variety of common social practices, ranging from resistance of Americans to adopt the metric system to refusals to admit errors in one’s memory. The upshot of this bias is that once knowledge has been initially encoded and organized, it tends strongly to resist change.

The possibility of misuse of schemas is especially strong in the legal sphere, where the admittedly more time-consuming and expensive “bottom-up” mode of analysis seems warranted and even required. Of course, schemas are not always determinative, and the legal system has many available mechanisms that may correct an errant causal judgment based on some schema. In litigation, both sides are required to introduce non-intuitive, bottom-up evidence to support their causal accounts, and this evidence must meet particular standards of proof. Nevertheless, even these checking mechanisms may not be sufficient to overcome what Kahneman and Tversky called the “anchoring” effects of schemas.\textsuperscript{20} That is, the decision maker’s initial judgment about a problem, based on a schema, is, once made, very difficult to overcome, even in the face of analytical or evidentiary challenges.

Recent work in attribution theory\textsuperscript{21} has emphasized the extent to which schemas influence how observers of events identify and explain the causes of those events.\textsuperscript{22} As Taylor and Fiske explain, “[T]here is now evidence that . . . when people are faced with a causally ambiguous situation, they think through what they know about the causes in that specific domain.”\textsuperscript{23} People tend to rely on particular categorical schemas in making causal attributions rather than applying content-free attributional principles. This reliance on categories leads lay observers to overattribute characteristics and dispositions to actors who occupy those

\textsuperscript{18} Nisbett and Ross, p. 149.


\textsuperscript{20} Amos Tversky and Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases, 185 Science 1124 (1974).

\textsuperscript{21} On attribution theory, see Lee Ross and Craig A. Anderson, Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments, in id., at 129.

\textsuperscript{22} See Amos Tversky and Daniel Kahneman, Causal Schemas in Judgments under Uncertainty, in Judgment under Uncertainty, at 117, 125.

\textsuperscript{23} Taylor and Fiske, supra, at 60.
categorical positions. They draw particular inferences about the actors involved in the events they are trying to explain. These inferences in turn affect the causal judgments at which they arrive. The ordinary observer is apt to draw different conclusions about actors’ responsibility for events according to the categorical role that the actor occupies.

One of the most important dimensions of role-categorization is the type of relationship that an actor has with others with whom she interacts. More accurately, the relational type that socially-created knowledge structures assign to someone who occupy a particular role strongly influences how lay analysts interpret that person’s responsibility for events with which she is associated. Relational roles tend to be assigned according to hierarchical or non-hierarchical categories. Friends, business partners, and co-workers, for example, relate to each other in non-hierarchical roles, that is, positions of relative equality of power and knowledge. Doctor-patient, lawyer-client, and parent-child relationships, by contrast, are generally perceived as hierarchically-structured relationships in which one party occupies a role of dominance and responsibility for the other. The fact that collective schemas assign responsibility to the dominant role-occupant in hierarchically-structured relationships strongly influences how lay observers analyze questions of responsibility and blame for bad events that happen to the subordinate role-occupant. Lay observers are much more apt to assign blame to dominant role-occupants in hierarchical relationships than they are to either role-occupant in non-hierarchical relationships. Blaming the dominant role-occupant is the default norm for hierarchical relationships. For non-hierarchical relationships, there is no default norm, and issues of causation are resolved in the basis of data-driven, bottom-up analysis.

II. Fiduciary relationships, role-schemas, and liability

The cognitive theory of role-schemas may help explain the sense in which fiduciaries are different from ordinary contracting parties. Fiduciaries are associated in legal cognition with a distinct role schema. Lawyers and judges are explicitly trained to view fiduciaries, especially property fiduciaries, as a distinctive legal role, subject to legal norms that are more stringent than those applied to non-fiduciary legal roles. This training forms the basis for a schema of fiduciaries that differs in important respects from schemas associated with non-fiduciary contracting parties.

Legal doctrine conventionally depicts the relationship between fiduciaries and their beneficiaries as vertical, with the fiduciary occupying a dominant position of power and responsibility. By contrast, conventional doctrine describes ordinary (i.e., non-fiduciary) contracting parties’ relationships as horizontal, relationships among equals with all parties expected to attend exclusively to their own interests.

The difference between the horizontal and vertical relational character of fiduciary and non-fiduciary roles leads in turn to substantial differences in the duties that are assigned to those roles and also to important differences in the ways in which courts determine whether those duties have been fulfilled or breached. No one talks, for example, about a duty of loyalty between contracting parties. Yes, there is the good-faith obligation, but that obligation is substantially weaker than and qualitatively different from a duty to be loyal. The loyalty obligation requires that one party completely subordinate self-interest and act exclusively for the
benefit of the other party. In the contractual relationship self-interest is the name of the game for both parties; loyalty plays no role at all. Unlike the contractual relationship, loyalty is the heart of the fiduciary relationship, especially for property fiduciaries like trustees and estate executors. Joel Dobris and Stewart Sterk accurately express the legal profession’s perception of fiduciary duties when they state, “Lawyers tend to see the primary fiduciary duty as the duty of loyalty. A disloyal fiduciary is an anathema.”

Trust law has developed stringent rules to enforce the duty of loyalty. Most notably perhaps, the “no-further-inquiry” rule triggers strict liability in cases of trustee self-dealing. Under the rule a trustee is liable for all losses to the trust regardless of whether she acted reasonably or in good faith and regardless of whether her actions caused the losses. For instances of disloyalty other than self-dealing strict liability does not apply, but judicial scrutiny is still intense. Trustees may be held liable for even the appearance of a conflict of interest.

The rationale for both the loyalty duty and the decidedly blunt approach to enforcing that duty rests in the vertical character of the relationship between the property fiduciary and the beneficiaries. The verticality of their relationship means that the parties are viewed as in a gross imbalance of power. One commentator expresses the conventional wisdom when he states that “the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.” The legal literature consistently depicts trustees as occupying positions of superior power and beneficiaries as vulnerable. This is why judicial opinions in cases of breach of trust are, as Dean Clark has pointed out, replete with moralizing rhetoric. It is true, as Easterbrook and Fischel state, that moral rhetoric is “a proposition about judges rather than about rules,” but from a cognitive perspective it is judicial behavior that matters. Rhetoric, precisely because it affects behavior, matters, too.

The characteristic moral tone of judicial opinions about fiduciaries reflects the influence of a distinctive role-schema that judges associate with fiduciaries. Judges analyze claims of fiduciary liability in a qualitatively different fashion than they do claims of contractual liability. While they are more apt to use data-driven methods to decide questions about ordinary contractual disputes, judges tend to rely on particular a knowledge structure associated with the fiduciary role when dealing with claims of fiduciary misfeasance. The relational verticality of the fiduciary role strongly affects the content of that knowledge structure. There are, of course, many vertical role relationships in society, but the two that are most likely to be associated with the trustee/executor-beneficiary relationship are those between master and servant (i.e., not merely employer-employee) and between parent and child. Both the parent-child and master-servant relationships involve structural power imbalances that are directly analogous to that between trustee and beneficiary. These power imbalances result from two factors: first, passivity of the

26 Clark, at 71-76.
27 Easterbrook and Fischel, at 434.
subordinate role and, second, highly constrained exit options for the subordinate role. The upshot of the power imbalance is that the relationship is viewed as rife with opportunities for abuse by the dominant role. Masters and parents don’t always abuse their charges, of course, but it is widely recognized that the roles are fraught with the risk. Moreover, given the intimacy of the parent-child and master-servant relationship, abuses by the dominant role are difficult to detect. When abuses are hard to detect more stringent standards of liability are needed to discourage those who might be tempted to abuse their greater power.28

The structural similarity between the parent-child and master-servant relationships on the one hand and the fiduciary-beneficiary relationship on the other leads judges, as intuitive psychologists, to associate the latter with the former. That association in turn affects the inferences that judges draw about the fiduciary. Judges are not neutral about their expectations of fiduciaries. The fiduciary’s (perceived) power superiority, combined with the difficulty of actually detecting abuses of power, leads judges to draw inferences against fiduciaries. Moreover, because fiduciaries, like parents and masters, are expected to protect their charges, when beneficiaries experience losses, judges are apt to blame the responsible fiduciary. Questions of doubt are resolved against the fiduciary.

This mode of analysis differs substantially from that characteristically used in cases of alleged breach of contract. Because the contracting parties’ relationship is horizontal rather than vertical, they are assumed to be equally powerful and responsible only for themselves. There is no a priori warrant for drawing inferences against one side or the other. Consequently, analysis of disputes between them must be more data driven than in cases of beneficiary losses.

If my hypothesis regarding the influence of schemas in fiduciary cases is correct, then what we should expect is greater accuracy in judicial decisions in contract cases compared with fiduciary cases. Because the mode of analysis used in contract cases is more data driven and relatively uninfluenced by knowledge structures like role-schemas, the results tend to be more accurate than in fiduciary cases. That is, attribution of liability tends to be warranted by actual evidence in contract cases than in fiduciary cases.

III. An illustrative case: Matter of Rothko

To illustrate the influence of the distinctive fiduciary schema that I have described, I will briefly discuss a widely-noted case involving alleged breaches of the duty of loyalty. The case, Estate of Rothko,29 attracted considerable attention not only because the person whose estate was involved was a famous artist but also because of the harsh treatment that the fiduciaries received at the hands of the three courts that heard the case.

Three months after Mark Rothko’s tragic death by suicide in 1970, the three co-executors of his estate entered into two contracts with a well-known art gallery, Marlborough, to deal with some 800 paintings remaining in the estate. Rothko had

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personally selected all three executors, and his will expressly conferred on them the power to sell his estate assets, including his paintings. The first contract sold 100 paintings to the gallery for $1.8 million. The second contract consigned the remaining 700 paintings to the gallery, to be sold over twelve years at a fifty percent commission.

The trial court found that two of the executors, Bernard Reis and Theodoros Stamos, had breached their duty of loyalty by entering into these contracts. The conflict of interest was based on Reis’ and Stamos’ personal involvement with the gallery in relationships that, according to the court, benefited them personally. Reis was an officer (but not owner) of Marlborough, while Levine was a “not-too-successful” artist whose work was later handled by Marlborough. According to the court, the two men attempted to curry favor with the gallery by cutting deals that were unusually favorable to the gallery and allowed the gallery to earn substantial profits from resales of some of the paintings. The third executor, Morton Levine, was, the court found, not guilty of self-interest but had been negligent by failing to blow the whistle on his two disloyal co-executors.

The court voided the two contracts, ordered return of the unsold paintings, and held all three executors, as well as the gallery, jointly and severally liable for approximately $6.5 million. This amount represented the fair market value of the sold paintings at the time of sale. Additionally, the held the two disloyal executors and the gallery liable for an extra $2.8 million as “appreciation damages.” This represented the increase in the market value of the sold (and therefore unrecoverable) paintings between the time of sale and the time of trial. The total liability of the two disloyal fiduciaries, therefore, was some $9.2 million.

Both the Appellate Division and the Court of Appeals affirmed all the trial court’s findings, including the amounts of liability. Writing for the Court of Appeals, Judge Cooke stated that the findings of disloyalty were not based on application of the strict liability “no-further-inquiry” rule but instead on clear and strong evidence of actual disloyalty that directly caused substantial losses to the estate beneficiaries. As other commentators have noted, though, it is hard to square these conclusions with the facts. Vis-a-vis the gallery and the two disloyal executors, the award of $5.5 million (amount actually realized from the resale of paintings) is conceivably justifiable on restitutionary grounds as disgorgement of actual gain. But that award cannot possibly be justified as restitution against the third executor, who was not disloyal and in no way stood to gain from the transactions with the gallery. It can only be justified on the theory that these are causally-connected compensatory damages. But that theory works only if the executors were under a legal duty to delay sales of the paintings. Yet the trial court made no finding that the timing of the sales was wrongful. More significantly, none of the three courts that heard the case framed the issue in terms of asking how loyal and non-negligent executors would have handled the estate under the circumstances. Framing the issue that way would have invoked a bottom-up, data-driven mode of analysis.

Such an analysis would have disclosed several facts about which all three courts were totally silent. In response to the estate’s expert witnesses, who contended that a more gradual plan of disposition was appropriate, one might have pointed out that a loyal and non-negligent executor had to anticipate tax liabilities in addition to satisfying the decedent’s cash bequests. Rothko’s will made a cash bequest to his wife of $250,000. The original estate tax return of the executors conceded a liability of $546,000; the IRS responded that the deficiency was $4.6 million. On the other side of the ledger, the estate’s cash position at death was limited. Rothko had $330,000 in bank deposits and $1.1 million in receivables. These figures alone suggest that the executors were probably justified in selling when they did in order to improve the estate’s liquidity to a level necessary to both pay taxes and satisfy cash bequests.

Beyond that, a loyal and non-negligent executor in the position of these three would have taken other factors into account. As Richard Wellman aptly remarks, these factors include “weigh[ing] the risks of retaining inventory in the hope that, because of the stature of the artist and the quality of the paintings, its worth would increase; consider[ing] whether cash or art best suited the originally stated purpose of the residuary foundation to support deserving artists pending market acceptance of their works; and remember[ing] the conventional wisdom of fiduciary administration that the fiduciary’s first obligation is to conserve values which are certain and to avoid speculation.” Again, the three courts’ opinions were completely silent about all of these considerations.

The trial court’s opinion typified all three courts’ mode of analysis. The trial judge, Surrogate Millard Midonick, attributed a number of personal characteristics to the three executors, focusing especially on Bernard Reis. Reis and the others, Midonick asserted, were predisposed to look for opportunities for personal gain. In Reis’ case, the gain was not financial (because Reis already had amassed a huge fortune), but prestige, or as he put it, “aggrandizement of status.” His position as executor gave him a unique opportunity to act on his ambition by cutting deals with his gallery on terms that favored the gallery at the expense of the estate. Midonick’s analysis was dispositional rather than situational. That is, his analysis reflected the belief that people like Reis do as they do because of a general disposition to behave that way, rather than because of situational circumstances that are pertinent to the actions taken at the moment. Dispositional behavioral analysis encourages the analyst to make inferential leaps, as Midonick’s opinion demonstrates. Because Reis was predisposed to engage in opportunistic behavior, Midonick in effect reasoned, his motive for entering into the two contracts with Marlborough was strictly self-interested. Indeed, Midonick viewed Reis’ self-interest as so gross that he stated that although technically Reis did not engage in self-dealing, his breach of loyalty was “the equivalent of self-dealing.”

Midonick’s attributional moves and inferences effectively screened out a detailed

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33 Wellman, at 101 n.23.
35 Ibid.
analysis of non-disloyal reasons that might have led Reis to act as he did. The absence of such an inquiry led Midonick to magnify the degree of disloyalty and consequently to increase the size of the liability judgment. Midonick was influenced by a role-schema of fiduciaries more than he was by a neutral assessment of all of the immediate circumstances affecting the actor.

**Conclusion**

The purpose of this essay has been to suggest a sense in which fiduciary relationships differ from ordinary contracts. I do not suggest that trustees and executors are always held liable for beneficiary losses. Not all courts fall prey to cognitive errors when dealing with claims against fiduciaries. Sometimes the analysis is more data-driven and the decisions are accurate. And it needs to be said that it is likely to suppose that cognitive error creeps into judicial analysis in contract cases as well as fiduciary cases. Still, judicial behavior and reasoning are, by my hypothesis, characteristically different in the two contexts. Distinctive role-schemas and related aspects of knowledge structures are at work in fiduciary litigation and create, all other things being equal, a greater risk of judicial error in that context than that facing ordinary contracting parties. Such, at least, is this essay’s hypothesis. Its validity obviously depends on rigorous empirical testing.