Tort Remedy for Bad Faith Breaches of Intracorporate Fiduciary Duty

Kenneth R. Arment
Tort Remedy for Bad Faith Breaches of Intracorporate Fiduciary Duty

American corporations have generated or contributed to many of the most notable economic, technological, and social achievements of recent world history. The strength and expansion of corporations has been responsible, in part, for the unprecedented economic well-being and standard of living enjoyed in American society. The business corporation, the most important economic institution of this nation, is owned by shareholders. The corporate entity has flourished on the economic principle of pooling shareholder investments. Control of the corporation then is centralized by shareholder delegation of managerial power to the directors and officers. As a result of this delegation, shareholders and society derive greater benefits from the specialized skill and expertise of a centralized management. Interference with management decisions by shareholders and outsiders may reduce the efficiency and profitability of the corporation. For purposes of this comment, this economic theory of pooling and specialization of management without interference will be referred to as the "corporate might" theory.

To ensure that the delegated power of corporate might is not used to the detriment of the shareholders, California has imposed a fiduciary duty on the officers, directors, and majority shareholders of the corporation. The term "fiduciary" covers relationships in which

2. Id.
5. Id. at 122. "Pooling benefits the participants because it may produce economies of scale, shift risk from individuals to larger groups, and create the means of accomplishing projects that individuals with isolated resources could not undertake." Frankel, Fiduciary Law, 71 Calif. L. Rev. 795, 804 (1983).
6. See R. Hamilton, supra note 4, at 122.
7. See Frankel, supra note 5, at 800-04. Specialization or division of labor maximizes the productivity of individuals by directing their work efforts in a particular and productive area. See id. In addition, given the tremendous amount of information available, a person would have a difficult, if not impossible, task of becoming an expert in all fields. See id. For example, the theory allows a business manager to specialize in making business decisions rather than performing all the tasks of the corporation like programming computers, typing, bookkeeping, making sales, loading freight, and cleaning the floors. See id.
8. See id. at 813.
one party entrusts or confides the execution of a task to another, the fiduciary, who acts as a substitute and for the benefit of the entrustor.\textsuperscript{11} While this delegation gives the fiduciary a position of superiority and influence over the entrustor,\textsuperscript{12} the vulnerability of the entrustor to abuse of power does not result from an initial inequality of bargaining power or lack of sophistication.\textsuperscript{13} Instead, the very nature and structure of the fiduciary relation creates the risk of abuse.\textsuperscript{14} Possession of this entrusted power creates a risk that the fiduciary will misuse the power and injure the entrustor.\textsuperscript{15} The duty of good faith and inherent fairness that corporate fiduciaries knowingly assume benefits both society and the shareholders.\textsuperscript{16} This duty should be enforced to protect the shareholders and encourage the delegation of power.\textsuperscript{17}

The cultural and legal values of society place a premium on the right of an individual to be free from negligent or intentional harm.\textsuperscript{18} Even more reprehensible than the infliction of this general harm is intentional harm to be inflicted on those in fiduciary relationships who cannot protect themselves.\textsuperscript{19} For purposes of this comment, the fiduciary theory of promoting duty and loyalty and protecting entrustors, independent of corporate law, will be referred to as the "individual right" theory.

The internal governance of corporations, including the rights of shareholders, is a matter of state law.\textsuperscript{20} State legislatures, however, have been criticized for enticing businesses to incorporate within their state borders by sacrificing shareholder checks on management.\textsuperscript{21}

\begin{footnotes}
\footnote{Courts of equity have refrained from defining the exact parameters of the definition to avoid exclusion of other and perhaps new relations. See id.}
\footnote{Frankel, supra note 5, at 800-01, 808-09. The term "entrustor" was coined by Professor Frankel to designate the party to whom the fiduciary duty is owed. See id. at 800 n. 17. This definition will be accepted for the purposes of this comment.}
\footnote{See J. Shepherd, supra note 10, at 61-64.}
\footnote{Frankel, supra note 5, at 810.}
\footnote{Id.}
\footnote{Id. at 809-11.}
\footnote{See id. at 802-03, 816.}
\footnote{See id. at 816-32.}
\footnote{Note, An Insurer's Bad Faith Refusal to Pay a Valid First Party Claim: A Tort Whose Time Has Come In Iowa, 32 Drake L. Rev. 987, 987-88 (1983).}
\footnote{Frankel, supra note 5, at 832 (this is the position the entrustor occupies in fiduciary relationships).}
\footnote{Cort v. Ash, 422 U.S. 66, 84 (1975).}
\end{footnotes}
Delaware has led the competition in a “race for the bottom” by watering down shareholder rights vis-a-vis corporate management. The purpose of this race was to attract corporate business by creating lenient corporation laws. Prior to 1975, shareholders predominantly relied on federal law for relief from the oppressive imbalance created by state law favoring the corporate might. The United States Supreme Court, however, subsequently left a void for enforcement of the individual right by ruling that federal securities law would not be applied as a substitute for the state law governing internal corporate management. The result is that state law often treats the internal conflicts and injuries of the twentieth century corporation with nineteenth century standards and fails to properly balance the interests of the corporate might and individual right. One interest not adequately protected is freedom of the individual right from intentional breaches of the corporate fiduciary duty of good faith and inherent fairness. California law currently does not provide the corporation or shareholders with a tort remedy for a bad faith breach of the corporate fiduciary duty. Equitable remedies, particularly in their application by California courts, do not afford shareholders adequate compensation or protection from violations of the special trust and good faith required by law. When the policies of corporate

24. Id.
25. Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 were broadly applied. F. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS, at iii-vii (1975, Supp. 1984); Roberts, The Status of Minority Shareholders’ Remedies for Oppression After Santa Fe and Singer and the Question of “Reasonable Investment Expectation” Valuation, 6 DEL. J. CORP. L. 16, 18 (1981). The United States Supreme Court reaffirmed that the purpose of federal law was to promote full disclosure to investors and not to ensure the underlying fairness of transactions. Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477-78 (1977). Since breach of fiduciary duty per se is not currently protected by federal law, individual shareholders are more at the mercy of corporate insiders than the unsophisticated public investor. Comment, Suits For Breach Of Fiduciary Duty Under Rule 10b-5 After Santa Fe Industries, Inc. v. Green, 91 HARV. L. REV. 1874, 1874-81 (1978).
26. Santa Fe, 430 U.S. at 479-80.
27. See, e.g., R. HAMilton, supra note 4, at 765. “The managers of a corporation inevitably will know more about corporate affairs than outside shareholders or members of the public who may be interested in purchasing shares. There is an obvious temptation to utilize this superior knowledge to turn a personal profit. Where the transaction takes place through the facilities of an anonymous stock exchange... the common law seems to have no doctrine that prohibits such transactions.” Id.
28. See infra notes 197-236 and accompanying text.
30. “Where a breach of fiduciary duty occurs, a variety of equitable remedies are available, including imposition of a constructive trust, rescission, and restitution, as well as incidental damages.” Hicks v. Clayton, 67 Cal. App. 3d 251, 264, 136 Cal. Rptr. 512, 520 (1977).
31. See infra notes 197-221 and accompanying text.
might and individual right conflict, the final balance should reflect societal values.\textsuperscript{32}

This author proposes a judicially adopted common law tort remedy for bad faith breach of the fiduciary duties owed to the corporation and shareholders by corporate directors, officers and majority shareholders.\textsuperscript{33} This proposed tort remedy is founded upon the same policy that promotes the individual right of freedom from bad faith harm in the insurance and employment law areas.\textsuperscript{34} The duty imposed on the insurer, employer, and corporate fiduciary must be part of a comprehensive fiduciary policy that protects the individual right.\textsuperscript{35} In each context, the parameters and consequences of the duty should be balanced against the adverse interests involved.\textsuperscript{36} As this author will demonstrate, application of this tort remedy in the corporate context would preserve the mechanism of entrepreneurial risk and reward while serving to deter willful breaches of the corporate fiduciary duty.\textsuperscript{37}

This comment begins with an example of California corporation law. The well-known California Supreme Court case of Jones v. H.F. Ahmanson\textsuperscript{38} is critiqued as an illustration of the imbalance between the theories of corporate might and individual right.\textsuperscript{39} A brief survey of the protection of the individual right in the dynamic areas of insurance and employment law follows the discussion of Ahmanson.\textsuperscript{40}

\textsuperscript{32} See Frankel, \textit{supra} note 5, at 802-03.

\textsuperscript{33} Remillard, 109 Cal. App. 2d at 419, 241 P.2d at 74.

\textsuperscript{34} See \textit{infra} notes 94-145 and accompanying text.

\textsuperscript{35} See Frankel, \textit{supra} note 5, at 797, 802-04.

\textsuperscript{36} \textit{Id.} at 810 provides:

Fiduciary relations vary by the extent to which each type of fiduciary can abuse his power to the detriment of the entrustor. The magnitude of the risk of abuse depends on: (1) the purpose for which the parties established the relation, and consequently the nature of power that must be delegated to achieve the parties' purposes; (2) the extent of the powers delegated to the fiduciary; and (3) the availability of protective mechanisms that reduce the probability of abuse.

The role of these factors in determining the risk of abuse can be demonstrated by a comparison of different types of fiduciary relations. For example, one of the main purposes for establishing a public corporation is to provide for centralized management. Consequently, the directors of the corporation should have freedom to make timely decisions without resorting to shareholder approval. On the other hand, employees are usually expected to act only under the employer's control. Therefore, the entrustor-shareholder in a fiduciary relation with a corporate director is much more vulnerable to abuse of power than is the entrustor-employer in his relation with the employee. \textit{Id.}

\textsuperscript{37} See \textit{infra} notes 237-54 and accompanying text.

\textsuperscript{38} 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969). The trial court sustained the demurrer of defendants without leave to amend and was affirmed by the appellate court in Jones v. H.F. Ahmanson & Company, 76 Cal. Rptr. 293, 299 (1969) [hereinafter referred to as \textit{Ahmanson I}]. This decision was vacated by the California Supreme Court in Jones v. H.F. Ahmanson, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 [hereinafter cited as \textit{Ahmanson II}].


\textsuperscript{40} See \textit{infra} notes 94-145 and accompanying text.
The author notes the similarity of duties and the inherent conflicts of interest involved in these two substantive areas of law. In each context, the courts have applied the same individual right doctrine, but have tailored the application of the tort remedy to balance and protect the competing values at stake. An examination then will be undertaken of judicial policy decisions to apply tort remedies to claims that historically, like the claims for bad faith breach of corporate fiduciary duty, were not governed by tort law.

The traditional and modern corporate law of fiduciary duty then will be introduced, followed by a discussion of the extent of the fiduciary duty owed by officers, directors and majority shareholders. This author then notes that the structure of modern corporate management creates a greater risk of abuse by corporate fiduciaries than does the traditional corporate structure. This author contends that existing corporate law, unlike the law of insurance and employment relations, inadequately compensates victims of fiduciary breaches and fails to deter the bad faith harm. Finally, this author concludes that greater corporate accountability to the individual right is desirable and possible without stunting the entrepreneurial imagination of industry.

**Jones v. H.F. Ahmanson**

An attempt to enumerate the various types of corporate fiduciary conduct that give rise to an action for the breach of the duty of good faith and inherent fairness is beyond the scope of this comment. Indeed, no list could be exhaustive. Instead, the *Ahmanson* case is discussed as an illustration of the imbalance in California corporation law between corporate might and individual right.

In *Ahmanson*, plaintiff was a member of the minority class of stockholders of the United Savings and Loan Association of California (hereinafter referred to as the Association). The defendants were the officers and directors of the Association, including many relatives and business associates of Howard F. Ahmanson and other companies...
controlled by the defendants. United Financial Corporation of California, a Delaware holding company [hereinafter referred to as United], also was named as a defendant.

The Ahmanson group organized United and then transferred shares of the Association to the holding company at a 1 to 250 ratio. The purpose of this exchange was to create a mechanism by which defendants could reap profits from investor interest in the Association.

The Association shares were not readily marketable although the defendants could have made them so. Minority shareholders of the Association who were not members of the controlling group were excluded from acquiring shares in United except upon terms available to the public. As a result of this exchange, United owned eighty-five percent of the Association stock. Defendants thus maintained control of United, and through United also controlled the Association.

A public offering of United shares, backed by the control the defendants had over the Association, resulted in a large return of capital to defendants from which the minority shareholders were excluded. United then offered to purchase Association shares from the minority shareholders at a considerably lower price than the comparable worth in the hands of defendants. Although the price was substantially below Association fair market value and book value, the offer still was attractive because the minority was locked in to the Association.

The creation of United had destroyed any other potential markets in which minority investors could recoup their share earnings.

Two years prior to the offer from defendants to buy minority shares, the Association declared extra dividends of seventy-five dollars and

52. Ahmanson I, 76 Cal. Rptr. at 299.
53. Ahmanson II, 1 Cal. 3d at 101, 460 P.2d at 466, 81 Cal. Rptr. at 594.
54. Id. at 102, 460 P.2d at 467, 81 Cal. Rptr. at 595.
55. Id.
56. This stock was not readily marketable due to a high book value, lack of investor information and facilities, and the closely held nature of the Association. Id. at 113, 460 P.2d at 474-75, 81 Cal. Rptr. at 602-03. The defendants could have treated the minority fairly by either causing the Association to have a stock split or creating a holding company that would have allowed all stockholders to benefit alike. Id.
57. Ahmanson I, 76 Cal. Rptr. at 299.
58. Ahmanson II, 1 Cal. 3d at 113, 460 P.2d at 475, 81 Cal. Rptr. at 603.
59. Id.
60. United sold $7,200,000 worth of underwriting stock and convertible debentures. Ahmanson I, 76 Cal. Rptr. at 299. Of this amount, $6,200,000 was paid by United to the original shareholders of United as a distribution on their stock equal to $927 per share. Id.
61. United offered $1,100 per share. Ahmanson II, 1 Cal. 3d at 104, 460 P.2d at 468, 81 Cal. Rptr. at 596. The book value was $1,411.57 per share with annual earnings of $301.15 per share. Id. The equivalent in United stock had a fair market value of $3,700 exclusive of the $927 return of capital. Id.
62. See supra note 56 and accompanying text.
63. Ahmanson II, 1 Cal. 3d at 114, 460 P.2d at 476, 81 Cal. Rptr. at 604.
fifty-seven dollars per share. After the offer closed, the defendants caused the Association president and director for both the Association and United to inform each minority shareholder that no dividends other than the regular four dollars per share would be paid in the near future. The plaintiff alleged this action was taken to pressure minority shareholders into accepting a subsequent proposed exchange of Association shares for United shares at a 1 to 51 ratio. At the hearing before the California Corporations Commissioner for a permit to approve the proposal United attempted to justify the exchange rate on the basis that the United shares were highly marketable. United abandoned the application after minority shareholders questioned the fairness of the plan. Suit was consequently filed.

The plaintiff alleged that the defendants used their control of the Association in bad faith to force minority shareholders to sell their shares at unreasonable prices. Defendant officers, directors and majority shareholders allegedly breached their fiduciary duties by controlling the corporation to further their personal advantage to the detriment of the minority. To avoid a derivative action, the plaintiff stipulated that the Association was not harmed by the breach of fiduciary duties. Fraud was not alleged because defendants had not made any misrepresentations or failed to disclose information. Plaintiff, however, did contend that defendants conspired to restrain trade in violation of the Cartwright Act and common law.

Both the trial and appellate courts sustained the demurrer of defendants without leave to amend. The California Supreme Court reversed the demurrer on the ground that majority shareholders owe a duty of good faith and inherent fairness to the minority in any transaction in which control of the corporation is material. The court failed

64. Id. at 104, 460 P.2d at 468, 81 Cal. Rptr. at 596.
65. Id.
66. A block of 51 United shares had a total value of approximately $2,400 with a book value of $210 and annual earnings of $134, 85 percent of which reflected Association earnings. Id. at 105, 460 P.2d at 468-69, 81 Cal. Rptr. at 596-97. The book value of Association stock exceeded $1,700 per share with annual earnings of $615 per share and the value of each Association share in the hands of defendants was $8,800. Id.
67. Id. at 105, 460 P.2d at 469, 81 Cal. Rptr. at 597.
68. Id.
69. See id.
70. Ahmanson I, 76 Cal. Rptr. at 303.
71. Id.
72. Id. at 295.
73. See Ahmanson II, 1 Cal. 3d at 105, 460 P.2d at 469, 81 Cal. Rptr. at 597.
74. See id.
75. See id. at 101, 460 P.2d at 466, 81 Cal. Rptr. at 594.
76. Id. at 115, 460 P.2d at 476, 81 Cal. Rptr. at 604.
to mention director and officer liability and found no violation of the Cartwright Act.\textsuperscript{77} Despite finding that the destruction of a public market for Association stock was a foreseeable consequence\textsuperscript{78} and that defendants should have exercised a different course of action,\textsuperscript{79} the court ruled that plaintiff was entitled to compensatory relief only in the form of a shareholder appraisal remedy.\textsuperscript{80} Even if plaintiff at a subsequent trial proved that the actions of the defendants were exercised in an effort to gain additional profits by intentionally locking the ownership interests of the minority into the Association, tort damages would not be awarded.\textsuperscript{81} The president of the Association faced no liability in his management position for bad faith actions in pressuring minority shareholders to sell at an inadequate price.\textsuperscript{82} The maximum liability the defendants faced on remand was to pay the minority the market value that their shares would have been worth if defendants originally had acted in good faith.\textsuperscript{83}

These remedies provide minimal deterrence against bad faith conduct, since an innocent breach of the fiduciary duty would result in the same liability.\textsuperscript{84} While defendants may have had to account for some interest for the time the profits were wrongfully withheld, they enjoyed the use of the money for the same period.\textsuperscript{85} Furthermore, the court ignored the opportunity to establish stronger equitable remedies.\textsuperscript{86} Since other remedies were excluded, the trial court on remand was left with no other equitable or tort remedy to deter a repeat performance by the defendants.\textsuperscript{87} Current corporate fiduciaries, in the same position, know that if they get caught they simply must pay the minority their fair share, but if the fiduciaries are not caught they will enjoy an extra profit at the expense of the minority.\textsuperscript{88}

California has acknowledged that compliance with state corporation statutes does not relieve the corporate fiduciary of the duty owed

\begin{footnotesize}
\begin{enumerate}
\item See id. at 118-19, 460 P.2d at 478-79, 81 Cal. Rptr. at 606-07.
\item Id. at 117, 460 P.2d at 478, 81 Cal. Rptr. at 606.
\item Id. at 115, 460 P.2d at 476, 81 Cal. Rptr. at 604.
\item Id. at 117, 460 P.2d at 478, 81 Cal. Rptr. at 606.
\item See id.
\item See id.
\item See id.
\item See Ahmanson II, 1 Cal. 3d at 118, 460 P.2d at 478, 81 Cal. Rptr. at 606.
\item See Hicks, 67 Cal. App. 3d at 264, 136 Cal. Rptr. at 520. Even the imposition of an unjust enrichment remedy, however, provides little deterrence since at worst the defendant must hand back the wrongful gain and if not caught make a handsome profit. See Thompson, supra note 84, at 396. The defendant does not face any punishment or liability for the wrongful conduct itself. See id.
\item See supra notes 78-86 and accompanying text.
\item See supra notes 50-87 and accompanying text.
\end{enumerate}
\end{footnotesize}
to the shareholders or the corporation. The function of this duty is to prevent abuse of the individual right. In the absence of misrepresentation or failure to disclose, as exhibited by Ahmanson, intentional bad faith injury may be freely inflicted on the shareholder entrustor as far as tort law is concerned. California courts have found equitable and contractual remedies inadequate to deter analogous bad faith actions in the insurance and employment relationships.

**TORT REMEDIES IN INSURANCE AND EMPLOYMENT AREAS**

Since 1958, California courts have protected the individual right from insurers by imposing a duty of good faith and fair dealing on the relationship of the insurer to the insured. The California Legislature subsequently adopted this duty by statute. Recently, a similar duty has been extended to employers when the discharge of employees would be a violation of fundamental public policy. In each of these relationships competing interests exist, similar to those in the conflict between the corporate might and the individual right. Yet, a bad faith breach of the duty owed in these relationships gives rise to not only traditional remedies for breach of the duty, but also tort remedies.

The relationships between the insurer and insured and the employer and employee are primarily contractual. In a contractual environment, the parties transact to meet their needs or desires. Breach of the obligations arising from the contract itself does not give rise to a tort. California courts, however, enforce a societal duty, that if breached, results in a tort. The duty to protect the individual right in these relationships is not founded upon the will or intention

---

89. *Ahmanson II*, 1 Cal. 3d at 108, 109, 460 P.2d at 471, 472, 81 Cal. Rptr. at 599, 600.
90. See *supra* notes 9-19 and accompanying text.
91. See *supra* notes 52-90 and accompanying text.
92. See *supra* note 33 and accompanying text.
93. See *infra* notes 94-145 and accompanying text.
95. See Cal. Ins. Code §790.03.
100. Frankel, *supra* note 5, at 799-800.
101. Tameny, 27 Cal. 3d at 175, 610 P.2d at 1334, 164 Cal. Rptr. at 843-44.
102. *Id.* at 175-76, 610 P.2d at 1334-35, 164 Cal. Rptr. at 843-44.
of the parties, but upon individual right concerns of society for unwarranted abuse of power.\textsuperscript{103} Contract law, even with the imposition of equitable remedies, fails to compensate plaintiffs adequately for extra-contractual harm caused by intentional abuse of the relationship.\textsuperscript{104} The societal duty in each context is measured by the competing interests involved.\textsuperscript{105} For example, the duty of the employer in the employment context is less rigid than the duty imposed upon the insurer.\textsuperscript{106} The clearest application of the individual right doctrine in bad faith actions is exhibited in the relationship between the insurer and the insured.

A. Duty of The Insurer To Respect The Individual Right

California courts have acknowledged the existence of a bad faith tort for both first\textsuperscript{107} and third party\textsuperscript{108} claims. These actions may be brought against the insurer for refusing, in bad faith, to pay an insured for a claim owed under an insurance policy\textsuperscript{109} or to settle a claim with a third party.\textsuperscript{110} Insurers are not required to pay all claims or settle with a third party.\textsuperscript{111} Insurers merely are prohibited from unreasonably refusing to pay or settle an obligation that is due.\textsuperscript{112}

California courts have closely policed the special duty of the insurer because of the inherent conflict of interest between the loyalty of the insurer to the insured and the profit motive of the insurer.\textsuperscript{113} With each delay of a payment rightfully owed, insureds face the hardship of the lack of realization of an expected property right.\textsuperscript{114} Meanwhile, the insurers attempt to minimize the award of any claim.\textsuperscript{115} Insurers have a profit incentive to take advantage of the economic benefit they

\textsuperscript{103} See infra notes 109-36 and accompanying text.


\textsuperscript{105} See Seaman's Direct Buying Service, Inc. v. Standard Oil Company of California, 36 Cal. 3d 752, 768-69, 769 at n.6, 686 P.2d 1158, 1166-67, 1166 at n.6, 205 Cal. Rptr. 354, 362-63, 362 at n.6 (1984); Frankel, supra note 5, at 810.

\textsuperscript{106} See Seaman's, 36 Cal. 3d at 768-69, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362-63.

\textsuperscript{107} First party actions involve suits by an insured against an insurer for failing to pay or unreasonably delaying payment of a claim owed to the insured. See Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 575, 510 P.2d 1032, 1038, 108 Cal. Rptr. 480, 486 (1973).

\textsuperscript{108} See, e.g., Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958) (third party action brought against insured for refusal of insurer to settle with injured party, consequently leaving the insured personally liable for judgment in excess of policy limits).

\textsuperscript{109} See Gruenberg, 9 Cal. 3d at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

\textsuperscript{110} See Comunale, 50 Cal. 2d at 657-59, 328 P.2d at 200-01.

\textsuperscript{111} Bourhis, supra note 94, at 48.

\textsuperscript{112} Id.

\textsuperscript{113} See Gruenberg, 9 Cal. 3d at 582, 510 P.2d at 1043, 108 Cal. Rptr. at 491.

\textsuperscript{114} See Note, supra note 18, at 987; Note, Insurance—Bad Faith and First Party Extracontractual Damages, 5 AM. J. TRIAL ADVOC. 497, 500 (1982).

\textsuperscript{115} See Gruenberg, 9 Cal. 3d at 582, 510 P.2d at 1043, 108 Cal. Rptr. at 491.
derive from inadequate payments and delay. On the other hand, insureds lack an efficient remedy in contract law for harm caused by the bad faith delay. Prior to the judicial adoption of a tort remedy, insureds were forced to litigate their claims unnecessarily while insurers would profit from the interest accruing on these claims. Ordinary contract damages offer no motivation for the insurer not to breach. "In this context, compensatory and contract damages don't really compensate . . . reparation plus admonition are urgently required." To counteract this unfair situation and stem the tide of unnecessary litigation, California courts adopted a policy designed to promote good faith insurance settlements. To safeguard the individual right of insureds to be free from unreasonable harm, the courts resorted to tort remedies to enforce the good faith duty of insurers. Insurance law is not the only area in which tort remedies recently have been utilized to protect the individual right. California courts have applied tort remedies to the employer-employee relationship.

B. Duty of the Employer to Respect the Individual Right

The California Supreme Court in Tameny v. Atlantic Richfield Co. held that a wrongfully discharged employee has a tort action with corresponding remedies against an employer. The terminable-at-will employee in Tameny was discharged for refusing to coerce gasoline retailers into setting lower prices as part of a scheme to violate the Sherman Antitrust and Cartwright Acts. The supreme court in Tameny stated that to allow an employer to discharge an employee for refusing to violate a statute would be obnoxious to the interests of the state and contrary to public policy.
in *Tameny* was found to have breached not only an unwritten employment contract, but more importantly, a societal duty that protects the individual right to be free from unreasonable harm. Although the discharge by the employer in *Tameny* was not specifically barred by statute, the court nevertheless ruled that statutes may articulate fundamental public policy that must be protected.

The relationship between an employer and an employee, like the relationship between an insurer and an insured, presents a risk of abuse. Duties of loyalty and good faith may be imposed on both the employer and the employee regardless of contractual obligations. The employer in *Tameny* intentionally abused the special duties owed to the employee in an attempt to reach an end that violated fundamental public policy and inflicted harm upon the employee. The contention of the employer that the employee was limited to contractual damages was rejected. The court held public policy required that the employee, like the insured, have access to tort remedies, including compensation for emotional harm and the imposition of punitive damages in order to punish and deter bad faith infringement on the individual right.

C. Tort Remedies and Punitive Damages for Breach of Duty

Plaintiffs in both the employment and insurance contexts have tort causes of action for bad faith breach of the duty to respect the individual right. The general rule in California is that the injured party may recover tort damages for all detriment incurred, whether anticipated or not. Since breach of the good faith duty is considered an intentional tort, recovery may include damages for economic

---

130. Under both statutory and common law an employer does not enjoy an absolute right to discharge an at-will employee. *Id.* at 172, 610 P.2d at 1332-33, 164 Cal. Rptr. at 841-42. Discharge of an employee is limited by statutory objectives or firmly established principles of public policy. *Id.*

131. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.

132. See *supra* notes 113-31 and accompanying text.

133. Fiduciary relations do not give rise to reciprocal legal obligations. Frankel, *supra* note 5, at 818-20. The obligations placed on the employee are not designed to benefit the employer, but rather to facilitate the performance of services by creating an incentive to act diligently. See *id.*

134. See *Tameny*, 27 Cal. 3d at 170, 610 P.2d at 1331, 164 Cal. Rptr. at 840.

135. *Id.* at 174-75, 610 P.2d at 1334, 164 Cal. Rptr. at 843.

136. *Id.* The general rule is that the injured party may recover tort damages for all detriment caused whether the injury could have been anticipated or not. See Cal. CIV. Code §3333. Punitive damages are available when a defendant is found guilty of oppression, fraud, or malice. Cal. CIV. Code §3294.

137. See *supra* notes 94-105 and accompanying text.

138. See *supra* note 136 and accompanying text.

loss and mental distress, as well as punitive damages. An invasion of a property interest is sufficient harm to trigger the tort remedy. Additionally, if the plaintiff shows that the defendant is guilty of oppression, fraud or malice, punitive damages may be awarded.

In applying this standard, California courts allow juries to assess punitive damages following a determination that the defendant acted with a conscious disregard of the rights of the plaintiff.

The expansion of remedies for bad faith breaches of the duty owed in insurance and employment relationships represents only two areas in which California courts have continued to develop the common law. The development of these areas of the law illustrates that tort remedies are needed to compensate victims and deter repeated bad faith violations of the individual right. Having established that breach of the duty protecting the individual right gives rise to tort remedies in contractual relationships, this author will proceed by analogizing to the fiduciary duties existing in internal corporate relationships.

PAST AND PRESENT CORPORATE FIDUCIARY DUTY: GOOD FAITH AND FAIR DEALING

The interests of the corporate might and the individual right must be balanced to avoid entrepreneurial stagnation. The corporate might

---

Adoc. 497, 500 (1982); see W. KEETON, PROSSER AND KEETON ON TORTS, 130, 1029 (5th ed. 1984).

140. See supra notes 137-39 and accompanying text.
141. Note, infra note 146, at 500.
143. Id.
144. In Seaman's, the California Supreme Court declined to decide if breach of the implied covenant of good faith and fair dealing in all contracts always gives rise to an action in tort. Seaman's, 36 Cal. 3d at 767-69, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362-63. The court noted that in the insurance context, emphasis has been placed on the "special relationship" between insurer and insured, characterized by elements of public interest, adhesion and fiduciary responsibility. Id. at 768, 686 P.2d at 1166, 206 Cal. Rptr. at 362. The court then added: "No doubt there are other relationships with similar characteristics and deserving of similar legal treatment" and cited Tameny and the employment relationship. Id. at 769, 686 P.2d at 1177, 206 Cal. Rptr. at 373. Chief Justice Bird, in a concurring opinion, however, stated that tort liability should be imposed upon a showing of bad faith even in the context of the ordinary commercial contractual relationship involving parties of roughly equal bargaining power. Id. at 784, 686 P.2d at 1177, 206 Cal. Rptr. at 373; see also Wallis, 160 Cal. App. 3d at 1116, 207 Cal. Rptr. at 127 (the court found characteristics similar to the insurance relationship in an employment relationship and allowed claims of plaintiff for bad faith breach of contract).
interests, in the form of the business judgment rule,\textsuperscript{147} dictate that directors and officers will not be held liable on the basis of hindsight for negligent business decisions that create losses or fail to maximize the return on capital.\textsuperscript{148} If liability did attach to these decisions, management might be overly conservative and, in effect, cheat investors by always failing to maximize capital return.\textsuperscript{149} The business judgment rule, however, is not designed to protect corporate fiduciaries from liability for intentional breaches of their fiduciary duty.\textsuperscript{150} State law balances the corporate might interest against the individual right interest by imposing a fiduciary obligation on directors, officers and majority shareholders.\textsuperscript{151} This fiduciary duty is owed to both the corporation and the shareholders.\textsuperscript{152} The parameters of this fiduciary duty escape precise definition and may vary depending on the parties involved.\textsuperscript{153} An analysis of this fiduciary duty imposed upon officers, directors, and majority shareholders within the corporate structure follows. The fiduciary position to be examined first is that of a corporate director.

\textbf{A. Traditional Structure of the Corporation}

Directors are charged with overseeing the corporation for the benefit of the shareholders.\textsuperscript{154} They are elected by the votes of the shareholders, based on ownership interest.\textsuperscript{155} The primary function of the board of directors is to oversee and evaluate the performance of management in running the corporation.\textsuperscript{156} The California Corporations Code requires that directors perform their duties in the manner they believe to be in the best interest of the corporation.\textsuperscript{157} This is the statutory manifestation of the business judgment rule.\textsuperscript{158} As long as business decisions are made in a reasonable and good faith manner, directors need not fear personal liability.\textsuperscript{159}

\begin{thebibliography}{99}
\bibitem{147} Under the business judgment rule, courts presume that corporate management decisions were made in good faith and in the best interests of the corporation. See 1 Ballantine & Sterling, \textit{supra} note 29, at §102.01. This rule reflects a judicial policy of refraining from second guessing corporate management and policy decisions.
\bibitem{148} Kraakman, \textit{supra} note 146, at 883-84.
\bibitem{149} Id.
\bibitem{150} The business judgment rule is intended to protect only decisions made in good faith. See \textit{infra} notes 157-59 and accompanying text.
\bibitem{151} See \textit{infra} notes 154-96 and accompanying text.
\bibitem{152} See id.
\bibitem{154} Id.
\bibitem{155} See R. Hamilton, \textit{supra} note 4, at 375-76.
\bibitem{156} Geneen, \textit{supra} note 21, at 28.
\bibitem{157} Cal. Corp. Code §309(a).
\bibitem{158} 1 H. Marsh, \textit{supra} note 153, §10.3, at 571.
\bibitem{159} Id. The "reasonable" standard is considered in light of the business judgment rule,
\end{thebibliography}
While not technically trustees, directors bear a fiduciary relationship to the corporation and the shareholders.\(^1\)\(^6\) This relationship imposes a duty of the highest good faith upon directors.\(^1\)\(^6\)\(^1\) They are required to act in the best interests of the corporation and not for the purpose of personal profit or gain.\(^1\)\(^6\)\(^2\) A director violates this fiduciary duty by making or retaining secret profits.\(^1\)\(^6\)\(^3\) The role of a corporate officer carries a similar duty to that of the corporate director.\(^1\)\(^6\)\(^4\)

Traditionally, officers have been delegated the authority to manage the daily routine of the corporation.\(^1\)\(^6\)\(^5\) Courts have held that the duty of good faith and fair dealing owed by directors extends to officers.\(^1\)\(^6\)\(^6\) Since the duties owed by officers vary with their positions, however, they may be subject to higher or lower standards of care than directors.\(^1\)\(^6\)\(^7\) Thus, these fiduciaries cannot secure for themselves advantages not available to the shareholders in general.\(^1\)\(^6\)\(^8\) The officers also enjoy protection from negligent business decisions rendered within the confines of the business judgment rule.\(^1\)\(^6\)\(^9\)

The majority shareholders owe a similar fiduciary duty to minority shareholders.\(^1\)\(^7\)\(^0\) This duty also is imposed on a dominant or controlling shareholder or groups of shareholders although this duty is not expressly provided in the California Corporations Code.\(^1\)\(^7\)\(^1\) This duty arose from the potential of a dominant shareholder to manipulate the corporation or corporate property for the personal benefit of the majority, to the detriment of the minority.\(^1\)\(^7\)\(^2\) California courts closely scrutinize dealings between the majority shareholder and the corporation, particularly when the transactions result in the sale or control of the corporation.\(^1\)\(^7\)\(^3\)

Prior to Ahmanson, this close judicial scrutiny only applied to a sale or transfer of actual control of the corporation.\(^1\)\(^7\)\(^4\) The California

\(^{160}\) See 6 B. Witkin, SUMMARY OF CALIFORNIA LAW, Corporations §91, at 4388 (8th ed. 1974).

\(^{161}\) Id.

\(^{162}\) Id., supra note 159, §80, at 4378.

\(^{163}\) Id., supra note 153, §10.6, at 589.

\(^{164}\) Id.

\(^{165}\) Id., supra note 153, §10.1, at 568.

\(^{166}\) Id., supra note 159, §80, at 4378.

\(^{167}\) Id., supra note 153, §10.6, at 589.

\(^{168}\) Id., supra note 153, §10.1, at 568.

\(^{169}\) Id., supra note 159, §80, at 4378.

\(^{170}\) Id., supra note 153, §10.6, at 589.

\(^{171}\) Id., supra note 153, §10.1, at 568.

\(^{172}\) Id., supra note 159, §80, at 4378.

\(^{173}\) Id., supra note 159, §80, at 4378.

\(^{174}\) Id., supra note 153, §10.6, at 589.
Supreme Court, however, found that the traditional rule was insufficient to protect the minority shareholders in all circumstances.\(^\text{175}\) Since no sale or transfer of actual control had taken place in \textit{Ahmanson}, the injury to minority shareholders could be "inflicted with impunity" under traditional law.\(^\text{176}\) Breaking with traditional law, the supreme court in \textit{Ahmanson} imposed a comprehensive rule of good faith and inherent fairness in any transaction in which the control of the corporation is material.\(^\text{177}\) The court stated that the use of majority power to control the corporation should be considered in the same light as that of a trustee dealing with a trust estate and beneficiary.\(^\text{178}\) The method used to ensure this trust in \textit{Ahmanson}, however, was only the equitable imposition of compensatory damages in the form of a shareholder appraisal remedy.\(^\text{179}\) The need for a tort remedy for bad faith is even more imperative in light of the breakdown of the traditional corporate structure.

\section*{B. The Modern Corporate Structure}

Modern corporations tend to place actual control of the corporation in the hands of the officers.\(^\text{180}\) Officers usually are on the board of directors and determine the best interests of the shareholders.\(^\text{181}\) Potential abuse of the individual right is greater in the modern corporation than the traditional model of corporations since the board of directors cannot effectively oversee the officers.\(^\text{182}\) Officers usually are on the board of directors and will expel other directors who diligently question the acts of the management.\(^\text{183}\) Officers are employed to exercise their skill and best judgment to maximize the wealth of the corporation, but unchecked conflicts of interest pose great potential for abuse of their entrusted power.\(^\text{184}\) While officers may receive incentive bonuses for good performance they are not likely to fire themselves if they make the wrong decisions.\(^\text{185}\) A national movement has resulted from this conflict and lack of restraint on corporate

\begin{addendum}
\item \textit{Id.} at 112, 460 P.2d at 474, 81 Cal. Rptr. at 602.
\item \textit{Id.}
\item \textit{Id.} at 115, 460 P.2d at 476, 81 Cal. Rptr. at 604.
\item \textit{Id.} at 111, 460 P.2d at 473, 81 Cal. Rptr. at 601.
\item \textit{Id.} at 117, 460 P.2d at 478, 81 Cal. Rptr. at 607.
\item Ruder, supra note 21, at 771; Geneen, \textit{supra} note 21, 28-32; Ichan, \textit{supra} note 21, at 4.
\item Geneen, \textit{supra} note 21, at 29-31.
\item See supra note 180 and accompanying text.
\item Geneen, \textit{supra} note 21, at 29-31 (in more than 75\% of the Fortune 500 corporations the chief executive officer chairs the board).
\item See supra notes 9-19 and accompanying text.
\item See Geneen, \textit{supra} note 21, at 29-31.
\end{addendum}
management with the goal of curbing managerial power. The proponents of this movement call for federal regulation of internal corporate management to safeguard and promote the individual right. California courts, however, have yet to respond with new remedies designed to protect shareholders from managers who promote their own welfare in derogation of their obligation to shareholders.

Corporate fiduciaries owe a duty of good faith to minority shareholders. This good faith duty is breached when the interests of the shareholders are subordinated in favor of the personal interests of the fiduciary. Unlike application of the individual right theory in the insurer-insured and employer-employee relationships, the seemingly higher standard of duty imposed upon the corporate fiduciary is not protected by the same tort remedy, despite the historic policy of California corporation law that abhors breaches of the good faith duty. In *F.&M. Bank v. Downey*, the California Supreme Court expressed this policy as follows:

> When agents and others, acting in a fiduciary capacity, understand that these rules will be rigidly enforced, without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it.

Unfortunately, the methods of deterring the bad faith of corporate fiduciaries have not changed greatly since 1879, while the corporate structure and fiduciary laws have. No longer do modern corporate directors rely on their own judgment for the benefit of the shareholders. Instead they are dominated by the will of the corporate officers. Since the balance has tilted toward the corporate might without a corresponding weight being placed on the side of the individual right, state law is currently inadequate to protect the interests of the individual right.

**Existing State Law Inadequate**

The need for legal innovation is apparent as our society shifts from an industrial orientation to one with an emphasis on high technology.
and fiduciary relationships. The intentional nature of the bad faith tort is sufficient to dissipate concerns of unlimited liability attaching to negligent business decisions. Furthermore, emotional damage is as real as physical damage and therefore equally deserving of legal protection.

The societal interest in the individual right is enormous. Millions of minority shareholders throughout the nation invest in public corporations. The only contacts most shareholders have with directors and officers of the corporation occur through proxy solicitations. The directors, officers, and shareholders combine to create a corporate venture in the quest for profit. The typical participation by a minority shareholder, however, is relegated to near total reliance on the good faith and inherent fairness of the corporate fiduciaries.

Minority shareholders rely on corporate management to police the affairs of the corporation. Decisions involving a conflict between what is best for shareholders and what is best for management are decided by management. Management has confidential information and access to the economic power of the corporation. The imposition of a good faith requirement upon management, therefore, was designed to police inherent conflicts of interest. The potential to abuse the individual right in intracorporate fiduciary relationships can be analogized to the conflicts existing in the insurance and employment relationships.

While California courts have resorted to imposing a duty of good faith on all three relationships, only the latter two are protected by a tort remedy to deter a breach of that fiduciary duty.

197. See Bolla, supra note 104, at 577-79.
198. See id. at 565, 574-79.
199. See id. at 578.
200. Stewart v. Ruder, 84 N.W.2d 816, 824 (Mich. 1957); 1 J. SUTHERLAND LAW OF DAMAGES, 156-57 (1st ed. 1882). "With ever-progressive advances in medical science, it is now possible to determine with convincing certainty whether plaintiffs have actually suffered a mental or emotional injury. In short, damages for mental distress are moving from the intangible to more tangible, and becoming increasingly measurable." Bolla, supra note 104, at 566.
201. See supra notes 9-19 and accompanying text.
204. See supra notes 1-8 and accompanying text.
205. See supra note 5, at 814.
206. See supra notes 151-79 and accompanying text.
207. See supra note 151-79 and accompanying text.
208. See id.
209. See supra notes 183-85 and accompanying text.
210. See supra notes 151-53 and accompanying text.
211. See supra notes 137-45 and accompanying text.
The existing equitable remedies applied to the breach of the corporate duty of good faith are similar to the ineffective remedies for bad faith previously available in the insurance and employment areas. Fiduciaries face little deterrence while the courts merely continue to apply contractual and compensatory remedies under the guise of equity. When courts follow the precedent of Ahmanson, the remedy requires only the return of minority profits accompanied with the legal rate of interest from the date of the breach. When the legal interest rate for shareholder appraisal rights is below open market rates, a bad faith fiduciary may actually profit even if caught. The Ahmanson court could have left the trial court the option of imposing a constructive trust requiring the defendants to account for all the gains, but instead stated that plaintiff was entitled to no more than the limited compensatory remedy. American courts have been reluctant and unimaginative in the imposition of strong and effective equitable remedies. Application of tort remedies in intracorporate relationships would serve the same function of protecting the individual right to be free from unreasonable harm that exists in the insurer-insured and employer-employee relationships. In these contexts, tort law allows recovery for all harm, including emotional injury, caused by the bad faith interference with the rights of the entrustor. Under corporation law, however, tort remedies are available only upon a showing of fraud. Even in the absence of fraud, a strong deterrent to breaches of the fiduciary duty of good faith should be available.

A. Inadequate Deterrent to Abuse of Power

The purpose of awarding punitive damages is to discourage oppression, fraud or malice by punishing the wrongdoer in situations in which the mere granting of restitution is inadequate to deter. Before committing a breach of duty, the rational corporate fiduciary considers the repercussions of getting caught. If these repercussions

212. See supra notes 119-23, 134-36 and accompanying text.
214. Ahmanson II, 1 Cal. 3d at 117, 460 P.2d at 478, 81 Cal. Eptr. at 606.
215. See supra notes 117-23, 135-36 and accompanying text.
216. See infra notes 117-23, 135-36 and accompanying text.
217. See supra notes 117-23, 135-36 and accompanying text.
218. O'Neal, supra note 25, at 582.
219. See infra notes 103-06 and accompanying text.
220. See id.
221. See infra notes 117-23, 135-36 and accompanying text.
multiplied by the odds of getting caught are less than the personal rewards to be received by the fiduciary if the good faith duty is breached, a monetary incentive exists for the fiduciary to act in bad faith.\textsuperscript{224} Due to this potential abuse of power, a fiduciary duty is imposed upon corporate management.\textsuperscript{225} Current remedies, explained above, add little weight to the repercussions considered by the corporate fiduciary.\textsuperscript{226} This is particularly true with fiduciaries of large corporations because they enjoy the protection of liability insurance purchased by the very corporation they have betrayed.\textsuperscript{227} The possibility of facing punitive damages, however, would become an additional factor to deter bad faith.\textsuperscript{228} In many cases such as \textit{Ahmanson}, the corporation suffers no harm.\textsuperscript{229} Courts should not excuse self serving wrongful actions merely because the plaintiff did not suffer an ascertainable harm.\textsuperscript{230} Resolution of the problem to prevent self serving actions that do not produce ascertainable harm can be accomplished by analogizing to the law of trusts.\textsuperscript{231} Courts often have turned to trust law for defining standards of corporate fiduciary duty.\textsuperscript{232}

Under California case law, a trustee or other fiduciary is guilty of "constructive fraud"\textsuperscript{233} against the beneficiary and exposed to tort and punitive damages for acquiring an adverse or personal interest in the cestui.\textsuperscript{224} Punitive damages may be imposed upon a showing of abuse of the fiduciary duty, even though the complaining party is unable to show an ascertainable harm.\textsuperscript{233} In the corporate law context, however, as exhibited by \textit{Ahmanson}, courts rarely mention the imposition of a constructive trust upon corporate fiduciaries.\textsuperscript{236} If the special corporate fiduciary relationship is intentionally breached, courts should impose a punishment for this violation. Plaintiffs injured by

\begin{thebibliography}

\bibitem{224} See \textit{id}.
\bibitem{225} See Frankel, supra note 5, at 808-11.
\bibitem{226} See Mallor & Roberts, supra note 222, at 648.
\bibitem{227} See Geneen, supra note 21, at 31.
\bibitem{228} See Mallor & Roberts, supra note 222, at 648.
\bibitem{229} See \textit{Ahmanson I}, 76 Cal. Rptr. at 303.
\bibitem{231} See \textit{id}.
\bibitem{232} Frankel, supra note 5, at 804-08.
\bibitem{233} \textit{CAL. CIV. CODE} §1573 provides that:

\textit{Constructive fraud consists:} (1) In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or, (2) In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

\bibitem{234} \textit{Werschkull}, 85 Cal. App. 3d at 1002, 149 Cal. Rptr. at 842.
\bibitem{235} \textit{Id}.
\bibitem{236} See supra note 86 and accompanying text.
\end{thebibliography}
the bad faith conduct of corporate fiduciaries should have a tort remedy.

**TORT REMEDY SHOULD BE AVAILABLE**

The breach of a duty that is imposed by society lays a foundation for a tort remedy. A tort remedy for intentional breach of fiduciary duty would afford greater protection to the individual right interest of shareholders. This protection should not, however, undermine the corporate might doctrine.

A. Greater Shareholder Protection not Destructive to Corporations

The purpose of the proposed tort remedy is to deter willful and wrongful breaches of the duty of good faith and inherent fairness owed to the corporation and shareholders by corporate fiduciaries. California has recognized that wrongful acts committed in the course of contractual relationships may afford both tort and contract relief. The corporate fiduciary relationship is analogous to those contractual relationships. In each of these relationships, the individual right doctrine must be balanced against a policy of promoting business in the American economic system. In recognition of the special trust owed by corporate fiduciaries, the same theory affording protection to insureds and employees should be extended to shareholders. As made clear in these other relationships, a tort remedy in the corporate context will not spell the doom of business interests.

The tort remedy should be directed, as in the insurance and employment relationships, toward bad faith and not mere negligence. As long as the corporate fiduciary acts reasonably and in good faith, there would be no basis for personal liability. Since this standard embodies the current state of the law, only the remedy would be changed. Consequently, the adoption of a tort remedy would not

237. Tameny, 27 Cal. 3d at 174-75, 610 P.2d at 1334-35, 164 Cal. Rptr. at 843-44.
238. See supra notes 197-236 and accompanying text.
239. See supra notes 1-8 and accompanying text.
240. See supra notes 151-79 and accompanying text.
241. See supra notes 137-45 and accompanying text.
242. See supra notes 1-8 and accompanying text.
243. See supra notes 151-74 and accompanying text.
244. See supra notes 16-19, 32 and accompanying text.
245. See supra notes 197-221 and accompanying text.
246. This is the currently accepted business judgment standard. See supra notes 147-50 and accompanying text.
247. Id.
impinge upon honest business decisions, but would discourage corporate fiduciaries from acting in conscious disregard of the duty they have assumed. The parameters of liability of the bad faith corporate fiduciary must be tailored to preserve corporate might interests. Courts may draw on other areas, including insurance, employment, and trust law, to articulate the boundaries of this liability. This author does not attempt to apply the identical bad faith standards existing in the insurance and employment areas. The balance struck between corporate might and individual right should reflect the unique interests of corporate law. Given the vulnerability of insureds, a very high good faith standard has been applied to the insurer. The same high standard may not be appropriate, however, if applied to corporate fiduciaries. On the other hand, the Tameny standard is too lenient to be applied to corporate fiduciaries since employers do not have a fiduciary duty to account for business decisions to employees. Furthermore, the risk of abuse of the corporate fiduciary relationship is greater than the risk of abuse by the employer.

CONCLUSION

This author has discussed some of the problems of protecting the individual right to be free from unreasonable harm in the corporate context in the absence of tort remedies. An analogy was drawn between the rationale of the modern tort policy of California and the historic duty of good faith and inherent fairness owed by corporate fiduciaries. This examination found that existing compensatory damages are inadequate. In addition, little, if any, deterrent effect currently exists to prevent the corporate fiduciary from acting in bad faith. Adoption of a tort remedy, however, would provide a greater deterrent to the conscious disregard of this duty of good faith, and yet would not impede the honest business judgment of corporate executives in pursuit of profits.

A cohesive policy of fiduciary law should set the standards and create the obligations with respect to internal corporate accountability. Adoption of this proposed tort remedy would further the greater protection needed for shareholders. A tort remedy for bad faith would

248. See id.
249. See supra notes 1-8 and accompanying text.
250. Tameny, 27 Cal. 3d at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.
251. See Seaman's, 36 Cal. 3d at 768-69, 686 P.2d at 1166, 206 Cal. Rptr. at 362.
252. See Frankel, supra note 5, at 810.
253. See id.
254. See id.
help to restore the balance between the corporate might and individual right. In the best interests of society, tort sanctions for socially unacceptable bad faith conduct also should apply to corporate fiduciaries.

Kenneth R. Arment