BREACHES OF FIDUCIARY DUTY AND THE DELAWARE UNIFORM CONTRIBUTION ACT

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"[I]f a breach of fiduciary duty is not a tort action, what is it?"[1]

What is the nature of a claim for breach of fiduciary duty against the directors or officers of a Delaware corporation?[2] Is it a tort? Is it contractual? Is it something else altogether? Recent cases have raised whether the Delaware Uniform Contribution Among Tortfeasors Act ("DUCATA") applies to breach of fiduciary duty claims, but the Delaware courts have not yet decided this difficult issue. We conclude that a breach of a fiduciary duty is in fact a tort, although a unique species historically called an "equitable tort." The history of the Uniform Contribution Among Tortfeasors Act (the "Uniform Act"), on which DUCATA is based, provides unclear and conflicting indications regarding how its drafters intended to treat equitable torts. We conclude that DUCATA should apply to breaches of fiduciary duty, although given the substantial interpretive uncertainty, the most expedient solution would be for the Delaware General Assembly to amend DUCATA to clarify its application.

In Part I, we briefly discuss contribution generally and the origins of the common law rule that there was no contribution among tortfeasors. In Part II, we turn to the development of contribution among tortfeasors in Delaware and the currently ambiguous state of the law regarding contribution among directors for breaches of fiduciary duty. In Part III we introduce DUCATA, the statute enacted to abrogate the common law's no-contribution rule. Because DUCATA is based upon the Uniform Act, and there is no legislative history for DUCATA itself, we turn in Part IV to the 1939 drafting and the 1955 revision of the Uniform Act, searching for clues about the drafters' intent. As it turns out, both sets of drafters considered breaches of fiduciary duty to be "equitable torts" — a concept that has largely disappeared from the collective legal consciousness — but the 1939 drafters sought to include them within the Act's coverage while the 1955 drafters sought to exclude them. Ironically, both sets of drafters intended for contribution to exist, and their conflicting approaches reflected differing beliefs about the availability of contribution at common law for "equitable torts." The 1939 drafters sought to include equitable torts because they believed contribution outside of the Uniform Act was ineffective at best and non-existent at worst. The 1955 drafters sought to exclude equitable torts because they believed a well developed system for contribution for equitable torts already existed and the Uniform Act should not interfere with it. In Part V, we conclude that with respect to contribution among directors for breaches of fiduciary duty, the drafters of the 1939 Act were closer to the truth. There was a limited and uncertain right of contribution among directors at common law, but it was far less developed than the right of contribution among trustees, which is what the drafters of the 1955 Act appear to have had in mind.

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1. Charles Hansen, *The* Technicolor *Case—A Lost Opportunity*, 19 Del. J. Corp. L. 617, 637 n.152 (1994).

2. Directors and officers of Delaware corporations owe "identical" fiduciary duties. Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009). This article generally refers to the duties owed by corporate directors, rather than officers. The analysis for both should be the same or very similar, although the origin of the duties may differ. *See infra* note 83.

In Part VI, we explore the notion of "equitable torts" and find that it historically referred to torts falling within the exclusive jurisdiction of courts of equity. With the general merger of law and equity, the concept of "equitable torts" faded. Debate over the proper characterization of a claim for breach of fiduciary duty shifted to whether it fell within the rubric of tort or contract, an issue driven largely by fights over the proper statute of limitations, with a strong majority of jurisdictions adopting the tort characterization. In Part VII, we turn to Delaware, which has both retained its separate courts of law and equity and has treated breaches of fiduciary duty as something different from a traditional, or "legal," tort. Armed with the concept of the "equitable tort," we are able to explain this feature of Delaware law, which has otherwise been criticized by commentators. Because a claim for breach of fiduciary duty is best viewed as an equitable tort, it falls within the contemplation of the drafters of the 1939 Uniform Act, which is the version Delaware adopted. Moreover, as we saw in Part V, the drafters of the 1939 Uniform Act were largely correct in their belief that the common law had not developed effective doctrines of contribution where corporate directors were concerned. Thus we conclude that Delaware ought to interpret DUCATA as governing claims for breach of fiduciary duty against directors, and in Part VIII we explain why this is consistent with other aspects of Delaware law. But because of the interpretive quagmire, we recommend that the Delaware General Assembly amend DUCATA to clarify its application.

I. THE "NATURAL JUSTICE" OF CONTRIBUTION

> *"The right to contribution, being founded in natural justice, is not restricted to any special relation, but applies to original contractors, or any other relation, where equity between the parties is equality of burden, and one discharges more than his share of the common obligation."*[3]

When more than one person is jointly liable for a loss, but one defendant pays the plaintiff all (or a disproportionate share) of the total, the doctrine of contribution allows the overpaying defendant to pursue anyone else who is jointly liable, so that each liable person pays a fair share of the debt.[4] The rule operates in a straightforward fashion where the loss is contractual, such as the payment of a debt by one of several co-sureties.[5]

Where the underlying loss arises in tort, contribution is more complicated. The common law rule was described in the 1799 case of *Merryweather v. Nixan*,[6] where an English court held that one of two joint tortfeasors could not obtain contribution from the other. Lord Kenyon stated that "he had never before heard of such an action … where the … recovery was for tort."[7] The rationale was that tortfeasors had committed a morally wrong act, and *ex turpi causa non oritur*

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3. Bragg v. Patterson, 4 So. 716, 716 (Ala. 1888).

4. Levy v. HLI Operating Co., Inc., 924 A.2d 210, 220 (Del. Ch. 2007).

5. *See generally* 4 John Norton Pomeroy, Treatise on Equity Jurisprudence § 1418 (5th ed. 1941); 3 Ardemus Stewart, American and English Decisions in Equity 156 (1897).

6. Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799).

7. *Id.* at 1337.

action ("from a dishonorable cause an action does not arise").[8] Later English cases distinguished between intentional and negligent acts, denying contribution in the former case, but permitting it in the latter.[9]

By the mid-nineteenth century, however, most American courts had erased any distinction between intentional and negligent torts and barred contribution among all joint tortfeasors.[10] American common law thus distinguished between joint obligations arising from an express or implied contract, which fell under the Latin heading "*ex contractu*," and those arising in tort, which fell under the heading "*ex delicto*." Contribution was allowed *ex contractu* but not *ex delicto*.[11]

II. THE PRESENT STATE OF CONTRIBUTION AMONG DIRECTORS OF A DELAWARE CORPORATION

The development of the doctrine of contribution in Delaware followed the general path of the common law. By 1847, the Court of Chancery recognized as settled law the right of contribution among co-sureties.[12] Contribution

8. 1 Thomas Atkins Street, The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law 490 (1906). A famous example is the *Highwayman's Case*, in which two criminals committed a robbery and then sued in equity when they disagreed on the division of the spoils. The English court understandably declined to assist one wrongdoer in suing the other. Everet v. Williams (1725), printed in Notes, 9 L.Q. Rev. 197 (1893).

9. *See* Courtney Stanhope Kenny, A Selection of Cases Illustrative of the English Law of Tort 221-22 (3d ed. 1920) ("The current of subsequent decisions has limited the rule to cases where the person who claims the contribution must have known when he committed the tort, that what he was doing was tortious."). *Merryweather* established this rule for the law courts, and a similar prohibition on contribution between intentional wrongdoers applied in equity. *See* W.L.F., *Right of Contribution Among Co-Trustees*, 22 Va. L. Rev. 804, 806-07 (1936); *see also* M. Kevin Queenan, Comment, *Civil Code Article 2324: A Broken Path to Limited Solidary Liability*, 49 La. L. Rev. 1351, 1361 (1989); George Tucker Bispham, The Principles of Equity: A Treatise 442-43 (5th ed. 1893) ("No right of contribution exists where the demand is ex delicto. In cases of breach of trust, however, not involving actual fraud, contribution may be enforced by trustees as between themselves.").

10. William Prosser, The Law of Torts 306 (4th ed. 1971); Philip M. Nichols, *Symmetry and Consistency and the Plaintiff's Risk: Partial Settlement and the Right of Contribution in Federal Securities Actions*, 19 Del. J. Corp. L. 1, 7-12 (1994) (describing rule); Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130, 130 (1932) (same); *see also* Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77, 86-87 n.16 (1981) ("[T]he common law in this country traditionally prohibited contribution among joint tortfeasors in all cases.") (citations and quotations omitted).

11. *See* A. Sieber Hollinger, *Contribution Among Tortfeasors*, 44 Dick. L. Rev. 49, 50 (1940) ("Several reasons are generally given as to why contribution should not be permitted as between two or more persons who intentionally commit a tort, or a crime which, at the same time, amounts to a tort. The first of these may best be explained by the maxims *Ex turpi causa, non oritur actio*, and *In pari delicto, potior est conditio defendentis*. With these, and the doctrine of contributory negligence, and clean hands in equity, courts have frequently reiterated their determination not to aid a wrongdoer in his suit against another wrongdoer."); John Indermaur, An Epitome of Leading Common Law Cases with Some Short Notes Thereon 66 (3d ed. 1875) (the whole decision [*i.e., Merryweather v. Nixan*] may be shortly expressed by saying that as between defendants *ex contractu* the law allows contribution, but not between defendants *ex delicto*."); Street, Foundations of Legal Liability, *supra* note 8, at 490 ("Connected with the rule that a plaintiff can enforce reparations against one or more of the wrongdoers to the exclusion of others, is the further principle that one joint tortfeasor who pays or is compelled to pay all the damages, cannot obtain indemnity or contribution from those who are equally guilty as himself, or even more guilty than he. Such, in broad terms, was the ruling in *Merryweather v. Nixan* (1799). This is a necessary consequence of the principle embodied in the maxim *ex turpi causa non oritur actio*. Modern decision has limited the doctrine to situations where the person who claims contribution must be presumed to have known that he was doing an unlawful act.").

12. Jefferson v. Tunnell, 2 Del. Ch. 135 (Del. Ch. 1847), *rev'd on other grounds*, 5 Harr. 206 (Del. 1849); *see also* De Paris v. Wilmington Trust Co., 104 A. 691, 695 (Del. 1918) ("[Contribution] is an equitable principle based on natural justice, and was

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flowed from the premise that "[e]quality is equity," a proposition that was "universal" and "as simple a principle of natural justice as can be put."[13] For joint tortfeasors, Delaware followed the American courts' (over)expansive interpretation of *Merryweather v. Nixan* in prohibiting contribution among both intentional and negligent tortfeasors.[14]

Delaware courts had no occasion to consider whether contribution existed among directors for breaches of fiduciary duty prior to the current millennium. The issue likely did not arise for a combination of reasons. The risk of personal liability for breaches of fiduciary duty has always been low.[15] The dynamics of fiduciary duty litigation further reduce the potential for contribution disputes, because defendant directors typically "work as a relatively unified force to defeat the shareholder-plaintiffs' claims."[16] Directors historically followed this strategy even at the risk of compromising

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originally enforcible in equity only, but is now enforcible at law, the duty of one guarantor to reimburse his co-guarantor being the basis of an implied promise to do so. This promise is considered as made when the liability is assumed.") (internal citations omitted); Hutchinson v. Roberts, 11 A. 48, 51 (Del. Ch. 1887), *aff'd*, 17 A. 1061 (Del. 1889).

13. Eliason v. Eliason, 3 Del. Ch. 260 (1869) ("Equality is equity. One shall not bear a common burden in ease of the rest. Hence, if as often may be done, a lien, charge or burden of any kind, affecting several, is enforced at law against one only, he should receive from the rest what he has paid or discharged on their behalf. This is the doctrine of equitable contribution, resting upon as simple a principle of natural justice as can be put. Its most common application is to sureties and to owners of several parcels of land, subject to a lien or charge for the payment of money. But … the principle is universal.") (internal citations omitted); *see also* Wilmington Trust Co. v. Copeland, 94 A.2d 703, 708-09 (Del. 1953) (citing *Eliason* as concerning "the doctrine of equitable contribution — itself but an application of the ancient maxim 'equality is equity'" and observing "[t]hat this doctrine is a part of the law of Delaware admits of no doubt.") (internal citation omitted).

14. DiStefano v. Lamborn, 81 A.2d 675 (Del. Super. Ct. 1951), *disapproved on other grounds*, Halifax Chick Express, Inc. v. Young, 137 A.2d 743 (Del. 1958); *accord* Cox v. Delaware Elec. Coop., Inc., 823 F. Supp. 241, 246 (D. Del. 1993) ("The general rule of common law, and that operable in Delaware prior to 1949, is that where two or more individuals jointly or independently negligently cause harm to a plaintiff, one putative defendant is not entitled to contribution from the other."); Clark v. Teeven Holding Co., Inc., 625 A.2d 869, 877 (Del. Ch. 1992) ("Under Delaware law, however, there was no right to contribution among joint tort-feasors until the enactment of the Uniform Contribution Among Tort-Feasors Act on May 7, 1949. Because the substantive right to contribution among joint tort-feasors was not created until the adoption of the Uniform Act in 1949, that right was never a part of equity's traditional jurisdiction in Delaware.") (internal citations omitted); Lankford v. Richter, 1989 WL 12229, at *2 (Del. Super. Ct. Jan. 27, 1989) ("Prior to the enactment of [DUCATA], no common law right of contribution existed between joint tortfeasors."); Clark v. Brooks, 377 A.2d 365, 368 (Del. Super. Ct. 1977) ("The most startling change made by [DUCATA] was to provide a remedy of contribution among tortfeasors."); Lutz v. Boltz, 100 A.2d 647, 647 (Del. Super. Ct. 1953) ("Prior to 1949, no right of contribution existed between joint tort-feasors in this State."). It is somewhat ironic that Delaware did not address the pre-DUCATA rules governing contribution until some two years after DUCATA's adoption on May 7, 1949.

15. *See generally* Bernard Black, et al., *Outside Director Liability*, 58 Stan. L. Rev. 1055 (2006) (concluding based on empirical investigation that instances of outside director liability are rare). Directors under Delaware law are protected against liability by the business judgment rule and, after 1985, by the availability of charter provisions authorized by Section 102(b)(7) of the General Corporation Law. Del. Code Ann. tit. 8, § 102(b)(7). That statutory provision permits corporations to exculpate their directors for personal liability for breaches of fiduciary duty except for those falling into specific categories, upshot of which is to permit corporations to eliminate the threat of damages for breaches of the duty of care, but not for breaches of the duty of loyalty or the subsidiary duty of good faith. *Id. See generally* Karl E. Stauss, *Indemnification in Delaware: Balancing Policy Goals and Liabilities*, 29 Del. J. Corp. Law 143 (2004).

16. *In re* Telecorp PCS Inc., 2003 WL 22901025, at * 2 (Del. Ch. Nov. 19, 2003).

their individual defenses.[17] It is thus "rare for the defendants not to work out some allocation of the costs that avoids the need for litigation within the defendant class itself."[18]

In certain recent disputes, however, only some of the directors have settled, leaving others to face a potential money judgment. This has provided a powerful incentive for the remaining defendants to seek contribution from the settling directors.[19] In other cases, plaintiffs have chosen to sue fewer than all of the potentially liable fiduciaries, again providing an incentive for those who were sued to seek contribution from those who were not.[20]

The first Delaware case to address the potential for director contribution was *Odyssey Partners,* a 1997 decision.[21] Minority stockholders sued four directors and the corporation's controlling stockholder for allegedly breaching their fiduciary duties by allowing the controller to foreclose on the corporation's assets. After several months of discovery, the four director-defendants moved to assert a third-party claim for contribution against a fifth director, Banks, who had been appointed by the minority stockholders. It was undisputed that all of the actions challenged in the litigation had been approved unanimously by all five directors, and Chancellor William T. Allen appeared to accept that the four directors possessed a claim for contribution. He declined to permit Banks to be joined because "[o]bviously if the defendants are not liable, it would be more efficient to save Banks the expense associated with active party status."[22] The application therefore offered "only a very unclear claim of greater efficiency and certainly represents an attempt to use the joinder of party rules to gain tactical advantage."[23] Chancellor Allen did not discuss the scope or source of the potential contribution claim.[24]

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17. In *Smith v. Van Gorkom*, for example, one of the outside directors held liable in that case did not attend critical meetings and potentially had a unique defense to liability. Rather than raising this defense, he joined in the arguments made by all of the directors by their jointly retained defense counsel. It was not until a motion for reargument on appeal, *after* the Delaware Supreme Court rendered its decision, that the director retained separate counsel and asserted that he was differently situated. Not surprisingly, the Delaware Supreme Court found that the argument was not timely asserted. *See* Smith v. Van Gorkom, 488 A.2d 858, 898-99 (Del. 1985). The Delaware Supreme Court also rejected the argument on the merits based on the director's participation in a later meeting. *Id.*

18. *Telecorp*, 2003 WL 22901025, at *2. In terms of who would pay in the rare case where the defendants were held liable, many directors, particularly those who serve on the boards of publicly traded corporations, are protected by liability insurance, and they can look to the insurer to satisfy a judgment. Directors also are typically protected by indemnification provisions under which the corporation obligates itself to indemnify the director for fees, expenses, and amounts paid in settlement. *See* Del. Code Ann. tit. 8, §§ 145(a) & (b). A third party such as a corporate acquirer may agree to provide direct, contractual indemnification to directors or officers of a Delaware corporation. *See* La. Mun. Police Empl. Ret. Sys. v. Crawford, 918 A.2d 1172, 1180 (Del. Ch. 2007) (noting existence of direct, contractual promise of indemnification by acquirer). Even in the celebrated case of *Smith v. Van Gorkom*, no director had to pay. The parties reached a settlement involving a total cash payment of $23 million of which approximately $10 million was paid by Trans Union's insurers and the rest by the Pritzker family, whose acquisition of Trans Union gave rise to the case. *See* Stephen M. Bainbridge, The Story of Smith v. Van Gorkom, in Corporate Law Stories 225 (J. Mark Ramseye ed., 2009).

19. *See, e.g.*, Valeant Pharmaceuticals Int'l v. Jerney, 2007 WL 2813789 (Del. Ch. Mar. 1, 2007).

20. *See In re* Am. Int'l Group, Inc., 965 A.2d 763 (Del. Ch. 2009).

21. Odyssey Partners, L.P. v. Fleming Cos., Inc., 1997 WL 38134 (Del. Ch. Jan. 24, 1997).

22. *Id*. at *3.

23. *Id*.

24. For a similar issue and identical result, see Transcript of Oral Argument, Teachers' Retirement System of Louisiana v. Greenberg, C.A. No. 20106-VCS, at 6-7 (Del. Ch. July 10, 2007). Stockholders of American International Group, Inc. asserted

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A passing snippet in *Grace Brothers*[25] evinced an assumption that contribution was available among directors. Defendant-directors moved to dismiss a breach of fiduciary duty action in part because two entities involved in the transaction were unlikely to be subject to jurisdiction in Delaware, and the defendant-directors argued that the entities were indispensible parties. Vice Chancellor Leo E. Strine, Jr. rejected this argument, noting that "if this case gets to that point, the court can fashion an award of monetary damages that holds the defendant-directors accountable for any *and only* the harm that their breaches of fiduciary duty may have caused the plaintiffs."[26] The court continued, "[i]f the defendant-directors believe that [the entities] should shoulder a portion of their liability, the defendant-directors may file a separate action for contribution against [them] in the domiciles of those entities."[27]

Contribution was addressed more directly in *Telecorp*,[28] where stockholders of Telecorp PCS, Inc. sued its directors and its controlling stockholder, AT&T Wireless Services, Inc. Shortly before trial, the plaintiffs settled with AT&T and the directors of Telecorp who were affiliated with AT&T, but the outside directors and their insurers refused to contribute. AT&T funded the settlement, mooting the trial, and then sought to amend its answer to assert cross-claims for contribution against the non-settling defendants. Vice Chancellor Strine permitted the claims to be asserted, accepting the parties' assumption that DUCATA applied to breaches of fiduciary duty, but expressly declining to rule on the issue.[29]

The Court of Chancery again found it unnecessary to confront the issue directly in *Valeant*.[30] Stockholder plaintiffs sued twelve directors of ICN Pharmaceuticals, Inc. for granting large cash bonuses to themselves and other corporate officers as part of a restructuring. After a change of control, the corporation realigned as plaintiff and took over the claims. All of the defendants except for a single insider settled, and the remaining insider asserted that in the event

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derivative claims challenging insurance agency agreements between AIG and C.V. Starr & Co., Inc., a corporation owned by Maurice R. Greenberg and other senior executives at AIG. The plaintiffs originally sued all of the directors of AIG, then settled with various outside and inside directors of AIG after Greenberg left the company. The suit continued against Greenberg and two senior executives who departed with him, and they sought to assert claims for contribution against the directors who settled. Greenberg and his co-defendants argued that their claims for contribution should be heard as part of the underlying action so as to preserve the possibility of disproportionate fault, which the language of DUCATA suggests can be adjudicated against co-defendants only in the underlying proceeding. Without resolving the question of what law applied, the Court of Chancery rejected the application for practical reasons, finding that it would be "an awkward, weird trial to have" in which Greenberg would be arguing for part of the trial that no one had done anything wrong and then for another part of the trial that the other directors had engaged in the wrongful conduct. *Id.* By contrast, if Greenberg prevailed, there would be no need for a contribution action. The court also noted that the outside directors who had settled would have potentially viable motions to dismiss any contribution claims. The court concluded that any contribution action should be brought, if at all, after the resolution of the underlying proceeding, with the possibility of disproportionate liability specifically preserved.

25. Grace Bros. Ltd. v. Uniholding Corp., 2000 WL 982401, at *16 (Del. Ch. July 12, 2000).

26. *Id*.

27. *Id*.

28. *In re* Telecorp PCS, Inc., 2003 WL 22901025 (Del. Ch. Nov. 19, 2003).

29. *Id*. at *1 n.1 ("The parties have assumed the applicability of [DUCATA] to breach of fiduciary duty claims and in the absence of a dispute, I have as well.").

30. Valeant Pharmaceuticals Int'l, Inc. v. Panic, 921 A.2d 732 (Del. Ch. 2007).

he was held liable, he could seek contribution under DUCATA from his fellow directors.[31] The company argued that a breach of fiduciary duty was not a tort and therefore no contribution was available under DUCATA.[32] After noting that the relevance of DUCATA was a question of first impression, Vice Chancellor Stephen P. Lamb held that contribution was not implicated because the plaintiffs sought to recover each director's *pro rata* share of the costs of a special litigation committee process and non-director bonuses: "Pro rata payments do not, of course, give rise to claims for contribution among persons who are jointly and severally liable for the same loss."[33] The plaintiffs also sought to cause an officer to disgorge his unfair profits, "an obligation that is not a joint liability."[34] The availability of contribution was thus not presented by the case.

The consistent theme running through these decisions is that contribution among directors is available, but none of the cases have addressed the origin, nature or extent of the obligation. The United States District Court for the Northern District of Illinois, however, held squarely that DUCATA governs claims for breach of fiduciary duty, reasoning that Delaware's General Assembly "did not adopt the provision of the Uniform Act which prohibits a contribution claim based upon the breach of a fiduciary duty."[35] The court found that "Delaware's failure to adopt that portion of the uniform act is deemed intentional."[36]

Unfortunately for the *Hollinger* court's analysis, the Delaware legislature adopted the original 1939 version of the Uniform Act in 1949. As discussed below, the 1939 version did not contain the provision prohibiting the act from applying to fiduciary obligations.[37] That language did not appear until the 1955 revision of the Uniform Act, well after the Delaware General Assembly had considered and adopted DUCATA. *Hollinger*'s rationale that the provision was intentionally rejected is thus temporally impossible and unpersuasive. Existing precedent leaves open the core issue of whether DUCATA applies to breach of fiduciary duty claims.

III. WHAT IS THE SCOPE OF DUCATA?

As statutes go, DUCATA is short. It consists of eight sections, seven of which are substantive.[38]

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31. Valeant Pharmaceuticals Int'l v. Panic, Def. Jerney's Supp. Post Trial Br., 2006 DE Ch. Ct. Briefs LEXIS 89 (Dec. 1, 2006); Valeant Pharmaceuticals Int'l v. Panic, Plaintiff's Supp. Br. on Contribution and Damages, 2006 DE Ch. Ct. Briefs LEXIS 88 (Dec. 1, 2006).

32. Plaintiff's Supp. Br., 2006 DE Ch. Ct. Briefs LEXIS 88, at *5 (citing Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 370 (Del. 1993); Prod. Res. Group v. NCT Group, Inc., 863 A.2d 772, 801 & n.88 (Del. Ch. 2004); IM2 Merchandising & Mfg. v. Tirex Corp., 2000 WL 1664168, at *6 (Del. Ch. Nov. 2, 2000); Clark v. Teveen Holding Co., Inc., 625 A.2d 869, 877 (Del. Ch. 1992)).

33. 921 A.2d at 753 n.48.

34. *Id.*

35. Hollinger Int'l v. Hollinger, Inc., 2006 WL 1444916 (N.D. Ill. Jan. 25, 2006).

36. *Id*. at *2.

37. *See infra* Part IV.

38. Del. Code Ann. tit. 10, §§ 6301-08. So short is the statute that we reproduce it here in its entirety:

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Section 6302 establishes the fundamental purpose of DUCATA, providing that "[t]he right of contribution exists among joint tort-feasors."[39] Section 6301 in turn defines "joint tort-feasors" as "2 or more persons jointly or severally

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§ 6301. Definition

For the purposes of this chapter, "joint tort-feasors" means 2 or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

§ 6302. Right of contribution; accrual; pro rata share

(a) The right of contribution exists among joint tort-feasors.
(b) A joint tort-feasor is not entitled to a money judgment for contribution until he or she has by payment discharged the common liability or has paid more than his or her pro rata share thereof.
(c) A joint tort-feasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the settlement.
(d) When there is such a disproportion of fault among joint tort-feasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tort-feasors shall be considered in determining their pro rata shares.

§ 6303. Judgment against one tort-feasor

The recovery of a judgment by the injured person against one joint tort-feasor does not discharge the other joint tort-feasors.

§ 6304. Release of one joint tort-feasor

(a) A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasor unless the release so provides; but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.
(b) A release by the injured person of one joint tort-feasor does not relieve the one joint tort-feasor from liability to make contribution to another joint tort-feasor unless the release is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tort-feasor, of the injured person's damages recoverable against all the other tort-feasors.

§ 6305. Indemnity

This chapter does not impair any right of indemnity under existing law.

§ 6306. Third-party practice

(a) Third-party practice under this chapter shall be as provided by rule of court except as provided in this section.
(b) A pleader may either (1) state as a cross-claim against a coparty any claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant; or (2) move for judgment for contribution against any other joint judgment debtor, where in a single action a judgment has been entered against joint tort-feasors one of whom has discharged the judgment by payment or has paid more than his or her pro rata share thereof. If relief can be obtained as provided in this subsection no independent action shall be maintained to enforce the claim for contribution.
(c) The court may render such judgments, one or more in number, as may be suitable under the provisions of this chapter.
(d) As among joint tort-feasors against whom a judgment has been entered in a single action, subsection (d) of § 6302 of this title applies only if the issue of proportionate fault is litigated between them by cross-complaint in that action.

§ 6307. Uniformity of interpretation

This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

§ 6308. Short title

This chapter may be cited as the "Uniform Contribution Among Tort-Feasors Law."

39. Del. Code Ann. tit. 10, § 6302.

liable in tort for the same injury to person or property, whether or not judgment has been recovered against some or all of them."[40]

Through this simple language, DUCATA effected drastic changes in the common law of contribution.[41] Most significantly, Section 6302(a) expressly permitted contribution between tortfeasors, a result which one Delaware court described as a "startling change."[42] As described above, prior to DUCATA, and consistent with the American courts' broad application of *Merryweather v. Nixan*, Delaware declined to recognize any right of contribution among tortfeasors, regardless of the degree of culpability involved.[43]

What DUCATA did not do was specify whether individuals who breached their fiduciary duties were "joint tortfeasors" for purposes of the act. As is typical for a Delaware statute, there is no legislative history to shed light on the scope of the term. Section 6307 of the act states only that "This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it."[44] Without clear statutory language or Delaware legislative history, we turn to the drafting history of the Uniform Act upon which DUCATA was based to determine its intended scope.

IV. FIDUCIARY DUTIES AND THE UNIFORM ACT

The drafters of the Uniform Act intended to work significant change in the law and discussed many topics during their labors. We, however, are interested only in whether they intended for claims for breach of fiduciary duty to be treated as torts within the meaning of the Uniform Act. Unfortunately, the historical evidence on that point is muted and conflicting.

A. The 1939 Uniform Act Includes Equitable Torts By Refusing To Exclude Them

By the mid-1930s, academic scholarship was highly critical of the American rule against contribution among tortfeasors. Attempting to accelerate the death of the rule, the American Law Institute and the National Conference of Commissioners on Uniform State Laws agreed in the spring of 1935 to cooperate in drafting a uniform act to help guide the law's development.[45] As advisors, the ALI selected Harvard torts professor Warren Abner Seavey, Columbia torts profes-

40. *Id.* at § 6301. Whether another person is a "joint tortfeasor" within the meaning of DUCATA requires a finding by the trier of fact or an admission by the defendant. *See, e.g.*, Med. Ctr. of Del., Inc. v. Mullins, 637 A.2d 6, 9 (Del. 1994); Ferguson v. Davis, 102 A.2d 707, 708 (Del. Super. Ct. 1954).

41. Other major changes arising from DUCATA included (1) allowing contribution among both intentional and negligent tortfeasors, Section 6302(a); allowing defendants who caused more harm to be disproportionately liable, as opposed to the common law's strict pro rata rule, Section 6302(d); and allowing a plaintiff to settle with one tortfeasor without releasing all of the tortfeasors, in contravention of the common law rule, Section 6304(a).

42. Clark v. Brooks, 377 A.2d 365, 368 (Del. Super. Ct. 1977) ("The most startling change made by the Act was to provide a remedy of contribution among tortfeasors.").

43. DiStefano v. Lamborn, 81 A.2d 675, 677-78 (Del. Super. Ct. 1951), *disapproved on other grounds*, Halifax Chick Express, Inc. v. Young, 50 Del. 596 (1958).

44. Del. Code Ann. tit. 10, § 6307.

45. *Contribution Among Tortfeasors Act: Tentative Draft No. 1* (American Law Institute), Mar. 31, 1938, at 3 ("First Tentative Draft").

sor Young B. Smith, and Edward S. Thurston, a contracts scholar at Yale.[46] The National Conference of Commissioners chose the Dean of the University of Illinois College of Law, Albert J. Harno, as its advisor, and both groups "united in the selection" of Professor Charles O. Gregory as reporter.[47] Professor Gregory was an expert on labor and tort law and had authored the definitive text on that subject.[48]

Professor Gregory prepared an initial report which the "joint committee almost demolished."[49] Several preliminary drafts were subsequently created for discussion at a meeting in February 1938, and the result was a "first tentative draft" of a uniform act.[50]

As one might expect, the vast majority of the discussion relating to the first tentative draft addressed the significant changes it made in the common law. Lengthy deliberations concerned topics such as the efficiency of trying claims for contribution along with the main liability action[51] and whether contribution should extend to intentional tortfeasors.[52] The first tentative draft was held for further consideration at the 1938 meeting of the National Conference of Commissioners.[53]

At the 1938 meeting of the American Law Institute, Professor Gregory and Judge Learned Hand had a brief exchange on the topic of what constituted a tort:

> MR. GREGORY: The common law view is that there is no contribution among tortfeasors at all, and it is a decided change in substantive law.
>
> JUDGE LEARNED HAND: Is there any definition whatever of the kind of tort?
>
> MR. GREGORY: None at all. That is left completely open.
>
> JUDGE HAND: Are you sure that is desirable?

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46. *Id.*

47. *Id.*; *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Forty-Seventh Annual Conference* 136 (1937) ("1937 Proceedings").

48. Charles Oscar Gregory, Labor and the Law (1961).

49. 1937 Proceedings, *supra* note 47, at 136.

50. First Tentative Draft, *supra* note 45, at 3.

51. *Id.* at 29.

52. *Id.* at 20-21. The joint committee noted that in some jurisdictions, the rule was more complex, with the right of contribution "confined to tortfeasors who were 'passively' negligent or who qualified as 'joint tortfeasors' under some rather narrow local rule defining that phrase, and denied to tortfeasors who were 'actively' negligent or who were 'negligent' because of the inadvertent breach of some safety statute or who were liable for their own negligence and not merely vicariously liable for another's tort." *Id*. at 20. The joint committee regarded a broad rule as "an attempt to be practical" and "a repudiation of the moral note which has always made the common-law rule seem so unreal." *Id*. at 21.

53. *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Forty-Eighth Annual Conference* 188, 392 (1938) ("1938 Proceedings"); *Contribution Among Tortfeasors Act: Proposed Final Draft No. 1* (American Law Institute), Apr. 24, 1939, at 3 ("Proposed Final Draft").

> MR. GREGORY: Not at all sure. The matter was debated for a long time in drafting the Act, and we finally concluded, in view of the fact that one could not find any specific way to draw a meaningful line, that the whole thing should be left open.[54]

Mr. Charles V. Imlay, a prominent practitioner from Washington D.C., then expressed his continuing discomfort with contribution for intentional torts, but stated that "we are all agreed that in defining for the first time the principle of contribution we want it to go at least as far as we admit it is equitable it should go."[55] Mr. Imlay next brought up a recent case involving "one of the most striking illustrations of the case where it is fair to have contribution":

> MR. IMLAY: Within the last few weeks a decision has been rendered in this District making a group of eighteen bank directors liable. The liability cannot be said to be a case of a malicious tort. Nobody contends that. The liability arose out of the fact that the corporation organized under the Alabama law, Mr. Sims, continued after its charter had expired and the directors were held liable as liquidating trustees for what assets were in their hands at the time of the expiration of the charter and nobody contends that it was malicious and I am not sure that anybody can contend it was negligent.
>
> MR. PEPPER: Was it a tort at all?
>
> MR. IMLAY: These eighteen directors – and to relieve your minds I will tell you I am not one of them – these eighteen directors were acting as directors usually do through their agents and relying upon statements made by certified public accountants and it would be very difficult to say they were negligent and yet the liability is a tortious liability.[56]

Mr. Imlay suggested that if the ALI or the National Conference chose to limit the definition of a tort, it should adopt the "distinction that is made in the Bankruptcy Act" which discharged all liabilities "except a malicious tort."[57] Another participant suggested "simply excluding anything which is defined as a crime."[58]

If adopted, these positions would have gone a long way toward reinstating the distinction between intentional and negligent torts that the first portion of the act was meant to abolish. Professor Gregory, continuing to battle for the broadest application of the proposed statute, asked:

> How about breach of statutes? A great many cases of inadvertent breaches of statute are crimes but are treated as negligence. I think it would be highly unfortunate to exclude these cases from the operation of the act. There is a division of opinion among the states, where they do have contribution, on that very point.[59]

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54. 15 *American Law Institute Proceedings* 356 (1938) ("1938 ALI Proceedings").

55. *Id.* at 357-58.

56. *Id*. at 358-59. We believe this statement refers to the trial court decision in *Tenison v. Wilson*, 151 S.W.2d 327 (Tex. Civ. App. 1941), although that case involved seven directors and eighteen stockholders. The finding that the directors were liable was overturned on appeal.

57. 1938 ALI Proceedings at 358.

58. *Id.*

59. *Id*. at 359.

In assembling the final draft, the question of whether tort-like claims would fall under the statute arose.[60] At the 1939 meeting of the American Law Institute committee, Philip Halpern (then a torts professor at the University of Buffalo) inquired whether contribution would be available in cases where a second tortfeasor "by reason of his relationship to the person injured would not be liable to the person injured," referring specifically to workers' compensation cases.[61] He envisioned a situation in which an employee was injured in a traffic accident while on the job. The driver of the other car might be liable for the employee's injuries as a tortfeasor, but the employer would not be jointly liable, because workers' compensation would cover the employee and pre-empt a tort claim against the employer. Mr. Halpern suggested that additional language be added to clarify that contribution was available when the tortfeasor was liable for a judgment, rather than simply liable in tort.[62] Professor Gregory rejected this suggestion, replying that such an approach "would be very unfortunate because there is such a thing now known as the equitable tort and we feel courts should be left free to permit contribution in such cases."[63]

The 1939 Act, in final form, sought to aid the "recent trend toward legislative and judicial repeal or modification of the common-law rule" by providing a uniform act states could adopt if they wished that would overturn the "policy of Anglo-American common law … to deny assistance to tortfeasors on the understanding that they are wrongdoers and hence not deserving of the aid of courts in achieving equal or proportionate distribution of the common burden."[64] The 1939 Act ultimately did not define the term "joint tortfeasors," thereby excluding nothing and following Professor Gregory's approach with respect to "equitable torts." Equitable torts fall within the scope of the 1939 Act because they are not excluded.

B. Delaware Adopts The 1939 Uniform Act With Modifications

In 1949, Delaware adopted the Uniform Contribution Among Tortfeasors Act, principally in the form that had been approved by the National Conference of Commissioners in 1939.[65] The General Assembly adopted the first

60. Proposed Final Draft at 3.

61. 16 *American Law Institute Proceedings* 353 (1939) ("ALI 1939 Proceedings").

62. *Id.* at 351-53.

63. *Id*. at 354 ("We have discussed this point and my Advisers and I all agreed that we might well follow equity but for the juridical statements on this very point to the effect that since there is no tort liability at all as between certain persons, therefore, there is no tort as between them and that the Compensation Acts involve a statutory liability rather than a tort liability. I think we might in the interests of clarity on this point cause considerable harm in other directions. I would prefer, unless there is any strong feeling on it, to leave it as it is."). The group agreed to expand the commentary accompanying the uniform law to make clear its position on workers' compensation. *Id.*

64. Unif. Contr. Among Tortfeasors Act, 12 U.L.A. 196 (1976) ("As an original proposition, all might agree that courts should not lend their aid to rascals in adjusting differences among them. But all tortfeasors are not rascals, in spite of the literal translation of the term as wrongdoers. Most joint and several tort liability results from inadvertently caused damage, although it is almost impossible to draw a practical line between torts of inadvertence and others. It is, then, somewhat ironic to note that at common law contribution was denied among all tortfeasors and is allowed as a matter of course to one who has deliberately chosen to violate a contractual obligation undertaken with others. And this situation is aggravated by the common-law view that the injured person is 'lord of his action' and, when injured by the joint and several tort of two or more, may place the loss where and how he sees fit.").

65. 47 Del. Laws 151 (1949); 12 U.L.A. 193 (1976).

six sections and the final three sections of the Uniform Act as proposed by the commissioners.[66] The General Assembly modified the "third party practice" section of the law, providing that "third party practice … shall be as provided by rule of court," with certain exceptions.[67] The Delaware version did *not* provide for the serving of a third-party complaint (although Delaware had already adopted a version of the federal rules, which permitted that practice).[68] The Delaware version also modified the 1939 Act by permitting the defendant to "move for judgment for contribution" only against "any other joint judgment defendant," a view contrary to the recommendation of the National Conference of Commissioners on Uniform State Laws.[69] But there is no evidence that the Delaware legislature considered the application of DUCATA to breaches of fiduciary duty.

C. The 1955 Uniform Act Specifically Excludes Breaches Of Fiduciary Duty, As Equitable Torts, From Its Scope

The 1939 Act was adopted by Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island and South Dakota, although the commissioners lamented that "[m]ost of these states have made important changes in the act which have defeated the whole idea of uniformity, and in anything like its original form it is now in effect only in Arkansas, Hawaii and South Dakota."[70] Due to this frustrating circumstance and "unfavorable reports as to the progress

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66. The first six sections provided the substance of liability for contribution, while the final three sections provided for severability in the event some portion was found unconstitutional, applicability of the law of other states enacting the uniform law to interpret its meaning, and a short title.

67. 47 Del. Laws 151 (1949); Del. Code Ann. tit. 10, § 6301 ("(1) A pleader may either (a) state as a cross-claim against a co-party any claim that the co-party is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant; or (b) move for judgment for contribution against any other joint judgment debtor, where in a single action a judgment has been entered against joint tortfeasors, one of whom has discharged the judgment by payment or has paid more than his pro rata share thereof. If relief can be obtained as provided in this subsection no independent action shall be maintained to enforce the claim for contribution. (2) The court may render such judgments, one or more in number, as may be suitable under the provisions of this Act. (3) As among joint tortfeasors against whom a judgment has been entered in a single action, the provisions of Section 2, Subsection (4) of this Act apply only if the issue of proportionate fault is litigated between them by cross-complaint in that action."). Section 2, subsection 4 reads: "When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares."

68. Daniel L. Hermann, *New Rules of Procedure in Delaware*, 18 F.R.D. 327 (1956).

69. In promulgating the 1939 draft, the commissioners noted regretfully that the legislatures in six states only allowed contribution among tortfeasors subject to a joint judgment, thereby "leaving to the injured person control of the distribution of loss through contribution" because the plaintiff "cannot be compelled to take judgment against tortfeasors whom he does not wish to sue." 12 U.L.A. 196. The prefatory note to the commissioners' 1955 revision observed that eight states had contribution statutes not based upon the Uniform Act, regrettably "limited in their effect to contribution between joint judgment defendants" (Michigan, Mississippi, Missouri, New York, North Carolina, Texas & West Virginia), and that "[t]o this list should now be added Delaware, which has amended the 1939 act to limit it in this manner." 12 U.L.A. at 195; *National Conference of Commissioners on Uniform State Laws, Proceedings in the Committee of the Whole, Uniform Contribution Among Tortfeasors Act 3* (Aug. 18, 1955) ("1955 Notes of Proceedings") ("That, of course, as was so effectively pointed out in the introductory comment to the 1939 Act, put it entirely within the hands of the plaintiff to determine in what situations there should be contribution because the failure to sue, the failure to get a judgment, of course, made it possible for the principle of contribution to apply except as to those against whom a judgment was rendered.").

70. 12 U.L.A. 195.

and operation of the act, the commissioners withdrew it for further study and revision."[71] This revision committee was chaired by Kansas District Judge Spencer A. Gard, who also chaired the committee on Uniform Rules of Evidence.[72] Delaware never adopted the 1955 revision. Again, we concentrate only on the discussion related to including breaches of fiduciary duty within the scope of the revised act.

The most significant comment on that topic was made by George Gleason Bogert, Professor of Law at the University of Chicago Law School, member of the drafting committee for the *Restatement of Trusts* and author of *Bogert's Trusts and Trustees*. He inquired whether:

> [the Uniform Act] was intended to cover breaches of trust and other fiduciary relations which are sometimes called loosely equitable torts? There is a body of law, as I understand it, established that there is a right to have contribution between persons who commit joint breaches of trust, and I would rather suppose that your intention was to have this Act cover legal causes of action. Is that clear, do you think, in the Act?[73]

Chairman Gard replied that he was "not certain that anybody has considered that particular question," but that "if it falls in the category of a tort, it is covered. We have not defined what a tort is."[74]

Mr. Bogert thought the matter worthy of "rather serious consideration" due to the existing body of law "with regard to breaches of fiduciary relations, and it seems to me the situation isn't the same as it is with regard to legal causes of action like actions for negligence."[75] Mr. Bogert strongly believed that the Uniform Act should make explicit that wrongs by fiduciaries were outside its scope:

> MR. BOGERT: I think this matter that I raised about so-called equitable torts, breaches of trust and other fiduciary relations is of sufficient importance so that it should be settled one way or another and made clear, because otherwise it is going to involve litigation as to whether that is left to the courts of equity or whether it is covered by this Act, and for the purpose of getting the judgment of the meeting, I would like to move that the Act be framed so that it be made clear that the word "tort" does not include breaches of trust or other fiduciary relations.
>
> CHAIRMAN COE: Breaches of trust or breaches of other fiduciary relations?
>
> MR. BOGERT: Yes. Those are called, very loosely, equitable torts, but I don't think they really are, strictly speaking, torts, and it seems to me there is a body of law developed with regard to that subject entirely

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71. *Id*. The principal concerns giving rise to the 1955 amendments were (1) the 1939 act's failure to exempt intentional wrongdoers from the right to contribution; (2) the lack of a statute of limitations on the contribution action; (3) the 1939 act's allowing consideration of comparative fault in setting defendants' liability; (4) a belief that the initial act had the effect of discouraging voluntary settlements; and (5) general discontent with the third-party procedure provisions of the act. 1955 Notes of Proceedings at 4-5.

72. *Id.* The other members of the committee were Otis S. Allen, of Topeka, Kansas, George H. Hafer of Harrisburg, Pennsylvania, Nathaniel M. Haskell of Portland, Maine, Homer B. Harris of Lincoln, Illinois, Blakey Helm of Louisville, Kentucky, Miller Manier of Nashville, Tennessee, and Godfrey L. Munter, of Washington, D.C.

73. 1955 Notes of Proceedings at 8.

74. *Id.*

75. *Id.*

different from the body of law with regard to torts that can be brought into a court of law, and that it would be unfortunate to do away with that existing and satisfactory body of equitable principles.[76]

Later in the meeting, Professor Bogert suggested that the revised act contain a subparagraph (g) to section 1, reading "This act does not apply to breaches of trust or other fiduciary relationships."[77] Mr. Hicks Epton of Oklahoma (most famous as the founder of Law Day) stated that the "language is not essential to the draft. Nevertheless, we feel that it certainly would be helpful in spelling it out, that we do not intend to include that sort of thing."[78] Chairman Gard concurred, along with Karl Llewellyn, whose only suggestion was that the word "of" be included after the word "or."[79] The note accompanying subsection (g) in the final draft of the 1955 Act reads only "The meaning is clear. It is not intended that the act should extend to liabilities arising out of breaches of fiduciary relationships."[80] Thus the 1955 Act did not include any breaches of fiduciary duty within its scope.

D. Breaches Of Fiduciary Duty, As Equitable Torts, Were Included In The 1939 Act And Excluded From The 1955 Act Due To Conflicting Assumptions

The 1939 Act swept broadly and sought to include breaches of fiduciary duty within its coverage on the premise that contribution otherwise was not was available. The 1955 Act proceeded from the opposite premise — namely, that there was an existing common law right to contribution for breaches of fiduciary duty. The 1955 Act therefore included a provision excluding these issues from its coverage to avoid interfering with existing rights. Both acts contemplated that contribution would be available for fiduciary relationships; they differed only over whether the right would arise under the Uniform Act or from common law principles. Thus contribution was intended to exist for breaches of fiduciary duty, either by statute (under the 1939 Act) or under the common law (under the 1955 Act).[81]

V. THERE WAS A LIMITED RIGHT OF CONTRIBUTION AMONG DIRECTORS FOR BREACH OF FIDUCIARY DUTY AT COMMON LAW

It is clear that the common law recognized a right of contribution among directors for some breaches of fiduciary duty.[82] This right, however, was uncertain and limited. Professor Bogert was correct in his understanding of the broader

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76. *Id.* at 11.

77. *Id.* at 35.

78. *Id.* Mr. Epton was appointed the "Chairman" of the committee as to Subsection F.

79. *Id.* at 35-36.

80. Unif. Contr. Among Tortfeasors Act § 1, cmt. to subsection (g), 12 U.L.A. 204 (1976).

81. It thus should be clear that the failure of DUCATA to include Section 1(g) of the 1955 Act, which provides that [t]his act does not apply to breaches of trust or of other fiduciary relationships," cannot be interpreted as a conscious decision by the Delaware General Assembly to exclude fiduciary relationships from the scope of the act. The language did not appear in the 1939 Act that the Delaware legislature adopted in 1949, and thus the Hollinger court was wrong to infer anything from its absence.

82. Early cases involving director contribution did not involve breaches of fiduciary duty, but rather instances where directors bound "themselves for [the corporation's] benefit on the same obligation," as when "directors become the makers and endorsers

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availability of contribution for breaches of fiduciary duty by trustees, which was a far more developed and sophisticated system. Although the liability of directors to a corporation was originally grounded in analogies to trust law, it has over time become settled that the obligations of a director are "*sui generis*."[83]

The seminal decision confronting the puzzle of contribution for breaches of fiduciary duty by directors was Lord Hardwicke's 1742 ruling in *Charitable Corporation v. Sutton*.[84] Lord Hardwicke rejected the idea that each director only could be held liable for his own actions, and not those of his fellow directors, because "if this doctrine should prevail, it is indeed *laying the axe to the root of the tree.*"[85] Lord Hardwicke wrote, "I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination." [86]

After grounding directorial liability in trust law, Lord Hardwicke next required directors to "make good" losses paid by fellow directors: that is, he recognized a right to contribution.[87] As interpreted by Henry Osborn Taylor, the author of a leading early twentieth century treatise on corporations, the logic of Lord Hardwicke's rule "must end in allowing contribution or indemnification of directors and other officers of a corporation."[88] Taylor did not believe, however, that the directors who were personally involved in the wrongdoing could seek contribution from their fellow directors.[89]

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of a note to raise money for the corporation." Henry O. Taylor, A Treatise on the Law of Private Corporations Having Capital Stock §§ 805-06 (1884) (distinguishing that situation from common failure to file an annual report, where contribution would not be allowed). Even when there was no express agreement between the directors that they would be jointly liable for the loan amount, courts held that because the money was obtained for the furtherance of the company, all of the directors were "in the nature of sureties for the company" and "there existed between them a mutual responsibility in case of loss" that gave rise to "[t]he principle of contribution." Slaymaker v. Gundacker's Executors, 10 Serg. & Rawle 75, 1823 WL 2206, at *7 (Pa. 1823); *see also* Peoples Nat. Bank of Souderton v. Onorato, 63 Pa. D & C. 2d 485 (Pa. Com. Pl. 1972); Fix v. Isaacs' Adm'rs, 60 S.W. 2d 986 (Ky. 1933); Holston v. Haley, 135 A. 98 (Me. 1926); Aldrich v. Rowell, 166 N.W. 89 (Iowa 1918); Hall v. Gleason, 166 S.W. 608 (Ky. Ct. App. 1914); Weeks v. Parsons, 58 N.E. 157 (Mass. 1900); Middleton v. McCartee, 2 Mackey 420, 1883 WL 20227 (D.C. 1883).

83. The source of directors' fiduciary duties wavered between agency law and trust law, before finally settling on the "*sui generis*" description. *See* Henry Winthrop Ballantine, *Questions of Policy in Drafting a Modern Corporation Law*, 19 Cal. L. Rev. 465, 476 (1931) ("The practice of calling directors 'trustees' and subjecting them to the strict and rigorous rules which apply to dealings between a trustee and his beneficiary requires some modification. Directors must be held to reasonable limitations of fiduciary duty, but there is a distinct policy in favor of upholding contracts made by directors even though they may be interested on their own behalf or on behalf of another corporation if such contracts are just and reasonable."); *see also* Rudolph E. Uhlman, *The Legal Status of Corporate Directors*, 19 B.U. L. Rev. 12 (1939); Sveinbjorn Johnson, *Corporate Directors as Trustees in Illinois*, 23 Ill. L. Rev. 653 (1928). Delaware has a particularly strong tradition of analogizing directors' fiduciary duties to those of trustees. *See infra* note 151. The fiduciary duties of officers arise out of agency law. Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers are Fiduciaries*, 46 Wm. & Mary L. Rev. 1597 (2005).

84. 26 Eng. Rep. 642 (1742).

85. *Id*. at 645 (emphasis in original). Lord Hardwicke concluded that directors could be "guilty of acts of commission or omission, of mal-feasance or non-feasance." *Id*. at 644. Neglect of duty (non-feasance) by allowing others to "intirely" manage the corporation would make the director guilty of the "breaches of trust that are committed by others." *Id*.

86. *Id*.

87. According to Lord Hardwicke, those directors who "engaged in that confederacy are certainly liable to make up the losses which the corporation have sustained in the first place, and the committee-men [directors] who were not partners in this affair are liable in the second place only." *Id*.

88. Taylor, A Treatise on the Law of Private Corporations, *supra* note 82, at § 803.

89. *Id.* According to Taylor,

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Another early twentieth century treatise on corporations authored by Seymour D. Thompson and Joseph W. Thompson also spoke to the issue of contribution. The Thompson treatise likewise stated that "[d]irectors are not responsible for losses resulting from the wrongful acts or omissions of other directors, unless the losses are a consequence of their own neglect of duties."[90] The Thompson treatise further supported the notion that those directors who were not directly involved in the wrongdoing were entitled to contribution from each other so as to share equally in the loss.[91]

Echoing Lord Hardwicke, the Thompson treatise noted a distinction between acts "which involve bad motive or moral turpitude" and "those which consist of mere negligence or non-feasance."[92] As the treatise explained, "[i]t is universally conceded as already stated, that as to the first class there can be no contribution; but in the latter class, there may be."[93] American courts appear to have generally followed this distinction between misfeasance and non-feasance, although one nineteenth century commentator argued that contribution should be available when directors inadvertently violated a statute that imposed personal liability among them.[94]

The right of directors to contribution at common law was thus limited and unclear. Although its exact scope differed from jurisdiction to jurisdiction, it was frequently available only to those directors who did not participate in a decision or course of action, and courts would freely impute knowledge to directors to bar contribution claims. Directors who participated in (or knew about) the events giving rise to liability could not obtain contribution.

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A rule for such cases might perhaps be stated thus: If Directors A, B, C and D are held liable for the wrongful act of Director E, with which there was no way concerned, either actively or by connivance, they will have the right as against E to complete indemnification; and if one of their number, as for instance A, has been forced to pay all or more than his proportion then his proportion of the loss arising from the wrongful act, he will be, as against B, C and D, entitled to contribution.

Id. at 792.

90. 2 Seymour D. Thompson and Joseph W. Thompson, Commentaries on the Law of Corporations 939 (3d ed. 1927).

91. *Id*. at 936-37 ("There may be cases which hold that an absent director will not be liable for affirmative acts done by the remaining members of the board in his absence; but for losses occasioned by the negligent conduct of directors and found to properly supervise, examine, and inquire into the affairs of the corporation, it is obvious that no single director could escape liability.").

92. *Id*. at 1055.

93. *Id*.

94. Frederic C. Woodward, *When Contribution Between Joint Wrong-Doers May Be Enforced*, 1 N.Y. L. Rev. 115, 121 (1895) ("Even though such persons, as a result of negligence or a misapprehension of rights, have committed a tort, they cannot with any pretence of justice, or upon any possible ground of public policy, be denied their appeal to the courts to adjust their liability fairly as between each other …. If the directors of a corporation, by mere inadvertent omission, from forgetfulness or otherwise, with no intention of violating the law, fail to make and file the required annual report, they may in the eye of the law be joint tort-feasors. But they are not guilty of conscious or willful wrong-doing and are therefore clearly entitled to contribution."). Another author argued that if all the potential defendants had "certain continuing duties, and the injury results from an omission to act on the part of all" then "contribution may be had." Comment, *Indemnity and Contribution Between Joint Tort Feasors*, 34 Yale L.J. 427, 431 (1925). In an 1885 decision, Widrig & Co. v. Newport St. Ry. Co., 1885 WL 5744 (Ky. Ct. App. Jan. 8, 1885), the Court of Appeals of Kentucky suggested that contribution could be available even for directors who had engaged in misfeasance. This case appears to be an exception, and the general rule appears to have been that "No contribution can be enforced among directors guilty of a breach of trust for which a part are held liable." 3 William W. Cook, A Treatise on the Law of Corporations Having a Capital Stock § 749 (8th ed. 1923).

The abbreviated right to contribution among directors contrasts with the ability of a trustee to obtain contribution — and the latter is likely what Professor Bogert was referencing during the debates on the 1955 Act. Under the law of trusts, when two trustees are liable to the beneficiary for a breach of trust, each is generally entitled to contribution from the other.[95] If one trustee is "substantially more at fault than the other," then he is not entitled to contribution and instead must indemnify the other trustee.[96] Professor Bogert wrote in 1946 that "The trustee who is obliged to pay more than his proportionate share of the damage may have a cause of action for contribution against his cotrustees who are equally or more guilty than he."[97] If the trustee held liable "was guilty of less fault than the other trustee, or committed only a technical breach of trust, he may claim from the active violator of the trust … indemnity."[98]

The common law rules of contribution as applied to trustees thus did not principally rely on concepts of malfeasance or nonfeasance, but instead on relative fault.[99] The right of contribution generally existed for breaches of the duty of care. It even existed for some conflict transactions and breaches of the duty of loyalty not involving bad faith.[100] It thus made sense for Professor Bogert and the drafters of the 1955 revision of the Uniform Act to defer to the common law system of contribution that had developed for trustees. The same cannot be said for the common law of contribution among directors. Although a right of contribution existed, it was not the type of well-developed body of law that Professor Bogert sought to leave intact. It rather resembled more closely the largely ineffective and potentially unfair set of principles that Professor Gregory and the drafters of the 1939 Act sought to replace.

VI. RECALLING THE CONCEPT OF THE EQUITABLE TORT

The concept of the "equitable tort" provides a unifying theme for the limited discussions of breaches of fiduciary duty that preceded both the 1939 Act and the 1955 revision. The 1939 and 1955 drafters had different assumptions about the extent to which the common law provided a right of contribution for "equitable torts," but they both used the term. We believe this relatively antiquated notion has particular explanatory power for understanding the different approaches taken by the drafters of Uniform Act and for comprehending the interplay between DUCATA and Delaware's treatment of claims for breach of fiduciary duty.

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95. Restatement (Second) of Trusts § 258.

96. *Id.*

97. George Gleason Bogert, Bogert's Trusts and Trustees § 701 (1946).

98. *Id*.

99. Under comment d of the *Restatement*, the following factors are to be used in evaluating disproportionate fault:

> (1) whether [the trustee] fraudulently induced the other to join in the breach of trust; (2) whether he intentionally committed a breach of trust as the other was at most guilty of negligence; (3) whether because of his greater experience he controlled the conduct of the other … ; (4) whether he alone committed the breach of trust and the other is liable only because of an improper delegation, or failure to exercise reasonable care to prevent him from committing a breach of trust, or neglect to take proper steps to compel him to redress the breach of trust.

Restatement (Second) of Trusts § 258 cmt. d.

100. *See id*. cmt. f and illus. 5.

The notion of "equitable torts" appears to have fallen out of the collective memory. We find only seven uses of the term "equitable tort" in the Westlaw "allcases" database after 1945, and the phrase is almost uniformly used with quotation marks around it.[101] But prior to the merger of law and equity,[102] the proper characterization of a claim as "legal" or "equitable" was a question of some moment, because it determined whether the action was properly brought at law or in chancery. In a court of law, the claim generally would be tried to a jury with the remedy limited to money damages. In chancery, the claim would be tried before a judge — the chancellor — who could also grant equitable relief, including decrees ordering specific performance, rescission, reformation, or injunctions.

Within this system, a purely "equitable tort" was one that derived from a special relationship between one person and another, a definition that includes fiduciary relationships, and particularly the relationship between trustee and beneficiary.[103] Christopher Columbus Langdell, scholar and dean of the Harvard Law School distinguished legal rights from equitable rights as follows:

> [T]rue equitable rights, and true equitable wrongs, the latter being violations of equitable rights. A true equitable right is always derivative and dependent, i.e., it is derived from, and dependent upon, a legal right. A true equitable right exists when a legal right is held by its owner for the benefit of another person, either in whole or in part.[104]

That is, "[t]he liability is a peculiar one dependent entirely on the fiduciary relation … and is additional to the liability for torts which are independent of that relationship."[105] An early twentieth century treatise on corporate law cautioned that liability for an equitable tort such as breach of fiduciary duty "should not be confused with the ordinary rules of the

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101. *See, e.g.*, Hart Enters., Inc. v. Cheshire Sanitation, Inc., 1999 WL 33117189 (D. Me. Feb. 22, 1999) ("The defendants offer no authority to support their argument that a party cannot be liable for aiding and abetting the 'equitable tort' of breach of fiduciary duty, as opposed to other torts."). Several of these cases decline to decide whether an "equitable tort" is a tort within the meaning of the Federal Tort Claims Act. Gould v. United States, 2007 WL 2325177 (W.D. Va. 2007) ("To the extent that Plaintiff seeks to avoid the strictures of the Federal Tort Claims Act, he fails, because if equitable tort claims are truly distinct from common-law tort claims (which I do not decide), they would require their own waiver of sovereign immunity apart from the FTCA."); San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 883 n.13 (D. Ariz. 2003) (concluding the court need not address whether Federal Tort Claims Act provided the exclusive remedy for the equitable tort of nuisance); Land v. United States, 35 Fed. Cl. 345 (1996) (utilizing Federal Tort Claims Act case law to decide congressional reference case involving equitable torts).

102. This term refers to the period during which jurisdictions combined their separate courts of law and equity, or unified the separate dockets (or "sides") in jurisdictions where matters at law or in equity were heard by the same court. In the United States, the movement towards consolidation began in 1848 in New York with the adoption of a new code of civil procedure, championed by David Dudley Field, which sought to "revise, reform, simplify, and abridge" the practice and pleadings of the state's courts. Charles E. Clark, Law of Code Pleading § 7 (2d ed. 1947) (quoting N.Y. Const. art. 6, § 2 (1846)); *see also* Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 Cornell L.Q. 238 (1942). At the federal level, merger was accomplished in 1938 when the Federal Rules of Civil Procedure went into effect. *See generally* 4 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1042 (1995).

103. 1 Joseph Story, Commentaries on Equity Jurisprudence § 29 (1839) (observing that equity courts provide remedies for rights which "Courts of Common Law do not recognize at all, or if they do recognize them, they leave them wholly to the conscience and good will of the parties" such as trusts, which are "equitable estates").

104. C.C. Langdell, A Brief Survey of Equity Jurisdiction 5 (2d ed. 1908).

105. 1 Arthur W. Machen, A Treatise on the Modern Law of Corporations § 400 (1908) (describing the liability of promoters as fiduciaries).

common law as to liability for torts."[106] Courts historically characterized breaches of fiduciary duty by directors as falling within the narrow band of "equitable torts."[107]

The second category consisted of torts that could be sued upon either in equity or at law.[108] These "legal" torts, over which concurrent jurisdiction existed, were distinct from true "equitable" torts.[109] A plaintiff could assert a legal right in equity to obtain an adequate or more complete remedy, but the claim was still upon a legal right. It was not a "true equitable right" that when violated creates a "true equitable wrong."[110]

The first *Restatement of Agency*, the first *Restatement of Restitution*, and the first *Restatement of Torts*, all of which were being drafted at around the same time as the first Uniform Act, treated breaches of fiduciary duty as capable of being remedied either at law or in equity (and thus "legal" torts). The *Restatement (First) of Agency*, finalized in 1933, observed explicitly that for breaches of the duty of loyalty, the principal could maintain either a "bill to enforce a constructive trust" in equity or an action at law for the value of the things taken.[111] The *Restatement (First) of Restitution*, finalized in 1936, likewise viewed breaches of fiduciary duty as remediable at law or in equity.[112]

Section 874 of the first *Restatement of Torts*, completed in 1939, stated that "A person standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by such relation."[113] Comment b to § 874 confirmed that "[a] fiduciary who commits a breach of his duty as a fiduciary is guilty of

106. *Id.*; *see also* George P. Costigan, Jr., *Trusts Based on Oral Promises To Hold In Trust, To Covey, Or To Devise, Made By Voluntary Grantees*, 12 Mich. L. Rev. 423, 431 (1914) (suggesting that for a breach of trust, equity "may recognize an equitable tort, i.e., a tort remediable only in equity, regardless of the fact that there is no corresponding legal tort").

107. Wood v. Perkins, 57 F. 258, 260 (D. Mass. 1893) (suit for breach of duty in joint venture was cognizable in equity because co-venturer who breached agreement was "an equitable tort feasor"); Moseley v. Briggs Realty Co., 69 N.E.2d 7, 10 (Mass. 1946) (describing suit for wrongful payment of dividends as falling within "the class of equitable 'actions of tort'"); Old Dominion Copper Mining & Smelting Co. v. Bigelow, 74 N.E. 653, 659 (Mass. 1905) (claim for breach of fiduciary duty against promoter of corporation was an "equitable tort").

108. *See* H. Gerald Chapin, Handbook of the Law of Torts § 13 (1917) (stating that any wrong remediable by damages is a tort, even though courts of equity or admiralty have concurrent jurisdiction).

109. *See* Zechariah Chafee, Does Equity Follow the Law of Torts? *in* Some Problems of Equity 103, 115 (1950) (distinguishing a "new equitable wrong like breaches of trust" from a court of equity's providing equitable relief for a legal tort such as waste); *see also id*. at 128 (observing that some new torts were concurrently developed by law and equity).

110. Langdell, Survey of Equity Jurisdiction at 5; *see id*. at 258-59 ("Perhaps, however, it is not very material whether they be regarded as breaches of obligation or as equitable torts; for, whether they be one or the other, it seems that the relief which equity will give will be the same. For equity never gives damages for an infringement of an equitable right, but makes the wrong-doer a debtor to the person wronged instead, and proceeds upon the theory of compelling the former to restore to the latter what he has lost, or to place him in the situation in which he would have been if the wrong had not been committed.").

111. Restatement (First) of Agency § 403 & cmt. f. The authors of the *Restatement of Agency* observed that "[i]t is not within the scope of the Restatement of this Subject to state generally the conditions under which the principal has a particular remedy."

112. Restatement (First) of Restitution § 138 cmt. a ("A fiduciary who commits a breach of his duty as fiduciary is guilty of tortious conduct and the beneficiary can obtain redress either at law or in equity for the harm done."). A number of courts have relied on Section 138 when addressing claims against corporate fiduciaries. *See, e.g.*, Shanno v. Magee Indus. Enters., 856 F.2d 562, 565 (3d Cir. 1988); Brown v. New York Life Ins. Co., 58 F. Supp. 252, 257 (D. Or. 1944), *aff'd*, 152 F.2d 246 (9th Cir. 1945); Gray v. Sutherland, 268 P.2d 754, 761 (Cal. Ct. App. 1954); Weisbecker v. Hosiery Patents, 51 A.2d 811, 813 (Pa. 1947).

113. Restatement (First) of Torts § 874.

tortious conduct."[114] The comment then continued by stating that "[t]he local rules of procedure, the type of relation between the parties and the intricacy of the transaction involved, determine whether the beneficiary is entitled to redress at law or in equity."[115]

The first *Restatement of Trusts*, on the other hand, took the definite position that the breach of fiduciary duty by a trustee was an "equitable" tort. It arose out of a purely equitable right and therefore only could be remedied in equity. The only time a beneficiary could maintain an action at law was if the trustee had an unconditional duty to pay money or transfer property immediately.[116] In all other cases, the remedies of the beneficiary were "exclusively equitable."[117] This type of breach of fiduciary duty was therefore a true "equitable tort."

The distinct nature of the world of trusts, in which a breach of fiduciary duty was a purely "equitable tort" and operated within a well-developed system of contribution, could perhaps explain the different positions of the 1939 and 1955 Uniform Acts. Professor Bogert, who asked about the scope of the Uniform Act during the 1955 revision, was an expert on trust law, and he appears to have viewed a fiduciary obligation as a purely equitable tort that carried with it a framework for contribution that should not be disturbed. Professor Gregory, the reporter for the 1939 Act, was an export in labor and tort law, and he probably started from the premise articulated in the *Restatement of Torts* that "[a] fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct." Outside of the world of trusts, a breach of fiduciary duty was generally a "legal" tort upon which suit could be brought either at law or in equity, and which lacked a well-developed system of contribution.

We will see in the next section that in addition to providing insight into the intentions of the drafters of the Uniform Act, the nuances of equitable torts also potentially explain the seemingly unique approach to breaches of fiduciary duty taken by the Delaware courts, one of the few jurisdictions that retained the division between law and equity. Otherwise, with the merger of law and equity largely complete by 1938, the characterization of a breach of fiduciary duty as a "legal" versus "equitable" tort ceased to have much meaning.

Instead, to the extent the proper classification of a breach of fiduciary duty claim arose, the debate was framed in terms of tort versus contract. Parties joined issue frequently in disputes over the applicable statute of limitations, where a longer period typically applies to contract claims.[118] Disputes also arose when the administrator or executor of an estate argued that the claim sounded in contract and therefore survived the death of the fiduciary.[119]

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114. *Id.* at cmt. b.

115. *Id.* The *Restatement (Second) of Torts*, published in 1979, continued this approach. Section 874 retained the general statement of regarding liability and the comment that "[a] fiduciary who commits a breach of his duty as a fiduciary is guilty of tortious conduct." It also retained the statement that "[t]he local rules of procedure, the type of relation between the parties and the intricacy of the transaction involved, determine whether the beneficiary is entitled to redress at law or in equity." The Reporters' Note added the caution that "[s]ome fiduciary relations, such as those of … director and corporation are the subject of a considerable group of substantive rules of law; and a breach of fiduciary duty has usually been regarded as controlled by the substantive law rules governing the relationship." The note then stated, "But the action may properly be regarded as in tort for damages, being an equitable tort even when the action is in the traditional scope of equitable jurisdiction." Thus while concluding that a breach of fiduciary duty was a tort, the *Restatement (Second) of Torts* continued to leave other matters up to "[t]he local rules of procedure, the type of relation between the parties and the intricacy of the transaction involved."

116. Restatement (First) of Trusts § 198.

117. *Id.* §§ 197, 199.

118. Delaware has had no need to address this question because the same three-year limitations period applies to both contract claims and to any "action to recover damages caused by an injury unaccompanied with force or resulting directly from the act of the defendant," which has been interpreted to govern fiduciary duty claims. Del. Code Ann. tit. 10, § 8106; *see* Kahn v. Seaboard Corp., 625 A.2d 269, 270-71 (Del. Ch. 1993) (applying Section 8106).

119. Delaware has not needed to address this issue because by statute, "all causes of action, except actions for defamation, malicious prosecution, or upon penal statutes shall survive." Del. Code Ann. tit. 10, § 3701.

Litigants who argued that a breach of fiduciary claim sounded in contract consistently pointed to the typically contractual underpinnings of the fiduciary relationship in question, which for suits against directors meant the certificate of incorporation and bylaws that governed the relationship among the directors, the corporation, and its stockholders. Litigants also asserted an implied contractual undertaking based on an individual's agreement to serve as a director or, when an oath of office is required, the oath itself.[120] Although the decisions were mixed, in the late nineteenth and early twentieth centuries, the contract-based arguments were often successful, both in obtaining the longer contractual statute of limitations[121] and for purposes of the survival of actions.[122]

The savings and loan crisis of the 1980s brought the proper characterization of breach of fiduciary duty claims back to the forefront. After a brief flirtation with the earlier theories that breaches of fiduciary duty arose in contract,[123]

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120. Many of the decisions involved federally chartered banks and asserted violations of specific provisions of the National Bank Act in addition to general breaches of fiduciary duty. In *Cockrill v. Cooper*, the United States Court of Appeals for the Eighth Circuit held that a section of the National Bank Act that provided for personal liability for directors for violations of the act was "nothing more than a recognition of a liability which the directors of such institutions would incur at common law and in the absence of the statute." 86 F. 7, 12 (8th Cir. 1898); *accord* Orth v. Mehlhouse, 36 F.2d 367, 368 (D. Minn. 1929) (quoting *Cockrill*). The *Cockrill* court interpreted the specific provisions of the statute as establishing "a standard of liability … without creating a new cause of action, or altering the foundation upon which the personal liability of directors for wrongful or negligent acts ultimately rests or depends." *Cockrill*, 86 F. at 11. The court noted that as a result of their fiduciary duties, directors must "act within the scope of the bank's charter and by-laws" and "exercise at all times a reasonable degree of care and diligence in the discharge of duties which they have been appointed to perform." *Id*. at 13. "If they are guilty of a culpable violation of this obligation, and the corporation thereby sustains damage, the directors are personally liable therefor…." *Id.*

121. *See, e.g.*, Hughes v. Reed, 46 F.2d 435, 441 (10th Cir. 1931) (applying longer statute of limitations for breach of contract: "While the measure of the obligation is that of ordinary care and prudence, the obligation arises from the implied agreement, and not alone by failure to exercise such care."); Wallace v. Lincoln Savings Bank, 15 S.W. 448, 453 (Tenn. 1891) (applying longer statute of limitations applicable to breach of contract actions to claims for breach of duty against bank directors). *But see* McNair v. Burt, 68 F.2d 814, 816 (5th Cir. 1934) (holding that the claim for breach of fiduciary duty "must rest … upon the statutory and common-law right to recover for negligence and dereliction of duty in the management of the bank's affairs"); Squire v. Guardian Trust Co., 72 N.E.2d 137, 145 (Ohio. Ct. App. 1947) ("Where facts alleged fall short of establishing an express trust and the defendants have failed to exercise skill and prudence in caring for and investing the bank's funds, *a fortiori*, such defendants are liable in tort for such dereliction.").

122. *See, e.g.*, Boyd v. Schneider, 131 F. 223, 229 (7th Cir. 1904) (holding that directors owed duties to bank depositors and that a suit by depositors of an insolvent bank in equity for breach of duty "survives against the representatives of deceased directors, because it is a suit on contract, and not in tort"); Curtis v. Phelps, 208 F. 577, 577 (N.D.N.Y. 1913) ("There is an implied contract and undertaking on the part of the directors of a national bank to properly and faithfully perform their duties as directors, and if by misconduct or negligence they fail to perform such duty and damage results to the creditors of the bank, or the stockholders, a cause of action arises which may be enforced by the receiver in behalf of the creditors and stockholders. Such a cause of action is contractual, and arises out of the contractual relation of the parties, and is not in tort."); Allen v. Luke, 163 F. 1018 (D. Mass. 1908) ("As to one defendant who died before the bill was filed; that the action did not survive. The weight of authority is otherwise."); Cunningham v. Commissioner of Banks, 144 N.E. 447, 459 (Mass. Super. Ct. 1924) ("Action by or in behalf of a corporation against one of its directors for negligent performance of his managerial duties sounds in contract. In substance and effect it is a breach of the contract which springs in to existence by acceptance of the office of director and the assumption of its duties."). *But see* Orth v. Mehlhouse, 36 F.2d 367, 369 (D. Minn. 1929) (declining to treat claim against director as contractual).

123. *See* Fed. Deposit Ins. Corp. v. Former Officers and Directors of Metro. Bank, 884 F.2d 1304, 1307 (9th Cir. 1989) (applying longer contractual statute of limitations to breach of fiduciary duty claims); Federal Sav. & Loan Ins. Corp. v. Burdette, 696 F. Supp. 1196, 1201 (E.D. Tenn. 1988) (same); Bibo v. Jeffrey's Restaurant, 770 P.2d 290 (Alaska 1989) (applying contract statute of limitations as the longer of two periods that reasonably could apply).

a strong majority view emerged that characterized breaches of fiduciary duty as tort claims.[124] For example, in the part of the country that was ground zero for the savings and loan crisis, courts consistently held that claims for breach of fiduciary duty against corporate fiduciaries were tort claims, such that corporate fiduciaries received the protection of a shorter statute of limitations.[125]

As a result of these authorities, there is now a large body of case law outside of Delaware that treats a claim for breach of fiduciary duty against corporate directors as a tort. These decisions do not make fine distinctions between "legal" or "equitable" torts, nor do they delve into the nuances of the equitable underpinnings of the fiduciary relationship. They simply hold that a breach of fiduciary duty is a tort.[126] The natural consequence of such an approach is that contribution under the Uniform Act would exist, unless a state has adopted the provision from the 1955 revision excluding breaches of fiduciary duty from its coverage. Delaware's approach to fiduciary duties, however, is not so simple.

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124. *See, e.g.*, Freeland v. Enodis Corp., 540 F.3d 721, 740-41 (7th Cir. 2008); Federal Deposit Ins. Corp. v. Abel, 1995 WL 716729, at *9 (S.D.N.Y. Dec. 6, 1995); Resolution Trust Corp. v. Gravee, 1995 WL 75373, at *3 (N.D. Ill. Feb. 22, 1995); Resolution Trust Corp. v. Fortunato, 1994 WL 478616, at *4 (N.D. Ill. Sept. 1, 1994); Resolution Trust Corp. v. Zimmerman, 853 F. Supp. 1016, 1020 (N.D. Ohio 1994); Resolution Trust Corp. v. O'Bear, Overholser, Smith & Huffer, 840 F. Supp. 1270, 1278 (N.D. Ind. 1993); Federal Deposit Ins. Corp. v. Gonzalez-Gorrondona, 833 F. Supp. 1545, 1560 (S.D. Fla. 1993); Washington Bancorporation v. Said, 812 F. Supp. 1256, 1272 (D.D.C. 1993); Federal Deposit Insurance Corporation v. Dannen, 747 F. Supp. 1357, 1361 (W.D. Mo. 1990); C-T of Virginia, Inc. v. Barrett, 124 B.R. 689, 693 (W.D. Va. 1990); Beloit Liquidating Trust v. Grade, 677 N.W.2d 298, 311 (Wis. 2004); Brooks v. Hill, 717 So.2d 759, 764 (Ala. 1998). *But see* United States Small Business Administration v. Wasson, 865 F. Supp. 753, 754 (W.D. Okla. 1994) (finding "plaintiff's claims for breach of fiduciary duty, failure to keep adequate books and records and absence of internal controls are based in contract").

125. *See* Askanase v. Fatjo, 130 F.3d 657, 665-66 (5th Cir. 1997); Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1307 (5th Cir. 1993); Federal Deposit Ins. Corp. v. Fay, 1993 WL 740984, at *4-5 (S.D. Tex. Dec. 17, 1993).

126. Maryland and Illinois have taken different paths. In the leading Maryland case, the appellant sought to overturn a judgment in favor of a trustee because the case had not been tried to a jury. Kann v. Kann, 690 A.2d 509 (Md. 1997). The Court of Appeals of Maryland rejected the idea that all claims for breaches of fiduciary duty were torts for which a right to jury trial existed. *Id*. at 521. The court held that the presented claim against the trustee was properly tried in equity, and that "there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries." *Id*. Thus, in future cases, "identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion." *Id*. The court will "identify the particular fiduciary relationship involved, identify how it was it was breached, consider the remedies available, and select those remedies appropriate to the . . . problem." *Id*.

In the leading Illinois case, a taxpayer sued Chicago's mayor and several public officials for breach of fiduciary duty for misappropriating funds. Kinzer v. City of Chicago, 539 N.E.2d 1216 (Ill. 1989). The Illinois Supreme Court refused to hold that the claim sounded in tort such that the officials were immune from suit under the Illinois Tort Immunity Act. The court declined to accept "the Restatement (Second) of Torts view" and instead "regarded breach of fiduciary duty as controlled by the substantive laws of agency, contract and equity." *Id*. at 1220. Subsequent Illinois courts have held flatly, citing *Kinzer*, that contribution under the Illinois version of the Uniform Act is not available for breach of fiduciary duty claims because the claims do not impose liability in tort. People v. Cmty. Hosp. of Evanston, 545 N.E.2d 226, 230 (Ill. Ct. App. 1989); *accord* Weiboldt Stores v. Schottenstein, 111 B.R. 162, 169 (N.D. Ill. 1990); *In re* HA-LO Indus., Inc., 2004 WL 45499, at *2 (Bankr. N.D. Ill. Jan. 5, 2004). Parties in turn have sought to reallocate losses under various alternative theories, all of which have been rejected as applied to breach of fiduciary duty claims. Because the Illinois version of the Uniform Act does not apply, the Illinois courts have defaulted to harsh common law doctrines that the Uniform Act was intended to prevent, such as the rule that releasing one defendant automatically constitutes a release of all. *See* Cherney v. Soldinger, 702 N.E.2d 231, 236 (Ill. Ct. App. 1998) (common law "release of one, release of all" rule applied where breach of fiduciary duty was not a tort and therefore not covered by Illinois version of Uniform Act).

VII. UNDER DELAWARE LAW, A CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST A CORPORATE DIRECTOR IS LIKELY AN EQUITABLE TORT

The analysis of the proper characterization of a breach of fiduciary duty claim under Delaware law is dominated by *Cede & Co. v. Technicolor.*[127] In this opinion from 1993, the Delaware Supreme Court decisively rejected the application of traditional common law tort elements and burdens to a claim for breach of fiduciary duty. These rulings were roundly criticized,[128] prompting one commentator to ask, "[I]f a breach of fiduciary duty is not a tort action, what is it? A contract action?"[129] With the history of the Uniform Act having reminded us of a largely forgotten concept, the answer would appear to be "an equitable tort."

The *Technicolor* saga[130] began as an appraisal proceeding brought by Cinerama, Inc. following the acquisition of Technicolor, Inc. by MacAndrews & Forbes Group, Inc., an investment vehicle of Ronald Perelman. During discovery in the appraisal action, Cinerama developed evidence that it believed supported claims for breaches of Technicolor directors' duties of loyalty and care. Cinerama filed a plenary action asserting these claims, which eventually was consolidated with the appraisal proceeding.[131] After a 47-day trial, Chancellor William T. Allen ruled on the appraisal,[132] then issued a second opinion addressing the breach of fiduciary duty action.[133] Chancellor Allen rejected the breach of loyalty claims and, relying on then-District Judge Learned Hand's decision in *Barnes v. Andrews*, held that even if he assumed that the directors failed to exercise due care, the plaintiffs had the burden to establish causation and damages.[134] Having already

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127. 634 A.2d 345 (Del. 1993).

128. *See, e.g.*, Bernard S. Sharfman, *Being Informed Does Matter: Fine Tuning Gross Negligence Twenty Plus Years After* Van Gorkom, 62 Bus. Law. 135, 152 (2006) ("[*Technicolor*] was received by the legal community with possibly even less enthusiasm than the opinion in *Van Gorkom.*"); William A. Gregory, *The Fiduciary Duty of Care: A Perversion of Words*, 38 Akron L. Rev. 181, 188 (2005) (criticizing *Technicolor* as "silly" and noting that "[a] duty of care claim is always a tort action and is always based on negligence"); Franklin A. Gevurtz, Corporation Law 302 (2000) ("The *Cede* court's rejection of tort law causation principles, in favor of a sort of reverse application of the business judgment rule, seems bizarre. Indeed, it appears to illustrate the power of the so-called business judgment rule to confuse courts."); Michael P. Dooley, Fundamentals of Corporation Law 269 (1995) ("*Technicolor*'s conflation of care and loyalty doesn't clarify matters any … ."); Lyman P. Johnson, *Rethinking Judicial Review of Director Care*, 24 Del. J. Corp. L. 787, 801 (1994) ("[N]o clear and reasoned prior authority exists for the [*Cede*] holdings … ."); Lawrence A. Cunningham and Charles M. Yablon, *Delaware Fiduciary Duty Law After* QVC *and* Technicolor*: A Unified Standard (and the End of Revlon* Duties?), 49 Bus. Law. 1593, 1600-01 (1994) (discussing revolutionary approach in *Cede*)

129. Charles Hansen, *The* Technicolor *Case—A Lost Opportunity*, 19 Del. J. Corp. L. 617, 637 n.152 (1994).

130. The "extraordinarily protracted and voluminous" Technicolor case began in 1983 when Cinerama sought appraisal of its Technicolor shares. Cede & Co. v. Technicolor, Inc., 1999 WL 65042, at *1 (Del. Ch. Jan. 29, 1999). After two decades of litigation, in 2001 Chancellor William B. Chandler, III observed that "the conflict between them not only appears to sustain both combatants, but has in part come to define them." Cede & Co. v. Technicolor, Inc., 2001 WL 515106, at *1 (Del. Ch. May 7, 2001). The final judgment issued after the case was remanded by the Supreme Court for a sixth time in 2005. *See* Cede & Co. v. Technicolor, Inc., 884 A.2d 26, 30 (Del. 2005) ("[T]he history of this 'sempiternal appraisal action' is thoroughly recorded in the annals of Delaware corporate law … .").

131. *See* Cede & Co. v. Technicolor, Inc., 542 A.2d 1182 (Del. 1988).

132. *See* Cede & Co. v. Technicolor, Inc., 1990 WL 161084 (Del. Ch. Oct. 19, 1990).

133. *See* Cinerama, Inc. v. Technicolor, Inc., 1991 WL 111134 (Del. Ch. June 24, 1991).

134. *Id*. at *3 (citing Barnes v. Andrews, 298 F. 614 (S.D.N.Y. 1924)).

found that in his appraisal ruling the deal price exceeded the fair value of the dissenter's shares, Chancellor Allen held that Cinerama could not meet its burden.

By citing *Barnes* and requiring the plaintiff to establish damages, Chancellor Allen relied on basic common law tort concepts that he believed were equally applicable to a claim for breach of the duty of care.[135] Chancellor Allen required the plaintiff to show a duty, a breach, causation and damages — all of the traditional elements of a tort claim.[136]

Cinerama appealed, squarely presenting the Delaware Supreme Court with the propriety of applying common law tort principles to a claim for breach of the duty of care. The Supreme Court rejected the Court of Chancery's approach, noting that the defendants conceded "the lack of any Delaware corporate law precedent for applying tort principles of liability to a fiduciary duty of care analysis."[137] According to the Delaware Supreme Court, "While *Barnes* may still be 'good law,' *Barnes*, a tort action, does not control a claim for breach of fiduciary duty."[138] The Delaware Supreme Court held explicitly that "[t]he tort principles of *Barnes* have no place in a business judgment rule standard of review analysis."[139]

Eschewing the traditional common law tort framework in which the burden of proof of each element of the claim rested on the plaintiff, the Delaware Supreme Court held that in an equitable proceeding for breach of fiduciary duty, the plaintiff only has to establish a breach of either the duty of loyalty or the duty of care. In the event of either showing, the burden of proof shifts to the defendant fiduciaries to prove that the challenged transaction was entirely fair.[140] "[B]reach of the duty of care, without any requirement of proof of injury, is sufficient to rebut the business judgment rule."[141] It therefore was "fundamental error" for the Court of Chancery to "inject[] into the duty of care element a burden of proof of resultant injury or loss."[142]

Although *Technicolor* dealt with a breach of the duty of care rather than a breach of the duty of loyalty, the Delaware Supreme Court's rejection of common law tort concepts echoed similar language in its 1944 decision in *Bovay v. H.M. Byllesby & Co.*[143] The *Bovay* court refused to treat self-interested conduct by a fiduciary as a "mere tort" to which

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135. In *Barnes*, the receiver of an insolvent corporation sued a corporate director who had been negligent. Although the case involved what now would be viewed as a *Caremark* claim, Judge Hand framed the question in terms of the tort of negligence. In a passage quoted by Chancellor Allen, Judge Hand observed,

This cause of action rests upon a tort, as much though it be a tort of omission as though it had rested upon a positive act. The plaintiff must accept the burden of showing that the performance of the defendant's duties would have avoided loss, and what loss it would have avoided.

Id. at *17 (quoting *Barnes*, 298 F. at 616-18).

136. *Id.* at *18. He held that "a shareholder-plaintiff must prove by a preponderance of evidence that director negligence did cause some injury and must introduce sufficient evidence from which a responsible estimation of resulting damage can be made." *Id.*

137. *Cede*, 634 A.2d at 360.

138. *Id*. at 370.

139. *Id*.

140. *Id*. at 371.

141. *Id*.

142. *Id.*; *see also* Young v. Colgate-Palmolive Co., 790 F.2d 567, 570 (7th Cir. 1986) ("[A] claim for breach of fiduciary duty is sufficient if it alleges the fiduciary relationship and its breach, as these two elements alone would establish liability" (citing Restatement (Second) of Torts § 874 cmt. b)).

143. 38 A.2d 808 (Del. 1944).

the statute of limitations would apply.[144] Similarly in *Harman v. Masoneilan International, Inc.*,[145] the Delaware Supreme Court declined to view a claim for breach of fiduciary duty against a controlling stockholder as a legal tort over which the Court of Chancery exercised concurrent jurisdiction, such that an action seeking only damages had to be brought at law in the Delaware Superior Court.[146] In reversing the Court of Chancery's dismissal of the claim, the Delaware Supreme Court held that when "[a] majority shareholder in alleged breach of its fiduciary duty has exercised control over corporate machinery to impose its will upon the minority to accomplish a force out merger," the resulting claim "falls within equity's inherent or exclusive jurisdiction."[147] In other words, it was an inherently "equitable" tort.

Since *Technicolor*, there has not been any significant discussion in Delaware decisions about the proper characterization of breach of fiduciary duty claims. The cases nevertheless appear to treat breach of fiduciary duty claims as distinct from common law tort or contract claims. In a 2007 opinion, for example, the Delaware Supreme Court differentiated between a claim "arising out of contract or tort," which a creditor of an insolvent corporation could bring directly in its own name, and "a purported breach of fiduciary duty," which creditors only could assert derivatively.[148] In a 2008 ruling, the Delaware Court of Chancery remarked that a defendant "could be viewed as having committed actions in the nature of a tort — a breach of fiduciary duty, an equitable obligation — in Delaware" for purposes of subjecting himself to jurisdiction under Delaware's Long Arm Statute.[149] With other bases for jurisdiction rendering the discussion *dictum*, the court nevertheless was careful to describe the breach of fiduciary duty claim as "in the nature of a tort" and as "an equitable obligation."

Without the concept of an "equitable tort," these decisions — and particularly *Technicolor* — could be read to suggest that a breach of fiduciary duty claim in Delaware is *sui generis*. At a minimum, *Technicolor* would cast doubt on characterizing a breach of fiduciary duty under Delaware law as a tort. These conclusions in turn would call into question whether DUCATA could apply to a breach of fiduciary duty.

The concept of an "equitable tort" brings coherence to these issues. Because an equitable tort differs from a common law tort, it should come as no surprise that an equitable tort could involve different burdens of proof and elements.

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144. *Id*. at 820. Delaware continues to judge the timeliness of claims for breach of fiduciary duty using the doctrine of laches, rather the statute of limitations. *In re* Trados Inc. S'holders Litig., 2009 WL 2225958, at *5 (Del. Ch. July 24, 2009) ("This Court, however, is not bound by the analogous statute, and 'as the equities require, may apply a period either shorter or longer than that fixed by statute.'" (quoting Elster v. Am. Airlines, Inc., 128 A.2d 801, 805 (Del. Ch. 1957)).

145. 442 A.2d 487 (Del. 1982).

146. In *Harman*, the defendants sought to have the case dismissed from the Court of Chancery for lack of subject matter jurisdiction. Divorced of context, the defendants' position today seems counter-intuitive, because corporate and director defendants generally prefer the Court of Chancery for the experience of its judges in corporate disputes, lack of a jury, and inability to award punitive damages. But at the time, the Superior Court did not have a class action mechanism. *Id*. at 500. The plaintiff stockholder thus only would have been able to sue individually. Forcing the action to be brought at law in the Superior Court could prevent the case from being economically viable. This anomaly has since been changed, and the Superior Court now has a class action procedure.

147. *Id*. at 499.

148. *See* North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 103 n.43 (Del. 2007); *see also* IM2 Merch. and Mfg., Inc. v. Tirex Corp. 2000 WL 1664168, at *6 (Del. Ch. Nov. 2, 2000) ("[P]laintiffs' claim is really one based on contract or tort law, rather than the law of fiduciary duty.").

149. Sloan v. Segal, 2008 WL 81513, at *9 (Del. Ch. Jan. 3, 2008). Subsection (3) of the Delaware Long Arm Statute permits the exercise of jurisdiction over anyone who "[c]auses tortious injury in the State by an act or omission in this State." Del. Code Ann. tit. 10, § 3104(c)(3).

The differences between common law fraud and equitable fraud, in which a showing of *scienter* is not required, illustrate this possibility.[150] Characterizing a breach of fiduciary duty as an equitable tort is also consistent with Delaware authorities that derive the fiduciary duties of directors from analogies to the law of trusts.[151] As we have seen, claims for breaches of fiduciary duty against trustees present the purest case of an equitable tort.[152] Most significantly for present purposes, characterizing a claim for breach of fiduciary duty claim as an equitable tort logically brings the claim within the scope of DUCATA, because "equitable torts" were meant to be included in the 1939 draft that Delaware adopted.

VIII. POLICY SUPPORTS THE APPLICATION OF DUCATA

It thus appears legally correct to apply DUCATA to breaches of fiduciary duty by directors of a Delaware corporation. Furthermore, there are important public policy considerations that weigh in favor of applying DUCATA. First and perhaps most significant is the underlying purpose of the Uniform Act, which was to ameliorate the consequences of harsh common law rules governing contribution. If DUCATA does not apply to claims for breach of fiduciary duty, harsh common law rules could continue to control.[153] The Delaware Supreme Court and the Delaware Court of Chancery could ameliorate the common law rules by developing new doctrines and principles, such as those set forth in the *Restatement (Second) of Trusts*, but favorable development of the law would require changes in the common law's traditional approach. Changing the common law rules was precisely what the Uniform Act and DUCATA sought to achieve, and it would be oddly redundant for Delaware courts to decline to apply DUCATA only to embark upon their own ameliorative effort.

Second, there is some evidence of a general expectation that DUCATA applies to breach of fiduciary duty claims. As demonstrated by the arguments made in *Telecorp*, *Valeant*, *Greenberg*, and *Hollinger*, practitioners have looked to DUCATA to govern contribution issues. A majority of jurisdictions outside of Delaware treat a breach of fiduciary duty as a tort to which the Uniform Act logically would apply, such that applying DUCATA to breaches of fiduciary duty would be consistent with the expectations of other jurisdictions. As demonstrated by the reactions to the *Technicolor* decision, a number of commentators already believe a breach of fiduciary duty is a tort, and they were surprised when the Delaware

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150. *See generally* 3 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 873 at 420-422 (5th ed. 1941); 1 Joseph Story, Commentaries on Equity Jurisprudence § 184 at 159-60 (1839); Donald J. Wolfe, Jr. and Michael A. Pittinger, Corporate and Commercial Practice in the Delaware Court of Chancery § 2.03[b][1] at 2-32 (2009).

151. In 2008, the Delaware Supreme Court wrote that the fiduciary duties of directors "stem in part from the quasi-trustee and agency relationship directors have to the corporation and stockholders that they serve." Schoon v. Smith, 953 A.2d 196, 206 (Del. 2008). This continued a long tradition of analogizing directors to trustees. *See, e.g.*, Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("While technically not trustees, [directors] stand in a fiduciary relation to the corporation and its stockholders."); Bodell v. General Gas & Elec. Corp., 132 A. 442, 446 (Del. Ch. 1926) ("There is no rule better settled in the law of corporations than that directors in their conduct of the corporation stand in the situation of fiduciaries. While they are not trustees in the strict sense of the term, yet for convenience they have often been described as such."); Lofland v. Cahall, 118 A. 1, 3 (Del. Ch. 1922) ("Directors of a corporation are trustees for the stockholders, and their acts are governed by the rules applicable to such a relation."); Bowen v. Imperial Theatres, 115 A. 918, 921-22 (Del. Ch. 1922) ("Directors of a corporation are frequently spoken of as its trustees. Their acts are scanned in the light of those principles which define the relationship existing between trustee and cestui que trust."); State v. Jessup & Moore Paper Co., 72 A. 1057, 1057 (Del. 1909) ("[I]t is the duty of the directors of corporations to afford to their stockholders every reasonable opportunity to get accurate information as to the conduct and management of the business of which they merely act as trustees").

152. *See* Part V, *supra*.

153. This has been the result in Illinois. *See supra* note 126.

Supreme Court suggested otherwise. Under a "duck" approach to the law,[154] there is benefit to treating breaches of fiduciary as torts, albeit as equitable torts, and applying DUCATA.

Third, there is virtue in the certainty of DUCATA, which addresses a number of nuts-and-bolts issues where predictability is desirable. DUCATA covers, for example, matters such as when a claim for contribution can be filed, the effects of a judgment against one joint tortfeasor on others, the effects of a release on other joint tortfeasors, and availability of third party practice. If DUCATA did not apply, then the Delaware courts would need to create rules to govern these areas. Until rules were established, litigants would act in a vacuum and potentially at their peril. Applying DUCATA is consistent with Delaware's goal of providing clear guideposts for parties to follow, particularly in the corporate context.

Fourth, the substantive concepts underlying DUCATA are consistent with Delaware fiduciary duty law. The premise that joint tortfeasors could be liable to different degrees is akin to the director-by-director analysis that Delaware law already requires before damages can be awarded against an individual director.[155] In a situation where some directors have breached their duty of loyalty while others have breached their duty of care, the possibility of disproportionate responsibility should be readily apparent. Indeed, if the corporation has a Section 102(b)(7) provision, it is unlikely that the directors who merely breached their duty of care could be subject to contribution claims, given the absence of any underlying basis for a monetary judgment against those directors. Even where multiple directors have breached their duty of loyalty, however, the possibility for differently situated defendants exists. A court might readily impose liability on a director who was self-interested in a transaction, while at the same time hold another director liable for failing to carry his burden of proof that he acted independently and not because of his loyalty to the self-interested fiduciary.[156] Depending on the equities of the case, a court in a contribution action could allocate liability equally among the directors, or could place a more significant portion of the liability on the self-interested director, particularly if the self-interested director actually received a quantifiable benefit from the challenged transaction that the other directors did not receive.

Importantly, the potential for contribution in a situation in which the director seeking contribution had a conflict or was held to have breached the duty of loyalty is consistent with the principles governing indemnification under Section 145(a) and (b) of the General Corporation Law. Both provisions permit directors to be indemnified "if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to a criminal action or proceeding, had no reasonable cause to believe the person's conduct was

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154. That is, if it looks like a duck, swims like a duck, and quacks like a duck, it is probably a duck. *See* McMillan v. Intercargo Corp., 768 A.2d 492, 506 n.62 (Del. Ch. 2000) (applying a "duck" approach in determining which provisions with defensive impacts would be reviewed as defensive measures); Hillsboro Energy LLC v. Secure Energy, Inc., 2008 WL 4561227, at *1 (Del. Ch. Oct. 3, 2008) (applying a "duck" analogy in concluding that the contract claim sought legal, rather than equitable, relief).

155. *See In re* Emerging Commc'ns, Inc., S'holders Litig., 2004 WL 1305745, at *38 (Del. Ch. 2004) (engaging in a director-by-director analysis before imposing liability on any individual director); *see also* William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 Bus. Law. 1287, 1318 (2001) ("In cases where the transaction cannot be undone, the court must conduct a director-by-director inquiry into which specific directors actually engaged in a breach of fiduciary duty sufficient to justify monetary liability. The fact that a transaction is found to be 'unfair' does not necessarily mean that all the directors have the same exposure to liability. Where the corporation has a charter provision that exculpates directors from monetary liability for breaching their duty of care, the plaintiff must establish that a director who had no conflicting self-interest in the transaction nonetheless acted in bad faith. If a director did not benefit from the unfair transaction, the plaintiff who seeks to subject that director to money damages liability should have the burden to prove that the director consciously breached his duties to the corporation.").

156. *See Emerging Commc'ns*, 2004 WL 1305745, at *40.

unlawful."[157] Delaware law thus already recognizes the possibility that a director who has breached his or her duty of loyalty could obtain indemnification, although it would be in the rare case where the statutory standard was met. DUCATA similarly would permit directors, even after an adjudicated breach of the duty of loyalty, to seek a discretionary ruling by the court permitting some form of contribution.

Finally, regardless of whether DUCATA applies, the Court of Chancery will retain its ability to apply equitable doctrines to reach equitable results. Most notably, in a case involving bad faith conduct by multiple defendants, the court could readily apply the doctrine of *in pari delicto* to decline to adjudicate the issue of contribution among the bad faith tortfeasors.[158] The right of contribution and the potential for a disproportionate allocation of responsibility that exist under DUCATA provide an opportunity for Delaware courts to reallocate responsibility if the case requires it. The converse is not true, and the Court of Chancery would not be required to permit contribution in every case, simply because DUCATA theoretically applied.

But despite the sound policy reasons for applying DUCATA to contribution among corporate directors, it is possible that Delaware courts could conclude DUCATA does not apply to a breach of fiduciary duty claim. This would not eliminate a right to contribution among directors, of course, but would leave the development of that right to the common law. Failure to apply DUCATA would leave Delaware corporations and litigants adrift for an unknown length of time while courts worked out the ground rules in a case-by-case fashion.

Given the interpretive uncertainty, the best solution would be for the Delaware General Assembly to pass legislation clarifying that DUCATA includes breaches of fiduciary duty, although these "equitable torts" should continue to be litigated in courts of equity. The application of DUCATA to contribution among corporate directors for breach of fiduciary duty provides clear, identifiable and specific benefits. Failing to apply the statute, though retaining flexibility, does not confer any similarly identifiable advantages. Applying DUCATA should not undermine settled expectations or suddenly change the ground rules for litigation — in fact, many commentators and practitioners appear to have assumed that DUCATA applies. It is time to conform the law to these long-held beliefs.

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157. Del. Code Ann. tit. 8, §§ 145(a) & (b).

158. *See In re* Am. Int'l Group, Inc. Consol. Deriv. Litig., 976 A.2d 872 (Del. Ch. 2009) (applying doctrine of *in pari delicto*).