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Legal Nature of Fiduciary Duty in Civil Law of Ukraine

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This article examines the legal nature of fiduciary duty in connection with the emergence of legal uncertainty and difficulties in law enforcement. The study begins with the definition of "fides", "fiducia", "legal duty" and "civil duty", taking into account historical developments and case law. The characteristics of civil duty are given. The article ends with our own vision of the legal nature of fiduciary duty.
Keywords: fiduciary; fiduciary duty; trust; legal relations; legal nature.

Fiduciarinės pareigos teisinė prigimtis Ukrainos civilinėje teisėje

Šiame straipsnyje fiduciarinių pareigų teisinė prigimtis nagrinėjama atsižvelgiant į teisinio netikrumo atsiradimą ir sunkumus, kuriuos patiria teisėsauga. Tyrimas pradedamas nuo sąvokų „fides", „fiducia", „teisinė pareiga" ir „civilinė pareiga" apibrėžimo, atsižvelgiant į istorinę raidą ir teismų praktiką. Pateikiami civilinės pareigos požymiai. Straipsnis baigiamas savąja fiduciarinės pareigos teisinės prigimties vizija.
Pagrindiniai žodžiai: fiduciarinis, fiduciarinė pareiga, pasitikėjimas, teisiniai santykiai, teisinė prigimtis.

Introduction

In civil law, there are different types of legal relations, including fiduciary. Their peculiarity is that they are based on the trust of participants in each other. Like all civil relations, fiduciary ones have their own meaning. There are fiduciary rights and responsibilities of their participants. The latter ones will be the subject of this article, as they have become widespread in many institutions of civil law of Ukraine and in judicial practice.

Despite the fact that the concept of "fiduciary duty" is not directly used in the regulatory acts of Ukraine, but it exists in many institutions of civil law. It is widely known in foreign law. Thus, in contrast to the domestic one, the corporate law of the United Kingdom and the United States has presented it quite widely. Due to this, firstly, there is an increase in the impact (at least the motivation for this) on the discipline of civil law participants; secondly, it sets standards of management; thirdly, in the case of illegal actions of civil law parties due to considering the duty as fiduciary, the necessary mechanism for compensation is determined.

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Domestic and foreign scholars and practitioners such as R. A. Maidanik and O. R. Kibenko, A. K. Bucholtz, A. B. Carroll, P. D. Finn, A. Dignam, J. Lowry, etc. paid attention to the analysis of issues related to fiduciary duty.

The analysis of modern domestic civil works shows that the topic of fiduciary duty has been raised repeatedly, in particular, in studies related to fiduciary legal relations, bringing officials and juridical individuals to civil liability, exceeding the authority of the representative while committing a transaction, studying the civil law category of waiver of subjective civil rights, etc. Meanwhile, the legal nature of the fiduciary duty has not been analyzed by Ukrainian civilists, which, as a result, leads to difficulties in law enforcement and ineffective legal protection of violated human rights due to nonperformance or improper performance of such duty.

This is confirmed in domestic law practice, particularly in the field of corporate law. Therefore, this article will analyze the case law to highlight the legal positions of the Supreme Court on the approach to addressing the above issues. It will also be clarified what is necessary to understand by "fiduciary duty". However, before that, we will focus on the study of the concept of "fiduciary" and "duty" in the field of civil law, but by taking into account the historical developments, doctrine and jurisprudence. These results are achieved by using analytical, comparative and historical methods. Finally, ***the aim of the article*** is to clarify the legal nature of fiduciary duty, given the general trend of bringing civil law in line with the European Union standards, and to further avoid legal uncertainty.

1. Judicial practice: in whose favor should fiduciary duty be performed?

Derivative claims in the interests of a legal entity against the director for compensation for damages were not common, as the courts generally protected the violated rights of shareholders/participants, not the legal entity. For example, in the decision of 16.05.2018, the Supreme Court concluded that the disputed ***law action violated the interests of the plaintiff as a shareholder***, as the value of his shares depends on the size of the company's assets, which it illegally alienated as a result of the disputed law action (SC, case #908/1029/16).

In another case, the Commercial Court of Cassation of the Supreme Court noted that the additional agreement to the loan agreement does not meet the requirements of the law and ***violates the rights of the State Property Fund of Ukraine as a shareholder of the*** Public Joint Stock Company "Zaporizhzhya Aluminum Plant" (SC, case #916/2872/16).

However, there are isolated cases of satisfaction of claims for bringing directors of companies to civil liability for negligent acts committed to the detriment of a legal entity. For example, in the resolution of 25.05.2021, the Grand Chamber of the Supreme Court indicated that in Article 92 of the Civil Code of Ukraine, Article 63 of the Law of Ukraine "On Joint Stock Companies", the responsibilities of the bodies of the legal entity (officials) (fiduciary duties) obliges acting in the interests of the legal entity, acting in conscientiously, acting reasonably and not exceeding their powers, as well as responsibility for their violation.

The main purpose of fiduciary responsibilities is the need to ensure the economic development of the enterprise, and accordingly, failure to comply with such basic responsibilities ***can lead to losses to the enterprise and the obligation to reimburse them*** (SC, case #916/2872/16).

Such different approaches indicate the lack of consistency and unity of case law in resolving this issue, which in turn hinders the achievement of predictability of case law, the implementation of the principle of legal certainty (res judicata) and the implementation of the doctrine of sustainability (jurisprudence constante).

2. What is fiduciary?

Clarifying the essence of the concept of "fiduciary duty" requires, first of all, the analysis of such concepts as "fides", "fiducia".

There is no doubt that the formation of most fundamental concepts and categories of civil law, in particular, good faith, honesty, justice, dignity, originates from the Roman law. The latter, in its turn, developed on the basis of moral values, which were of great importance for Roman society. Thus, the literature notes that it was in the ancient Roman spiritual tradition that such categories as fidelity to one's family and clan, state, and treaty arose and were cultivated. These categories stood on such pillars as personal modesty, children's respect for their parents, care of parents for their children, powerful people for their subordinates, thrift, conscience and shame (Karlyavin, 2015, p. 133).

2.1. Understanding the concept of "fides" as moral and legal

Such a moral category as fides is no exception, which means faith, commission, trust (Khomitska, 2007, p. 53). Gradually, it began to acquire legal meaning, as faith in oneself and one's honesty were the principles of civil law. Thus, E. Fraenkel, who studied the ancient Roman texts dedicated to fides, concluded that in the literature of the republican period, this concept acquires the true and most accurate meaning that has been attached to it for all times: guarantee, bail, promise, reliability, fidelity, probability, reliability. That is, guarantees in the broadest sense of the word, whether an action or promise or a certain legal relationship of one person to another (Fraenkel, 1916, p. 187).

In addition, the literature emphasizes that fides indicates the quality (personality) of someone who is trusted or, more precisely – the nature of his attitude to the other – who opposes him, but not mental activity or mood of the principal (Fraenkel, 1916, p. 187).

Thus, the concept of "fides" in the legal terms can be understood in two senses. Accordingly, in the first sense – it is a lawful act or condition, i.e. guarantees that give a person confidence in the decency of the other party. The second one is the nature of the relationship of one person to another, which arises from the occurrence of certain legal facts (for example, the conclusion of certain agreements, the establishment of guardianship or custody, etc.).

2.2. Implementation of the concept of "fides" in the legal principle of "uberrima fides" and its enforcement

In modern civilization there is a legal principle "uberrima fides", which means the highest trust or good faith of the parties in the insurance contract. Its essence is that all the parties in the contract must enter into it in good faith, providing each other with complete information about all relevant facts. Thus, the insured person has a precontractual obligation to provide the insurer with reliable information about the objects of insurance and risk factors (SC, case #753/731/16). At the same time, the insurer must make sure that the potential contract meets the needs and benefits of the insured person. Thus, it seems that this principle reflects the first approach to understanding the concept of "fides", i.e. is a legitimate action (provision of reliable information), as a result of which the other party in the contract can reliably assess all the risks of the insurance contract.

2.3. Understanding the concept of "fiducia" in view of Roman law

Another concept of "fiducia" also originates from the Roman law. Thus, Gai distinguishes two types of fiduciary agreement: with a friend – fiducia cum amico and with a creditor – fiducia cum creditore

(contracta). In the first case, fiducia drew up contracts for luggage, loans, orders, in the second – served to establish a real guarantee of obligation. This functional differentiation is secondary, because the structure of the contract is the same in all cases. The person (fiduciary, fiduciarius), who received a thing, becomes a kind of trustee and undertakes, under certain conditions, to return the thing to the creditor (fiduciant, fiducians) (Dozhdev, 2003, p. 562). Initially, the duty of the fiduciary (return of the thing) was provided only with honesty, fidelity to the word of the creditor, on one side, and the trust of the debtor – on the other side (fides) (Zaikov, 2020, p. 245]. That is, such relations were based only on the honesty and trust of the parties. Later, the fiduciary who performed the contract had the right to file a special lawsuit (actio fiduciae) against the fiduciary, if the latter refused to return the thing notwithstanding the agreement. This lawsuit is one of the oldest lawsuits of good conscience (bonae fidei). The position of the judge is freer here, because he is already invited in the intention to decide the case in good faith - ex fide bona (Zaikov, 2020, p. 246).

Thus, the concept of "fiducia" in the Roman law should be understood, first, as civil law contracts, which were based on the trust of one party to the other (agreement with the other). These include: baggage agreement (storage), loans, power of attorney. Second, the contract securing the performance of the obligation in the form of an institution, since the fiducia served as a real guarantee of the performance of the obligation. Sometimes in the literature the essence of fiduciary is revealed as an ancient form of an institution built on trust, when the mortgaged thing was considered the property of the creditor (Gidkova *et al.*, p. 230). That is, the third meaning of fiduciary, as an ancient form of a pledge built on trust, is also possible.

2.4. The main feature of the concepts of "fides", "fiducia"

Summing up, we can say that the concepts of "fides", "fiducia" are moral categories, which later acquired a legal meaning. Despite the diversity of the analyzed concepts, their main feature, which has become widespread in modern civil law, is the trust of participants in civil relations to each other.

The clarification of the essence of the concepts above makes it possible to claim that the fiduciary duty is a fiduciary duty or a duty based on trust.

3. Legal and civil duties

In general, legal obligation is traditionally understood in jurisprudence as a type and measure of proper conduct of a subject of law. Instead, in civil law, there is no single approach to the definition of civil duty. Thus, some scholars believe that this is an objectively necessary behavior, which has received legal regulation (Shershenevich, 1912, p. 619–620, Em, 1981, p. 20). Others believe that it is the type and measure of proper and necessary conduct, due to the legal requirements of the authorized person, which is subject to execution in the manner, way and limits specified by law and/or contract (unilateral transaction) or another regulator, and provided by means of coercion and encouragement (Nadion, 2018, pp. 5–6).

Thus, civil duty is a kind of legal obligation with its inherent features of the sectoral nature.

3.1. Civil Case Law

In judicial practice, a civil obligation is defined as a requirement from the subject of civil law of certain actions (or nonperformance of actions), provided by the possibility of legal incentive to behave properly. The content of civil duty consists of the following requirements: the conduct of the obligated person is

determined by the requirements of the rule of law or authorized persons; in case of nonfulfilment of a civil duty it is provided by a requirement (decision) of the court to fulfil this duty (SC, case #922/3737/17).

Thus, the Commercial Court of Cassation of the Supreme Court defines civil duty through the prism of the concept of "requirement". A claim in civil law is considered from two sides, first, as the right to the claim of the creditor (subjective civil law) and a component of the content of binding legal relations and, secondly, as an object of civil rights (Golubieva, 2013, p. 22). Obviously, this meant a requirement as the right of the creditor to demand from the obligated person (debtor) to perform or refrain from performing a certain action (actions).

3.2. Is there understanding of duty as a requirement universal for all civil relations?

We believe that this approach is acceptable. However, given the fact that civil law relations are diverse, the question arises: can the proposed definition of duty be considered universal?

Undoubtedly, in a binding legal relationship, where each participant is entitled to demand from the obligated person to perform his duty (to act or refrain from doing so), the duty must be understood through the prism of the concept of "requirement". Since obligations in civil law are divided into contractual and noncontractual, respectively, the claim of the entitled person is based on the provisions of the contract or law.

In property relations, where a person, for example, the owner has the right to own personally, use and dispose of property, and the duty of others (an indefinite number of persons) – not to interfere with the exercise of his rights, the latter is not directly the owner's requirement, however it follows Chapter 23 of the Civil Code. Thus, such a requirement is determined by the norms of law, and therefore the civil obligation in these legal relations can also be understood through the concept of "requirement".

Another example is corporate relationships that arise, change, and end with respect to corporate rights. The latter means the rights of the person whose share is determined in the authorized capital (property) of a business organization, including the authority to participate in the management of the business organization, receiving a certain share of profits (dividends) of the organization and assets in the event of liquidation, as well as other powers provided by law and statutory documents (Part 1 of Article 167 of the Civil Code). The participant exercises his powers by exercising the rights and making claims to the company defined by law (for example, participants with at least ten percent of the vote may request a general meeting (Part 4 of Article 98 of the Civil Code); the company has the right, if its actions were not approved by other participants, to demand from the company reimbursement of expenses incurred by him … (Part 2 of Article 122 Civil Code); the depositor of a limited partnership has the right to demand first return of the deposit in case of the liquidation of the company (Item 4, Part 2 of Article 137 of the Civil Code), etc.). Thus, in corporate legal relations, a civil obligation can be understood as a statutory requirement of a participant from a legal entity for certain actions.

In fiduciary (trust) legal relations, obligation may arise on the basis of a contract or law. Thus, the duty of the attorney to perform certain legal actions on behalf and at the expense of the other party is contractual. Instead, the duty of a body or person of a legal entity acting on its behalf to act in the interests of the legal entity in good faith and reasonably and not to exceed its powers is contained in the law (Part 3 of Article 92 of the Civil Code). Thus, we can conclude that for the considered types of civil law, the understanding of duty as a requirement is universal. In this case, such a requirement may be made by an authorized person or by law.

If we consider the inheritance relationship, it should be noted that the duties of the heirs have different legal nature, in particular, the obligations arising from the will (for example, the testamentary disclaimer of Articles 1237, 1238 of the Civil Code, imposing on the heir obligations to perform certain

actions aimed at achieving the socially useful goal of Part 2 of Article 1240 of the Civil Code, etc.), contract (management of hereditary property and its protection under Articles 1284, 1285 of the Civil Code, etc.), law (payment for the executor of the will of Article 1291 of the Civil Code, reimbursement of expenses for maintenance, care, treatment and burial of the testator of Article 1232 of the Civil Code, etc.), succession of heirs (satisfaction of creditors' claims of Article 1282 of the Civil Code). In this regard, scholars emphasize that for some of the responsibilities arising from the will – namely: to comply with the wishes of the testator about the place and form of burial ritual, disposal of his personal papers, the implementation of certain actions aimed at achieving socially useful goals, the creation of an institution indicating the purpose of its activities – there is no authorized person who has the right to demand (Spasybo-Fatieieva *et al*., 2016, p. 69). Therefore, the right of a specific person does not correspond to such responsibilities.

4. My approach to the characterization of civil duty

All of the above shows that in most civil law relationships, the obligation is a requirement specified by law or authorized persons. However, in hereditary legal relations there are such obligations of heirs which cannot be interpreted through the prism of the concept of "requirement". Thus, the definition of civil duty through the concept of requirement is not universal. It seems appropriate to use the traditional approach, according to which duty should be understood as the proper conduct of a person. This definition is inherent in all civil relations.

In order to better understand the essence of civil duty, we consider it necessary to note its characteristics:

- proper behavior of the subject of civil law;
- such conduct is determined by the requirements of the norms of law, wills or persons authorized by deed or other legal fact;
- clearly defined content and model of behavior of the obligated subject. Thus, in accordance with Part 2 of Art. 14 of the Civil Code, a person may not be forced to act, the commission of which is not obligatory for him;
- the possibility of legal incentive to behave properly through means of encouragement and responsibility;
- release of the obligated person from proper conduct in cases established by a contract or acts of civil law.

4.1. Determining the legal nature of a fiduciary duty

We believe that the legal nature of fiduciary duty can be determined on the basis of the analysis of the above concepts. This is the proper conduct of the subject of trust, due to the conclusion of certain agreements (e.g., power of attorney, property management, joint activities, legal services, etc.), or the occurrence of legal facts (election of the body or person of the legal entity has the right to act on his/her behalf, the establishment of guardianship or custody, the death of an individual, etc.).

Conclusions

In conclusion, it can be noted that the definition of the legal nature of fiduciary duty is necessary for both law enforcement and civil law doctrine. Today, there are a large number of legal constructions, which

are based on a relationship of trust, which in its turn, cause the emergence of fiduciary responsibilities in their participants. In order to clarify the legal nature of fiduciary duty, such concepts as "fides", "fiducia", civil duty were analyzed. It is established that the first two, respectively, in the Roman law, had several meanings, but the main thing is the trust of participants in civil relations to each other. The other must be understood as the proper conduct of the subject of civil relations, the content and model of which are determined by the requirements of the norms of law, wills or persons authorized by deed or other legal fact. A fiduciary obligation arises in the subject of a trust relationship on the basis of a contract or legal fact.

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Legal Nature of Fiduciary Duty in Civil Law of Ukraine

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S u m m a r y

The diversity of fiduciary legal relations in the civil law of Ukraine requires the study of their individual elements, in particular, fiduciary duty. In the modern civil doctrine, the concept of "fiduciary duty" is quite common. Domestic and foreign scholars and practitioners such as R. A. Maidanik, O. R. Kibenko, and A. K. Kibenko, A. K. Bucholtz, A. B. Carroll, P. D. Finn, A. Dignam, J. Lowry, etc. paid attention to the analysis of issues related to it. However, the legal nature of the fiduciary duty remains unexplored. Therefore, the purpose of this article is to clarify it, in order to avoid legal uncertainty, which leads to difficulties in law enforcement and, as a consequence, ineffective legal protection of violated human rights due to nonperformance or improper performance of such obligations.

Such concepts as "fides", "fiducia", civil duty are analyzed. It is established that the first concept, respectively, in Roman law had several meanings, but the main thing is the trust of participants in civil relations to each other. The second one must be understood as the proper conduct of the subject of civil relations, the content and model of which are determined by the requirements of the norms of law, testaments or persons authorized by deed or another legal fact.

It was found that fiduciary duty is the proper conduct of the subject of trust legal relations, due to the conclusion of certain agreements (e.g., power of attorney, property management, joint activities, legal services, etc.) or the occurrence of legal facts (election of a body or a legal person, who has the right to act on his behalf, the establishment of guardianship or custody, death of an individual, etc.).

Fiduciarinės pareigos teisinė prigimtis Ukrainos civilinėje teisėje

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S a n t r a u k a

Fiduciarinių teisinių santykių įvairovė Ukrainos civilinėje teisėje reikalauja ištirti atskirus jų elementus, ypač fiduciarinę pareigą. Šiuolaikinėje civilinėje doktrinoje sąvoka „fiduciarinės pareigos" yra gana paplitusi. Su ja susijusių klausimų analizei skyrė dėmesio tokie Ukrainos ir užsienio mokslininkai bei praktikai, kaip antai R. A. Maidanik, O. R. Kibenko ir A. K. Kibenko, A. K. Bucholtz, A. B. Carroll, P. D. Finn, A. Dignam, J. Lowry ir kt. Tačiau fiduciarinės pareigos teisinė prigimtis lieka neištirta. Atitinkamai šio straipsnio tikslas – ją išaiškinti, kad būtų išvengta teisinio neapibrėžtumo, kuris lemia teisės taikymo sunkumus ir neveiksmingą teisinę pažeistų žmogaus teisių apsaugą dėl tokių pareigų nevykdymo ar netinkamo vykdymo.

Analizuojamos tokios sąvokos, kaip antai „fides", „fiducia", fiduciarinė pareiga. Nustatyta, kad pirmoji sąvoka romėnų teisėje turėjo kelias atitinkamas reikšmes, tačiau pagrindinė – civilinių santykių dalyvių pasitikėjimas vienas kitu. Antroji turi būti suprantama kaip tinkamas civilinių santykių subjekto elgesys, kurio turinį ir modelį lemia teisės normų, testamentų ar asmenų, įgaliotų veiksmu ar kitu juridiniu faktu, reikalavimai.

Nustatyta, kad fiduciarinės pareigos – tai tinkamas pasitikėjimo teisinių santykių subjekto elgesys dėl tam tikrų sutarčių sudarymo (pvz., įgaliojimo, turto valdymo, jungtinės veiklos, teisinių paslaugų teikimo ir kt.) arba juridinių faktų atsiradimo (organo ar juridinio asmens, turinčio teisę veikti jo vardu, išrinkimo, globos ar rūpybos nustatymo, fizinio asmens mirties ir kt.).

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