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Disclaiming Loyalty: M&A Advisors and Their Engagement Letters

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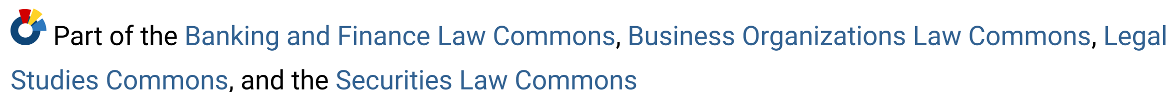

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See Also

Volume 93

Response

Disclaiming Loyalty: M&A Advisors and Their Engagement Letters: In response to William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*

Andrew F. Tuch*

I. Introduction

Though Delaware often serves as a model for the common law world on issues of corporate law doctrine and practice, there is one area of law that Delaware courts have been slow to develop. Only recently has the Court of Chancery begun grappling with how to treat disloyalty by investment banks advising corporations on merger and acquisition ("M&A") transactions, and it has yet to consider whether investment banks are fiduciaries of their M&A clients—an essential question given the conflicts of interest that may compromise the services investment banks provide. By contrast, deal makers in Anglo-Commonwealth jurisdictions benefit from a decade-old judicial opinion squarely confronting the fiduciary status of investment banks.[1]

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1. *See Australian Sec. and Invs. Comm'n v Citigroup Global Mkts. Austl. Pty Ltd. (No. 4)* (2007) 160 FCR 35 paras. 600–02 (Austl.); *see infra* notes 41–42 and accompanying text. This decision of the Federal Court of Australia guides banking practices in jurisdictions in which the law of England and Wales is binding or persuasive. *See, e.g.*, BRIEFING: CONTRACTING OUT OF A FIDUCIARY RELATIONSHIP – INVESTMENT BANKS AND CLIENTS, FRESHFIELDS BRUCKHAUS DERINGER (2007), http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Contracting %20out%20of%20a%20fiduciary%20relationship%20-%20investment%20banks%20and%

Nevertheless, Delaware's emerging approach is more demanding of investment banks and more protective of corporate shareholders' interests than is the Anglo-Commonwealth jurisdictions' approach. Whether it will shift banks' practices significantly, however, remains to be seen.

In *Bankers and Chancellors*, Professors William Bratton and Michael Wachter examine how Delaware treats disloyalty by investment banks advising corporations on M&A transactions.[2] The authors focus on disloyalty toward target firm clients in transactions in which *Revlon*[3] duties apply. Motivated by a string of prominent Court of Chancery decisions, namely, *Del Monte*,[4] *El Paso*[5] and *Rural Metro*,[6] Bratton and Wachter begin their inquiry by examining the activities investment banks perform for their M&A clients and then proceed with their analysis in three stages.

In the first stage, they ask which of two "doctrinal template[s]"—fiduciary or contract—provides the best fit for these relationships.[7] Examining the law of agency and drawing analogies with the lawyer-client relationship, they characterize the investment bank as a fiduciary of its M&A client, but only nominally so,[8] because banks take advantage of the opportunity under agency law to "contract[] out from fiduciary responsibility."[9] Banks do so in their client engagement letters, which contain various provisions, often boilerplate, that include clauses disclosing potential conflicts of interest, limiting liability for certain conduct, and disclaiming fiduciary duties.[10] Bratton and Wachter regard these provisions as getting banks "comfortably close to immunity respecting conflicts—given disclosure and consent and subject to exposure for their own willful misconduct, gross negligence, or bad faith."[11] Accordingly, investment banks take "full advantage" of their ability to "contract out" of fiduciary

20clients.pdf, *archived at* http://perma.cc/B7KD-4JZ9 (claiming that the decision is "likely to be persuasive" in English courts).

2. William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEXAS L. REV. 1 (2014).

3. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

4. *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011).

5. *In re* El Paso Corp. S'holder Litig., 41 A.3d 432 (Del. Ch. 2012).

6. *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014).

7. Bratton & Wachter, *supra* note 2, at 7.

8. *Id.* (referring to the banker–client relationship as "nominally fiduciary territory").

9. *Id.* at 32.

10. *Id.* at 36–43.

11. *Id.* at 42–43.

duties,[12] and "emerge in practice as arm's-length counterparties constrained less by rules of law than by a market for reputation."[13]

In the second stage of their analysis, Bratton and Wachter turn to Delaware's mechanism for constraining investment banks' conduct: shareholder lawsuits against directors alleging fiduciary breaches based on the compromising effect of banks' conflicts of interest (or potential disloyalty). They examine in detail the court's reasoning in *Del Monte*, *El Paso*, and *Rural Metro*, shareholder actions against target company directors. In line with the characterization of investment banks in the first stage of analysis as arm's-length counterparties of their M&A clients, these decisions "presuppose that bankers and clients have opted to define their relationships contractually."[14] The cases require directors to "treat the banker like an arm's-length counterparty, assuming self-interested motivation on the banker's part and using contract to protect [the corporation] and its shareholders."[15] To satisfy this requirement, Professors Bratton and Wachter envisage directors imposing contractual provisions on banks requiring them to disclose their conflicts of interest[16] and to act with "absolute fidelity," as well as provisions to "facilitate oversight" by directors of their bankers.[17] As a matter of legal doctrine and economics, they argue, these cases "are about taking contract seriously."[18]

In the final stage of their analysis, the authors evaluate Delaware's approach by comparing it against two rule-based alternatives, a per se prohibition on conflicts of interest and a safe harbor for stapled financing.[19] They regard Delaware's approach as preferable to both.[20]

Professors Bratton and Wachter's thorough and methodical article advances our understanding of an under-explored, but critically important business and legal relationship. Much scholarship has focused on lawyers' and accountants' relations with clients,[21] but significantly less has examined

12. *Id.* at 7–8 (referring to banker–client relationships as "nominally fiduciary territory" and asserting that banks and their clients "make full use of agency law's opt-out permission, opening a wide door to permit conflicted representation"); *id.* at 36 ("[A]gency law opens a door for contracting out of fiduciary duty . . . . Banker–client engagement letters seek to take full advantage of the opening.").

13. *Id.* at 8.

14. *Id.*

15. *Id.* at 8. *See also id*. at 46 ("[G]o into arm's-length mode in dealing with its banker . . . .").

16. *Id.* at 54 ("The board [of Del Monte] should have required the advisor to represent at the time of engagement that it had not dealt in advance with potential bidders or otherwise violated the terms of its previous engagement—that is, the board should have treated the advisor as a party *without* a duty to disclose.").

17. *Id.* at 61.

18. *Id.* at 8.

19. *Id.* at 69.

20. *Id.* at 82.

21. *See, e.g.*, William W. Bratton, *Shareholder Value and Auditor Independence*, 53 DUKE L.J. 439 (2003); Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of*

investment banks' relations with clients, especially in the context of M&A deals, despite longstanding criticism of investment banks for conflicts of interest and the prominent role banks play alongside lawyers and accountants in many transactions.[22] While the investment bank–client relationship has attracted greater scrutiny in Anglo-Commonwealth scholarship, including in my own research, to my knowledge Bratton and Wachter are the first to examine in detail directors' potential liability for the disloyalty of their investment banks (the second and third stages of analysis).[23] Additionally, *Bankers and Chancellors* includes detailed descriptions and analyses of market practices and recent industry developments, notably the terms of engagement letters and the rise of boutique M&A advisors, making it an authoritative resource for scholars and others focused on M&A activity.

While I generally agree with Professors Bratton and Wachter's analysis, I challenge their conclusions in the first and second stages of analysis. As to the first, I question their interpretation of investment banks as "arm's-length counterparties constrained less by rules of law than by a market for reputation."[24] This interpretation, I argue, hinges on a broad view of the effect of banks' engagement letters with clients. A more plausible interpretation of the letters' effect, one supported by the trilogy of recent Delaware decisions and consistent even with much of Bratton and Wachter's own analysis, is that banks are constrained by fiduciary duties owed to their

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Lawyers After Sarbanes-Oxley, 49 VILL. L. REV. 725 (2004); Robert W. Gordon, *A New Role for Lawyers? The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); Roberta S. Karmel, *A Delicate Assignment: The Regulation of Accountants by the SEC*, 56 N.Y.U. L. REV. 959 (1981); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); Simon M. Lorne, *The Corporate and Securities Adviser, The Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423 (1978); Jonathan Macey & Hillary A. Sale, *Observations on the Role of Commodification, Independence, and Governance in the Accounting Industry*, 48 VILL. L. REV. 1167 (2003); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975 (2005).

22. One exception is an important strand of literature considering fairness opinions provided by investment banks in M&A transactions. *See, e.g.*, Lucian A. Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair are They and What Can Be Done About It?*, 1989 DUKE L.J. 27; Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557 (2006).

23. As to scholarship in Anglo-Commonwealth jurisdictions regarding the fiduciary character of the relationship between investment banks and their M&A clients, see generally Andrew F. Tuch, *Investment Banks as Fiduciaries: Implications for Conflicts of Interest*, 29 MELB. U. L. REV. 478 (2005) [hereinafter Tuch, *Investment Banks as Fiduciaries*] and Andrew F. Tuch, *The Paradox of Financial Services Regulation: Preserving Client Expectations of Loyalty in an Industry Rife With Conflicts of Interest*, *in* THE REGULATION OF WEALTH MANAGEMENT 53 (Hans Tjio ed., 2008) [hereinafter Tuch, *The Paradox of Financial Services Regulation*]. Recent contributions in U.S. legal scholarship consider aspects of the issues considered in *Bankers and Chancellors*. *See, e.g.*, Bonnie White, Case Note, *If All Investment Banks Are Conflicted, Why Blame Barclays? An Examination of Investment Bank Fee Structures and* Del Monte Foods, 162 U. PA. L. REV. ONLINE 93 (2013), http://www.pennlawreview.com/online/162-U-Pa-L-Rev-Online-93.pdf, *archived at* http://perma.cc/HUC8-CSDM; Robert T. Miller, *Journeys in* Revlon-*Land with a Conflicted Financial Advisor:* Del Monte *and* El Paso, (Univ. of Iowa Legal Studies, Research Paper No. 12-24, 2012), *available at* http://ssrn.com/abstract=2156488, *archived at* http://perma.cc/973W-8Y33.

24. Bratton & Wachter, *supra* note 2, at 8.

clients, rather than by contractual provisions alone.[25] As explained below, the interpretation one adopts of investment banks—as either arm's-length counterparties or fiduciaries—determines the existence and content of any limits on banks' pursuit of self-interest—issues central to the regulation of investment banks.[26]

As to the second stage of analysis, I question the interpretation of the recent Delaware decisions as "about taking contract seriously."[27] A more tenable interpretation of these decisions is that they do *not* force or even counsel directors of client corporations to use contractual provisions (rather than existing fiduciary protections) to discharge their *Revlon* duties where they apply. There are even good reasons why directors might prefer fiduciary doctrine to attempting to craft what are essentially contractual substitutes for it.

II. Nominally Fiduciary Territory

In their first stage, the authors employ doctrinal analysis to characterize investment banks as nominal fiduciaries and, in practice, as arm's-counterparties of their clients. They recognize the absence of any direct authority regarding whether an investment bank owes fiduciary duties to its client (or its client's board of directors) in providing M&A advice.[28] Bratton and Wachter reason instead that investment banking advisors perform agency activities for their M&A clients and in this regard are "agents and therefore fiduciaries."[29] They then "extend" this fiduciary characterization of investment banks "to the [investment bank–client] relationship as a whole," and thus to the advisory component of that relationship, even though, "strictly speaking," banks may not be agents in giving advice.[30]

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25. As to the scope of this claim, see *infra* notes 33–35 and accompanying text. In this Response, *client* refers to a corporate entity (or to its board of directors) rather than to its shareholders.

26. *See infra* notes 46–49 and accompanying text.

27. Bratton & Wachter, *supra* note 2, at 8.

28. *Id*. at 32–33 ("We have found no cases that take up the question whether the fiduciary characterization extends to the banker's actions as an advisor, at least so far as concerns the primary clients—the sell-side corporation and its board of directors."). As the authors observe, several cases consider whether banks owe fiduciary duties to the shareholders of their client corporations. *See, e.g.*, Joyce v. Morgan Stanley & Co., 538 F.3d 797, 802–03 (7th Cir. 2008) (finding that investment bank advising acquired company owed no fiduciary duty to the acquired company's shareholders).

29. Bratton & Wachter, *supra* note 2, at 8 ("Banker-advisors are agents and therefore fiduciaries . . . .").

30. *Id.* at 32 ("Strictly speaking, no agency obtains. . . . It would seem sensible to extend the fiduciary characterization coupled with the agency to the relationship as a whole, tailoring the duty's particulars for the advisory role."). Although Bratton and Wachter highlight the possibility of investment banks owing fiduciary duties by virtue of their (nonagency) advisory activities and regard the imposition of fiduciary duties in that context as a sensible extension of doctrine applicable to banks performing agency activities, *id.* at 32, they do not pursue this possibility in extensive detail. *See id.* at 32. Accordingly, the authors' interpretation of investment banks in practice as arm's-length counterparties may hinge on characterizing investment banks as fiduciaries based on their role as agents. I have previously argued in favor of characterizing investment banks

After concluding that investments banks are fiduciaries of their clients in acting as M&A advisors, the authors argue that they are only nominal fiduciaries or, more specifically, that the bank–client relationship is "nominally fiduciary territory."[31] This assessment follows from various provisions of engagement letters, which the authors treat as applications of the agency law doctrine of informed consent.[32] Under this doctrine, M&A clients give their informed consent to bank conflicts, effectively freeing banks of fiduciary constraints and making them, in practice, arm's-length counterparties of their clients.

I focus not on Bratton and Wachter's initial characterization of investment banks as fiduciaries,[33] which I generally accept,[34] but on their treatment of banks' engagement letters. In examining engagement letters, I suggest a distinction be drawn between a bank obtaining its client's informed consent to certain conduct, on the one hand, and a bank disclaiming the existence of fiduciary relationships, on the other hand.[35] If a bank successfully disclaims a fiduciary relationship, it is not a fiduciary; the disclaimer prevents a fiduciary relationship from arising and thus also the peculiar duties that fiduciaries owe.[36] The bank would then have no need to

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as fiduciaries based on their advisory activities. *See* Tuch, *Investment Banks as Fiduciaries*, *supra* note 23, at 490–503.

31. Bratton & Wachter, *supra* note 2, at 7.

32. *See id.* at 36 (suggesting the concept of informed consent in agency law provides an "opening" of which "engagement letters seek to take full advantage"); *id.* at 42 ("Engagement letters, in sum, get the bankers comfortably close to immunity respecting conflicts—given disclosure and consent . . . .").

33. *Id*. at 8 ("Banker–advisors are agents and therefore fiduciaries . . . ."). I regard this as an initial characterization because Bratton and Wachter subsequently refer to investment banks in this context as nominal fiduciaries and in practice as arm's-length counterparties by reason of banks' use of informed consent. *See supra* notes 8–13, 31 and accompanying text.

34. *See* Tuch, *Investment Banks as Fiduciaries*, *supra* note 23 (examining the fiduciary status of investment banks as M&A advisors under Anglo-Commonwealth law); Andrew F. Tuch, *Deterring Disloyalty in Mergers and Acquisitions* (Apr. 28, 2015) (unpublished manuscript) (on file with author) [hereinafter Tuch, *Deterring Disloyalty in Mergers and Acquisitions*] (providing justifications for imposing fiduciary duties on M&A advisors). To be sure, not every investment bank is or should be a fiduciary of its M&A client. The analysis here concerns the investment bank–client relationship existing in the usual course of events. On occasion, fact patterns may differ, such as where a client engages multiple banks for advice on a single transaction, significantly limits the advisors' roles, itself has highly experienced internal deal advisors on whom it relies, and has a demonstrated record of M&A activity.

35. In this Response, I do not consider the additional possibility—one not considered by Bratton and Wachter—that banks' engagement letters may have the effect of narrowing the scope of agency relationships between banks and their clients. I also do not independently examine the operation of indemnification and contribution provisions in engagement letters, but assume for present purposes that, as Bratton and Wachter's treatment suggests, they are instances of the operation of informed consent. *See supra* note 32 and accompanying text.

36. Bratton and Wachter provide the following example of a fiduciary disclaimer: the "[investment bank] and the [client] specifically disclaim the creation of any fiduciary relationship between, or the imposition of any fiduciary duties on, either party." Bratton & Wachter, *supra* note 2, at 40 n.198 (quoting David B. Miller et al., *M&A Engagement Letters: Protecting Sellers and*

obtain consent for conduct in conflict with its client's interests, since it owes no fiduciary duty generally requiring loyalty in the absence of such consent. This bank would, however, be bound by contractual provisions in the client engagement letter, and thus be rightly regarded as an arm's-length counterparty of its client.

By contrast, informed consent operates only when a fiduciary relationship exists. When a fiduciary obtains its client's informed consent for conduct that would otherwise breach a fiduciary duty, the consent shelters the fiduciary from liability for that conduct.[37] However, it does *not* terminate the fiduciary character of the relationship. Rather, the fiduciary remains subject to fiduciary duties and thus generally obliged to act loyally within the scope of and for the duration of the relationship—but sheltered from liability for conduct to which its client consented.[38] Thus, the investment bank that relies on informed consent is a fiduciary, whereas the bank that effectively disclaims fiduciary duties is an arm's length counterparty, having no fiduciary constraints and so no need for client consent to conduct that would expose a fiduciary to liability.

Though Bratton and Wachter regard investment banks in practice as arm's-length counterparties, they do not ground this characterization in the effect of fiduciary disclaimers. In fact, they regard fiduciary disclaimers as having questionable effect[39]—correctly, given the state of U.S. doctrine.[40]

Buyers, STRAFFORD 18 (Nov. 21, 2013), http://media.straffordpub.com/products/m-and-a-engagement-letters-protecting-sellers-and-buyers-2013-11-21/presentation.pdf, *archived at* http://perma.cc/QT2P-C48G). In Anglo-Commonwealth law and scholarship, debate exists as to the syllogistic relationship between the existence of a fiduciary relationship and the incidence of fiduciary duties. For a detailed discussion, see MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 7–11 (2010). The dominant approach in U.S. law and scholarship, which this Response takes, is to regard fiduciary duties as arising because a fiduciary relationship exists.

37. More specifically, the conduct is treated as not constituting a breach of duty. *See* RESTATEMENT (THIRD) OF AGENCY § 8.06(1) (2006) ("Conduct by an agent that would otherwise constitute a breach of duty . . . does not constitute a breach of duty if the principal consents to the conduct . . . .").

38. This proposition follows from the defined consequences of an agent obtaining its client's consent: the agent's conduct will not constitute a breach of duty. *Id.* For further detailed discussion of the operation of informed consent under agency law, see Deborah A. DeMott, *Defining Agency and Its Scope*, *in* COMPARATIVE CONTRACT LAW: A TALE OF TWO LEGAL SYSTEMS 23–25 (Martin Hogg & Larry A. DiMatteo eds., forthcoming 2015) [hereinafter DeMott, *Defining Agency*].

39. Bratton & Wachter, *supra* note 2, at 42 ("Across-the-board provisions that disclaim a fiduciary duty to the client corporation and its board of directors present more of a problem, for they raise a theoretical question as to whether or not the common law of agency imports a mandatory fiduciary duty.").

40. Although detailed examination is outside the scope of this Response, the better view is that provisions purporting to disclaim the existence of fiduciary a relationship are not generally interpreted to prevent a fiduciary relationship arising. Rather, the question whether a relationship is agency (and therefore fiduciary) turns on whether the common law definition of agency is met. The Restatement (Third) of Agency asserts that "[a]n agency relationship arises only when the elements stated in § 1.01 are present" and further that "[w]hether a relationship is characterized as agency in an agreement between parties . . . is not controlling." RESTATEMENT (THIRD) OF AGENCY § 1.02

The U.S. position contrasts with that considered to prevail in Anglo-Commonwealth jurisdictions, in which fiduciary disclaimers have been given their literal effect. In the litigation referred to above,[41] the Australian Securities and Investments Commission brought proceedings against Citigroup, alleging that the bank had breached its fiduciary obligations to its client Toll Holdings when advising on Toll's proposed bid for Patrick Corporation. The business day prior to Toll publicly announcing its bid for Patrick, Citigroup's proprietary trading desk purchased over one million shares in Patrick. The Citigroup trader responsible for the purchase later claimed to have had no knowledge that Citigroup was advising Toll, pointing to the effectiveness of information barriers within the bank. The Federal Court of Australia gave literal effect to the fiduciary disclaimer Citigroup had included in its client engagement letter (that the bank was engaged "as an independent contractor and not in any other capacity including as a fiduciary"), finding that the disclaimer prevented a fiduciary relationship from arising in the first place.[42] That finding made redundant the question whether the client had given its informed consent to Citigroup's alleged conflicts of interest.[43]

Rather than point to fiduciary disclaimers, Bratton and Wachter rely on the operation of informed consent in their analysis. They treat engagement letters as the vehicle through which banks obtain their clients' consent to conduct that would otherwise breach banks' fiduciary duties. Banks are said to take "full advantage" of "contracting out" through the mechanism of obtaining informed consent.[44] By applying the doctrine of informed consent,

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(2006). It logically follows that the express disclaimer of an agency relationship by parties is not controlling. For further discussion of the effect of parties' own characterization of their relationship on the existence of an agency relationship, see generally DeMott, *Defining Agency*, *supra* note 38. A related question concerns the effect of such disclaimers when agency law is not the basis of any fiduciary duties that arise. As to the possibility that fiduciary duties can arise in nonagency activities performed by investment banks, see *supra* note 30. It is also far from certain in this context that a fiduciary disclaimer would be effective to prevent fiduciary duties arising. *See, e.g.,* Ha-Lo Indus., Inc. v. Credit Suisse First Bos., Corp., No. 004 C 3163, 2005 WL 2592495, at *5–6 (N.D. Ill. Oct. 12, 2005) (denying a motion for summary judgment which argued that a clause in an engagement letter disclaiming a fiduciary duty between a bank and its M&A client prevented the bank owing fiduciary duties to its client).

41. *See supra* note 1 and accompanying text.

42. *Australian Sec. and Invs. Comm'n v Citigroup Global Mkts. Austl. Pty Ltd. (No. 4)* (2007) 160 FCR 35 paras. 145, 324 (Austl.). In the absence of the fiduciary disclaimer, Citigroup would have owed fiduciary duties to its M&A client. *Id.* at para. 325 ("But for the express terms of the mandate letter, the pre-contract dealings between Citigroup and Toll would have pointed strongly toward the existence of a fiduciary relationship in Citigroup's role as an advisor."). For further discussion of the decision, see Joshua Getzler, *ASIC v Citigroup: Bankers' Conflict of Interest and the Contractual Exclusion of Fiduciary Duties*, 2 J. EQUITY 62 (2007), and Tuch, *The Paradox of Financial Services Regulation*, *supra* note 23, at 53, 69–84. The bank succeeded in defending against separate allegations of insider trading on account of the apparent effectiveness of its information barriers.

43. The Court nevertheless found that Citigroup's client had impliedly consented to Citigroup's alleged conflict of interest. *See Australian Sec. and Invs. Comm'n*, 160 FCR at paras. 355–361.

44. *See supra* note 12 and accompanying text.

Bratton and Wachter necessarily regard investment banks as fiduciaries of their M&A clients—for without a fiduciary relationship informed consent would be unnecessary.[45]

But in concluding that banks are only nominally fiduciary, that a contractual template applies, and that banks operate in practice as arm's-length counterparties, Bratton and Wachter take an especially broad view of the operation of informed consent. Can informed consent operate so that a fiduciary is, in practice, an arm's-length counterparty? The answer turns on the scope of the conduct to which a client can be taken to consent.

Observe what is at stake here. The issue is not one of classifying constraints on investment banks' self-interested conduct (as either fiduciary or contract). Rather, it is whether investment banks will owe a duty of loyalty; they will if a fiduciary "doctrinal template comes to bear," but not if a contract template does.[46] If the bank is an agent, it owes fiduciary duties of loyalty, subject to the possibility of obtaining informed consent for conduct that would otherwise breach a duty.[47] If it is an arm's-length counterparty, and thus not a fiduciary, it owes no such duties. (Importantly, at this first stage of analysis the authors do not suggest that engagement letters include provisions attempting to mimic fiduciary doctrine, such as by imposing a requirement for loyal service by banks[48]). Accordingly, the question of which doctrinal template applies has both theoretical significance, because of the need for analytical accuracy, and practical significance, because it determines whether banks owe duties of loyalty and thus have potential limitations on their ability, as financial conglomerates, to simultaneously provide multiple products and services to clients.[49]

To examine the operation of informed consent, consider how it applies to various hypothetical fact patterns. Assume that the investment bank First Manhattan is engaged by Target Co. to advise on the company's proposed sale of control. Assume that the bank is a fiduciary of its client (and any fiduciary disclaimer does not have its purported effect) and that *Revlon* duties apply to Target Co.'s directors. In its engagement letter with Target Co.,

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45. For elaboration of this point, see *supra* notes 42–43 and accompanying text.

46. Bratton & Wachter, *supra* note 2, at 7 (discussing the distinction between fiduciary and contractual "doctrinal templates" and asking "[w]hich doctrinal template comes to bear here, fiduciary or contract?").

47. *See* RESTATEMENT (THIRD) OF AGENCY §§ 8.01, 8.06(1) (2006).

48. In the second stage of their analysis after having concluded that banks are nominal fiduciaries of their clients, Professors Bratton and Wachter consider the recent Delaware decisions, interpreting them as requiring corporate directors to "take contract seriously," which directors may do, the authors suggest, by requiring banks, among other things, to act with fidelity. *See supra* text accompanying note 17; *infra* note 69 and accompanying text. The professors' analysis of the applicable doctrinal template, however, assumes the absence in engagement letters of such contractual provisions (that require fidelity).

49. For discussion of how the imposition of fiduciary duties could constrain the activities of financial conglomerates, see Andrew F. Tuch, *Financial Conglomerates and Information Barriers*, 39 J. CORP. L. 563, 572–78 (2014).

First Manhattan discloses its desire to provide stapled financing to Bidder *A*, the existing merger partner. Assume the client's agreement to the engagement letter constitutes informed consent to that conduct.

Now assume that Bidder *B* unexpectedly emerges as a more favorable merger partner for Target Co. May First Manhattan offer stapled financing to Bidder *B* without specifically obtaining Target Co.'s informed consent to do so, relying instead on the effect of the existing engagement letter? What if the engagement letter had referred instead to the provision of stapled financing generally without specifying any particular proposed bidder? Might First Manhattan rely on the effect of the engagement letter to underwrite a securities offering by Bidder *B* to raise funds for its acquisition of Target Co. or to advise Bidder *B* on the acquisition of Target Co.? Might First Manhattan instead make a bid for Target Co. itself, relying on the effect of the engagement letter? If the engagement letter were considered too narrowly drawn to provide informed consent for any of these investment banking activities, what if the letter had sought to provide client consent to *all* conflicts of interest, existing and potential, arising from the investment bank's activities?

As these examples illustrate, the broader the effect of informed consent, the greater the fiduciary's immunity for breach of fiduciary duty. More specifically, the broader the range or scope of a fiduciary's activities to which a client is taken to consent, the more extensive the fiduciary's immunity from liability for breach of fiduciary duty. In turn, the more extensive the fiduciary's immunity from liability, the more plausible the characterization of a fiduciary as, in practice, an arm's-length counterparty of its client.

But informed consent generally operates narrowly. The *Restatement (Third) of Agency* provides that "the principal's consent concerns either a *specific* act or transaction, or acts or transactions of a *specified* type that could reasonably be expected to occur in the ordinary course of the agency relationship."[50] Consent must also be given with knowledge of *all* material facts.[51] Professor Deborah DeMott explains that these requirements—that consent be specific and given with knowledge of all facts—"reflect the fundamental point that an agent is, on an ongoing basis, a legally-salient extension of the principal."[52] Moreover, provisions that *generally* disclose existing and potential conflicts of interest may be ineffective in obtaining a client's informed consent. These generalized disclosure provisions may fail

50. RESTATEMENT (THIRD) OF AGENCY § 8.06(1)(b) (2006) (emphasis added). Because they characterize investment banks as "agents and therefore fiduciaries . . . ," Bratton and Wachter determine the effect of provisions in engagement letters purporting to restrict or limit fiduciary duties by recourse to doctrines of agency law. See Bratton & Wachter, *supra* note 2, at 36 (referring to agency law in considering the effect of engagement letters).

51. RESTATEMENT (THIRD) OF AGENCY § 8.06(1)(a)(ii).

52. Deborah A. DeMott, *Forum-Selection Bylaws Refracted Through an Agency Lens*, 57 ARIZ. L. REV. 269, 282 (2015).

to provide clients with a full appreciation of all material facts—as necessary to constitute effective consent. Confirming these doubts in a related context, the *Law Governing Lawyers* provides that a "client's consent will not be effective if it is based on an inadequate understanding of the nature and severity of the lawyer's conflict"[53] and that "[c]lient consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general."[54]

The Delaware Court of Chancery has itself recently taken a narrow view of informed consent. In *Rural Metro*, Vice Chancellor Laster rejected the bank's argument that a generalized disclosure provision in its engagement letter (one referring to the possibility of the bank providing acquisition financing to purchasers) constituted informed consent by the client to the conflict of interest in question.[55] The court instead recognized the need for the bank to "disclos[e] the conflict and its import" and suggested that the failure to do so would constitute "'what in the old days, might have been called constructive fraud.'"[56]

In light of this analysis, First Manhattan's engagement letter (disclosing the bank's specific intention to provide financing to Bidder *A*) would shelter it from fiduciary liability for providing stapled financing to Bidder *A*. If drafted more broadly, the letter might also shelter it from fiduciary liability for providing stapled financing to Bidder *B*. But one must doubt whether it would shelter First Manhattan from fiduciary liability for conflicts of interest arising from other circumstances not disclosed in the letter. On this reasoning, First Manhattan, as a fiduciary of Target Co., may be sheltered from fiduciary liability in providing stapled financing but would be constrained by fiduciary duties in performing activities that fall within the scope of the fiduciary relationship but outside the scope of the client's informed consent.

While Professors Bratton and Wachter expressly acknowledge the limits of generalized disclosure provisions,[57] their choice of a contractual template nevertheless requires that engagement letters have broad effect. If banks are, in practice, arm's-length counterparties of their clients from the time engagement letters are executed, informed consent must operate with

53. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. b (2000).

54. *Id.* § 122 cmt. d at 268 ("[C]lient consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent."). Nevertheless, certain conflicts are "nonconsentable." *See id.* § 122 cmt. g.

55. *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 101 (Del. Ch. 2014) ("[The client] did not waive any claim that [the investment bank's] sell-side advice was tainted by an undisclosed material self-interest.").

56. *Id.* (quoting Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1068 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005)).

57. Bratton & Wachter, *supra* note 2, at 37 n.189 (observing that disclosure provisions are often generic and noting the ineffectiveness of such a provision in *Rural Metro*).

considerable breadth. But if a narrow interpretation is preferable, it is implausible to regard investment banks in practice as arm's-length counterparties.

One might counter that banks operate in practice as arm's-length counterparties not because of the breadth of informed consent but because of clients' willingness to give consent when conflicts actually occur. This view posits not that a bank's relationship with its client is arm's-length because of the engagement letter's effect; rather, it suggests the ineffectiveness of the engagement letter as a mechanism for obtaining informed consent and thus the subsequent need for clients to consent to specific conduct, perhaps long after the engagement letter was signed. This view is consistent with the practice reflected in *Del Monte* and *Rural Metro* of investment banks seeking informed consent during the course of a deal rather than relying on any consent obtained in their engagement letters.[58] It is also consistent with the Court of Chancery's approach in *El Paso* of examining the reasonableness of directors' consent to conflicts of interest given during the deal.[59] This view also helps answer a question regarding Bratton and Wachter's interpretation of the recent cases as requiring directors to "go[] into arm's-length mode and oversee[] proactively" when "consenting to a conflict."[60] Why must clients consent at all to a conflict arising during a deal if banks have already sought consent in their engagement letters? It is, I think, because informed consent generally operates narrowly.

Nevertheless, the argument characterizing banks as arm's length counterparties based on clients' apparent willingness to consent to bank conflicts during deals must ultimately fail. It stands in opposition to the authors' interpretation of banks' engagement letters as effective in providing informed consent, since the need for such consent indicates the existence of

58. Thus, for example, in *Del Monte* and *Rural Metro* the banks in question sought their clients' informed consent during the course of the deals; they thus acted as if their engagement letters did not relieve them of duties of loyalty. Although these engagement letters are not publicly available, the practice of banks excluding or narrowing fiduciary protections in their engagement letters is common. *See* Bratton & Wachter, *supra* note 2, at 36–43. Legal advisors also suggest this practice to their banking clients. *See, e.g.*, *A Legal Update from Dechert's Corporate Finance Group: The Uncertain Fiduciary Duty of Investment Banks*, DECHERT ON POINT 2 (2008), http://www.dechert.com/files/Publication/8f0c95cc-2d16-4d9d-b3af-f06effd02fdd/Presentation/PublicationAttachment/5038ed10-8336-4e89-a5ae-f0d595fa0aec/CF_10_08_SA_Fiduciary_Duty.pdf, *archived at* http://perma.cc/5BV7-H6ZU ("Investment banks should, therefore, make clear in their agreements with their clients that their relationship is solely contractual in nature and that the relationship does not give rise to any fiduciary duties."); FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 1, at 3 (referring to "the importance of reviewing existing contractual arrangements [between investment banks and their clients] to ensure they are effective to modify fiduciary obligations or to displace them altogether").

59. The judicial approach of examining directors' responses when asked to consent to conflicts of interest is consistent with banks owing a continuing duty of loyalty rather than having "contracted out" from such a duty in their engagement letters. *See In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 834–35 (Del. Ch. 2011).

60. Bratton & Wachter, *supra* note 2, at 61("[O]ne takeaway for a conscientious board is that consenting to a conflict means going into arm's-length mode and overseeing proactively…").

ongoing fiduciary constraints on banks.[61] More broadly, the argument stands in tension with the focus in *Bankers and Chancellors* on engagement letters; why consider the effect of these documents if the real work of consent occurs afterwards when a conflict arises? More importantly, the argument fails because clients cannot be assumed to give their consent (consider a client asked to consent to its bank advising both sides of a deal or competing with it as a principal), nor do banks always request informed consent (consider much of Barclays' conduct in *Del Monte*). It therefore seems implausible to characterize banks as arm's-length counterparties based on clients' apparent willingness to consent to conflicts as they occur during a deal.

Finally, consider whether a bank's apparent need for informed consent during a deal can be explained as it owing its client a (nonfiduciary) duty of good faith and fair dealing. This potential explanation rests on twin claims: first, that a bank operates as an arm's-length counterparty after obtaining client consent in its engagement letter; and second, that its need for client consent afterwards exists not because it is a fiduciary but because it owes a (nonfiduciary) duty of good faith and fair dealing. To be sure, an agent must "deal in good faith with each principal" and "otherwise . . . deal fairly with each principal" *even after* obtaining the principals' informed consent. But this continuing obligation applies only when an agent acts for *multiple principals* in a single transaction[62]—circumstances rarely occurring in the M&A context. Rather, an agent must generally act in good faith and otherwise deal fairly with its principal "in obtaining the principal's consent."[63] That obligation, however, is not a continuing one. If a bank needs informed consent to a conflict of interest during a deal, it is because it is a fiduciary of its client and has not previously obtained consent for the conflict in question.[64]

In sum, only if we take a particularly broad view of informed consent can we regard investment banks as "arm's-length counterparties [of their M&A clients] constrained less by rules of law than by a market for reputation."[65] Given Bratton and Wachter's initial interpretation of an investment bank as a fiduciary of its M&A client and their skepticism toward fiduciary disclaimers, the more plausible characterization of the bank is that it remains a fiduciary of its client, not a nominal fiduciary, but one obliged to act loyally during the course of the relationship.[66] Under this characterization, when a conflict of interest arises during a transaction, a bank must obtain its client's informed consent or risk violating its fiduciary

61. As to the authors' interpretation, see *id.* at 36 ("[A]gency law opens a door for contracting out of fiduciary duty . . . . Banker–client engagement letters seek to take full advantage of the opening.").

62. RESTATEMENT (THIRD) OF AGENCY, § 8.06(2).

63. *Id.* § 8.06(1)(a) (2006).

64. This assumes the absence of a contractual provision requiring the client's informed consent.

65. Bratton & Wachter, *supra* note 2, at 8.

66. As to the scope of this claim, see *infra* notes 33–35 and accompanying text.

duties. Even when it does obtain its client's consent, a bank will remain a fiduciary of its client—sheltered only from liability for the specific conduct, or the conduct of a specified type, to which its client consented. The bank's fiduciary duties will constrain its conduct in all other facets of the fiduciary relationship at least until that relationship ends. Though their reputations surely matter, under this more plausible view banks must regard themselves as constrained by rules of law, including fiduciary duties.

III. Taking Contract Seriously

I now turn to consider the second stage of Bratton and Wachter's analysis, their interpretation of recent Delaware decisions. Are these decisions most cogently interpreted as requiring clients to "treat the banker like an arm's-length counterparty, assuming self-interested motivation on the banker's part and using contract to protect itself and its shareholders?"[67] Among the contractual mechanisms Professors Bratton and Wachter propose in order for directors to satisfy their *Revlon* duties are provisions requiring banks to disclose their conflicts of interest[68] and imposing an obligation of "continued absolute fidelity to the sell-side interest for the duration of the deal."[69] They also interpret the decisions as requiring contractual provisions that "facilitate oversight and position the board to take appropriate action."[70] These provisions ought to be included in banks' engagement letters, the analysis suggests.

While I do not reject the possibility of contractual provisions aiding directors in overseeing their M&A advisors, I find the suggested contractual requirements for loyalty and disclosure puzzling.[71] If investment banks are constrained by fiduciary doctrine, what would these contractual provisions add to the existing protections? Generally speaking, a contract promisor is not obliged to act with fidelity or loyalty toward her counterparties, and even in performing her contractual obligations she may pursue her self-interest,

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67. Bratton & Wachter, *supra* note 2, at 8.

68. *Id.* at 54 ("The board [of Del Monte] should have required the advisor to represent at the time of engagement that it had not dealt in advance with potential bidders or otherwise violated the terms of its previous engagement—that is, the board should have treated the advisor as a party *without* a duty to disclose.").

69. *Id.*

70. *Id.* at 61.

71. Fiduciary duties may also play a role in aiding directors in monitoring their bankers. The diligent client—or, rather, the client represented by diligent directors, themselves fiduciaries—may use existing fiduciary doctrine to monitor. For example, directors could consent to their M&A advisor providing stapled financing on the condition that the individual bankers advising it are quarantined from the process and that none of the client's nonpublic information is shared. Moreover, in fiduciary territory, the client that gives its informed consent may well adopt a more skeptical stance toward its investment banking advisor, being alert to the possibility that the bank will act beyond the explicit terms of informed consent and to the possibility of receiving skewed advice.

subject to the implied covenant of good faith and fair dealing.[72] By contrast, the obligation to act loyally toward another is perhaps the distinctive obligation of the fiduciary relationship.[73] The provisions requiring absolute fidelity and disclosure suggested by Professors Bratton and Wachter, though not specified in detail, generally mimic fiduciary duties.[74] Why not require directors to enforce existing protections available under fiduciary doctrine than suggest they craft new ones in their contracts?

There may be advantages of contractually articulating these duties. Doing so might provide a clear statement of the bank's obligations and avoid ambiguity that some claim is inherent in fiduciary doctrine.[75] It might also sharpen the minds of the various actors involved, increasing the likelihood they will comply with these duties than if the duties were left implicit.

However, I question whether contract can successfully mimic fiduciary doctrine. Fiduciary doctrine draws upon a rich body of guidance concerning the content and scope of duties of loyalty, the operation of informed consent, and the application of these principles to diverse circumstances—guidance that parties could not feasibly establish in their contracts, at least not cost-effectively. For instance, a contractual provision requiring loyalty would need to answer basic questions such as whether loyalty was required only of the individual bankers involved, of the investment banking division, or of the bank as a single economic enterprise. Reflecting this view, Chief Justice Strine and Vice Chancellor Laster recently expressed doubt about the ability of drafters to "substitut[e] their own bespoke [contractual] provisions for the equitable principles that have been forged by cases over centuries."[76]

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72. That limitation has been expressed as constraining a contract promisor from "do[ing] anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (1933). For further discussion of the implied covenant of good faith and fair dealing, see generally Daniel Markovits, *Sharing* Ex Ante *and Sharing* Ex Post*: The Non-Contractual Basis of Fiduciary Relations*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 209 (Andrew S. Gold & Paul B. Miller eds., 2014).

73. Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 926 (2006) (referring to loyalty as "the distinctive and unifying element of fiduciary relationships").

74. A duty of absolute fidelity is synonymous with a duty of loyalty. *See* Leo E. Strine et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 644–45 (2010) ("[L]oyalty, fidelity, and faithfulness are all synonyms.") (footnotes omitted). A duty of disclosure is owed by investment advisors, a category of fiduciary in the U.S.; it requires them to disclose conflicts of interest (or to eliminate them). *See* Registration Under the Advisers Act of Certain Hedge Fund Advisers, Release No. IA-2333, 84 SEC Docket 1032, n.2 (Dec. 2, 2004) (citing SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191–94 (1963).

75. *See* Larry Ribstein, *Fiduciary Duties of Investment Bankers: Senate Testimony—May 4, 2010* 1 (Ill. Law & Econ. Research Papers Series, Research Paper No. LE10-019, 2010), *available at* http://ssrn.com/abstract=1661285, *archived at* http://perma.cc/A229-8DTH (describing the fiduciary duty as "one of the most amorphous concepts in the law").

76. Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS (Robert W. Hillman & Mark J. Lowenstein, eds., forthcoming 2015) (manuscript

Fiduciary doctrine would seem better suited than a contractual approach to requiring loyalty and thus constraining conflicts of interest.

Another complication with the use of contract concerns the deliberative orientation a party adopts when her conduct is governed by contract rather than fiduciary doctrine. Professor Daniel Markovits recognizes that a "contract promisor, . . . must honor her contract but go no further."[77] Though the contract promisor is constrained by an implied covenant of good faith in performing her contractual obligations, that covenant "does not add to the content of contractual obligation[s]."[78] The contract promisor's posture is thus based on self-interest and her conduct depends on the contract, rather than needing to adjust "open-endedly to the interests of the other as circumstances develop *ex post*."[79] In contrast, the fiduciary's orientation *ex post* is necessarily other-regarding and must adjust open-endedly, rather than being constrained only by the contract between the parties. This difference in the structure of contract and fiduciary doctrine underlies the difficulty of attempting to achieve by contract what is typically within the domain of fiduciary doctrine.[80]

More fundamental questions stem from Bratton and Wachter's proposal for contractual provisions to require absolute fidelity and the disclosure of conflicts of interest. Fiduciary duties are conventionally justified when parties have difficulty, by contract, specifying their agreement *ex ante* and evaluating it *ex post*.[81] Indeed, Professor Markovits explains that fiduciary relations arise "precisely because [the beneficiary] cannot adequately

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at 5), *available at* http://ssrn.com/abstract=2481039, *archived at* http://perma.cc/3L3L-FWXU. While the authors' statements are made in the context of the governing instruments of alternative entities, such as limited liability companies and limited partnerships, there is no apparent reason to think drafters of engagement letters would be any more successful.

77. Markovitz, *supra* note 72, at 216.

78. *Id.* at 212.

79. *Id.* at 213.

80. Another difference concerns the often distinctive remedies available under contract and fiduciary law. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 37 DUKE L.J. 879, 888 (1988) ("Another profound dissimilarity between contract and fiduciary analysis is the remedy available if the obligation is breached."). Where monetary relief is sought, damages under contract law are calculated to compensate the plaintiff for the expected gain lost, while fiduciary doctrine would strip the fiduciary of his or her gain or award damages measured on a tortious basis. *See id.* (discussing the different basis for the award of damages under contract law and fiduciary doctrine). *See also* RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1979) (explaining that the beneficiary of a fiduciary duty is entitled to tort damages for harm caused by a fiduciary who breaches its duty as a fiduciary). For further discussion of the various forms of relief available against a fiduciary for breach of fiduciary duty, see DeMott, *supra* note 73, at 927–29. A potential further difference concerns approaches toward the "efficient breach" of obligations. *See* Markovitz, *supra* note 72, at 209 ("The law thus rejects a practice of efficient breach of fiduciary duties.").

81. *See* Markovits, *supra* note 72, at 215; Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1040–41 (2011).

regulate her affairs by contract."[82] The premise that the investment bank–client relationship can be adequately regulated by contract is in tension with the characterization of that relationship as fiduciary. Stated differently, if the investment bank–client relationship may be adequately regulated by contract, in particular by provisions requiring loyalty and the disclosure of conflicts of interest, what justification exists for characterizing that relationship, even initially, as fiduciary (as the professors do)?

Another, potentially deeper, regulatory issue looms—whether directors will *use* the protective measures—fiduciary or contract—at their disposal. As Bratton and Wachter note, U.S. courts have failed to squarely confront the fiduciary character vel non of the investment bank as M&A advisor.[83] Why? It seems that directors virtually never sue their M&A advisors. Though we can speculate as to the reasons for this,[84] we must ask why, if directors have not taken advantage of the existing fiduciary protections at their disposal, they would enforce any newly crafted contractual protections.

Recognition of the apparent unwillingness of directors to take their banks to task prompts one to ask whether Delaware's recent interventions go far enough. Though the Court of Chancery is justified in creating incentives for directors to monitor their investment banking advisors, the court's requirement for directorial monitoring of investment banks may be articulated too narrowly. As I argue elsewhere, it could usefully require directors to do more than monitor their investment banking advisors *ex ante*; it could also require directors to enforce those protections *ex post*.[85] Under such a requirement, where bank disloyalty occurs, directors who stand behind the availability of fiduciary or contractual protections may not be regarded as having discharged their *Revlon* duties unless they have actually invoked these protections. Accordingly, when disloyalty exists the Chancery Court should examine how directors actually responded when conflicts of interest came to light. Were they willing to invoke protections in service of shareholders' interests?

It is true, as Professors Bratton and Wachter observe, that *Rural Metro* breathes new life into the possibility of banks being held liable for aiding and abetting fiduciary breaches by directors. In the current context, however, such liability can arise only where courts find that directors breached their

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82. Markovits, *supra* note 72, at 216 ("The beneficiary engages the fiduciary, after all, precisely because she cannot adequately regulate her affairs by contract."). *See also* Richard R. W. Brooks, *Knowledge in Fiduciary Relations*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 225, 228 (Andrew S. Gold & Paul B. Miller eds., 2014) ("For proponents of the fiduciary as contract argument, . . . [f]iduciary law is simply a contractual means of dealing with individuals who possess special knowledge and skills that others contract for (incompletely) and monitor (imperfectly).").

83. Bratton & Wachter, *supra* note 2, at 32–33 ("We have found no cases that take up the question whether the fiduciary characterization extends to the banker's actions as an advisor, at least so far as concerns the primary clients—the sell-side corporation and its board of directors.").

84. For possible explanations, see Andrew F. Tuch, *The Self-Regulation of Investment Bankers*, 83 GEO. WASH. L. REV 101, 162–66 (2014).

85. *See* Tuch, *Deterring Disloyalty in Mergers and Acquisitions*, *supra* note 34.

Revlon duties. If courts find that directors satisfied their *Revlon* duties by having in place monitoring mechanisms (whether those suggested by Bratton and Wachter or those available under fiduciary doctrine)—without an assessment of directors' willingness to invoke those protections—the threat posed by aiding and abetting liability diminishes.

IV. Conclusion

Professors Bratton and Wachter explain that the M&A world looks very different after *Del Monte* and its progeny than it did before.[86] Directors are now on notice that their own conduct towards investment banks is under review. For their part, investment banks face the prospect of enhanced monitoring by boards of directors and potential liability for aiding and abetting fiduciary breaches by directors. Their incentives under Delaware law to comply with fiduciary norms are considerably stronger than those existing in Anglo-Commonwealth jurisdictions. But it seems altogether possible that banks and boards will simply alter their dance moves, unless the Court of Chancery also creates incentives for directors to enforce their protections. Directors may simply attempt to avoid the heavy hand of fiduciary doctrine and instead try to get by with contractual substitutes, seeking primarily to portray an elegant and facially appealing process designed to give them rights to monitor their investment banking advisors. Unless the Court of Chancery comes down hard again, finding directors' breached their *Revlon* duties because they failed to enforce their protections when disloyalty occurred, it is questionable whether banks will face the incentives necessary to shift their practices significantly.

Professors Bratton and Wachter capture the import of the Delaware cases, and their analysis provides a valuable framework to guide scholars and others examining this field. Their suggestions for contractual protections may even be taken up by directors. In fact, directors will be more inclined to deploy contractual protections than to use fiduciary doctrine against institutions that stridently resist fiduciary constraints across the regulatory frontier (while simultaneously touting their loyalty to clients' interests).[87] But it may not be until directors begin taking fiduciary duties—namely, those of their investment banking advisors—seriously that the Court of Chancery's decisions will have their desired effect.

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86. Bratton & Wachter, *supra* note 2, at 83.

87. As to investment banks' resistance to fiduciary constraints, see, for example, Goldman Sachs in its Business Standards Committee Impact Report acknowledging that it owes fiduciary duties only when acting as an investment manager, rather than in the various other roles it performs. GOLDMAN SACHS, BUSINESS STANDARDS COMMITTEE IMPACT REPORT MAY 2013, at 8 (2013), ("Goldman Sachs acts in many different roles across our various businesses, including as advisor, fiduciary, market maker and underwriter. . . . [O]ur responsibilities as a market maker are quite different from our responsibilities as an investment banking advisor or our fiduciary responsibilities when acting as an investment manager."). The firm has publicly opposed claims that it owes fiduciary duties in its M&A and underwriting activities. *See, e.g.*, EBC I, Inc. v. Goldman Sachs &

Co., 91 A.D.3d 211, 218 (N.Y. App. Div. Dec. 8, 2011); Mannesmann AG v. Goldman Sachs Int'l, [1999] EWHC (Ch) 837, [3], [8]. As to the firm opposing the fiduciary constraints on its market-making activities, see generally *Wall Street and the Financial Crisis: The Role of Investment Banks: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affairs*, 111th Cong. 7, 26–27 (2010). Nevertheless, investment banks and investment bankers also tout their loyalty to clients. For example, Goldman Sachs' widely cited business principles state that "our clients' interests always come first" and that "[t]o breach a confidence or to use confidential information improperly or carelessly would be unthinkable." *Goldman Sachs Business Principles and Standards,* GOLDMAN SACHS, http://www.goldmansachs.com/who-we-are/business-standards/business-principles/, *archived at* http://perma.cc/G8HD-L2BZ. In its promotional materials on investment banking, JP Morgan claims to "focus[] on being a trusted advisor on corporate strategy and structure." *Investment Banking*, J.P. MORGAN, https://www.jpmorgan.com/pages/jpmorgan/au/cib/ib, *archived at* https://perma.cc/HDA5-P7UD. Goldman Sachs also has claimed to have an "extraordinary focus on [its] clients." JONATHAN R. MACEY, THE DEATH OF CORPORATE REPUTATION: HOW INTEGRITY HAS BEEN DESTROYED ON WALL STREET 48 (2013) (citing a Goldman Sachs conference call). In public remarks, investment bankers claim to be trusted advisors in serving their M&A clients. *See, e.g.*, Dana Mattioli & Gillian Tan, *Deal Advisers Take It on the Chin*, WALL ST. J., Aug. 6, 2014, http://www.wsj.com/articles/with-demise-of-time-warner-and-t-mobile-deals-advisers-take-it-on-the-chin-1407364153, *archived at* http://perma.cc/URU2-UMG9 (quoting investment bankers claiming to give advice in clients' best interests, even where that means advising them not to pursue deals, contrary to banks' own financial interests); Liz Moyer & Matthias Rieker, *Wells Fargo Scores Citadel Investment-Bank Talent, Deals*, WALL ST. J. Aug. 16, 2011, http://www.wsj.com/articles/SB10001424053111903480904576510020766912988, *archived at* http://perma.cc/3SK5-MPRH (quoting an investment banker aiming to "deepen the relationships [we] already [have] so that more CEOs and boards view [us] as the trusted adviser for all their strategic banking needs, including . . . M&A"). In communications with clients, banks also signal or explicitly promise loyalty to client interests. *See e.g.*, *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 446 n.43 (Del. Ch. 2012) (referring to a call by Goldman's CEO to an M&A client claiming that the firm was "very sensitive to the appearance of conflict [of interest]"); *Australian Sec. and Invs. Comm'n v Citigroup Global Mkts. Austl. Pty Ltd. (No. 4)* (2007) 160 FCR 35 paras. 99, 328 (Austl.) (quoting an investment banker promising to "back to the hilt" its client's transaction "even if it gets a little hairy," a claim interpreted by the Court as indicative of fiduciary relations between the bank and its client). A storied history of investment banks associates them with "trust" and "loyalty." *E.g.* BRUCE WASSERSTEIN, BIG DEAL: 2000 AND BEYOND 562 (2000) ("[U]ltimately, the investment banking business is about building a long-term trusting relationship with clients."); Heidi N. Moore, *Merrill Lynch: Gasp, You Only Love Me For My Money*, WALL ST. J., Feb. 4, 2008, http://blogs.wsj.com/deals/2008/02/04/merrill-lynch-gasp-you-only-love-me-for-my-money/, *archived at* http://perma.cc/879H-RMBN ("Investment banks loves to talk about being trusted advisers."); *Investment Banking: Does it pay to hire top banks?*, ECONOMIST, Mar. 21, 2012, http://www.economist.com/blogs/freeexchange/2012/03/investment-banking, *archived at* http://perma.cc/665G-3A5K (referring to investment banks as "[companies'] most trusted advisers").