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A Comparison of Fiduciary Duties as a Corporate Governance Mechanism in the US and China

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Abstract: *The fiduciary duties are one of the core institutions of modern corporate governance and serve as an effective way of judicial intervention in corporate governance. In the United States, the origin, nature and content of fiduciary duties have been extensively debated, and a more complete standard of review has also been developed in judicial practice. Under US law, the standard of review on the duty of care is mainly based on the business judgment rule. The business judgment rule is often described as a legal presumption that directors and officers of a company exercise due care by acting in good faith on an informed basis and in the good faith belief that their actions are in the best interests of the company. By exploring the development history, existing problems and future development direction of US legal system of fiduciary duty and standard of review, and combining the domestic practice with the legal tradition, this paper provides a reference for the construction of legal system of fiduciary duty and standard of review in Chinese Company law.*

Keywords: *Fiduciary Duties; Duty of Care; Business Judgment Rule; Chinese Company law*

1. Introduction

This essay examines fiduciary duties as a corporate governance mechanism, concerning the comparison of the US and China. It discusses primarily the fiduciary duties of the United States, followed by a focus on the fiduciary duties of China. In modern corporate governance theory, "the separation of ownership and control of a company" gives rise to a problem that economists call the "agency problem".[1] There is indeed a significant deviation between the interests pursued by the directors and those of the shareholders. Most of the provisions in company law can therefore be seen as addressing this "agency problem" in order to guide directors or force directors to prioritise the interests of the company and shareholders. As one of the most effective vehicles for dealing with modern corporate agency problems, the fiduciary duties system plays a key role in balancing and resolving conflicts of interest between the company's stakeholders (directors-shareholders, controlling shareholders-minority shareholders). In the UK, fiduciary duties were an obligation crafted by the Court of Chancery in the 18th and 19th centuries for those who owned assets or exercised representation for the benefit of others, and directors' fiduciary duties are the result of this system being applied by analogy to corporate relationships. In 1939, Pepper v. Litton clarified the basic meaning of the fiduciary duties more clearly, setting out the requirements of "good faith" and "inherent fairness". The fiduciary duty demands that the fiduciary cannot abuse his or her powers and cannot place the interests of shareholders and creditors (in the event of insolvency) below his or her own.

In civil law jurisdictions, the appointment relationship theory has traditionally been used to explain directors' fiduciary duties. In common law jurisdictions, the "corporate contract theory" has also been used to explain the origins of the fiduciary duty theory, but this argument has also been challenged by many scholars. Despite significant disagreement over the origins and necessity of the fiduciary duty, there is general agreement in theory and practice that the duties imposed on company directors by traditional fiduciary duties contain two elements: they impose a dual "duty of loyalty and care". For most jurisdictions, the two main foundations of fiduciary duties are the "duty of care" and the "duty of loyalty". Although they have different concerns, their ultimate purpose is to regulate and limit the business misconduct of managers. The former tends to focus on the decision-making process of directors and officers. The latter tends to focus on motives and attempts to eliminate the possibility of interest conflicts from a motivational perspective. Unlike the common law system, the duty of fiduciary duty under Japanese company law considers the duty of loyalty to be only one specific aspect of the duty of care.[2] For shareholder representative actions arising from a breach of a director's duty of care, Japanese courts generally apply a standard of review which is similar to the "business judgment rule".[2] However,

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fiduciary duties are not well developed in China and the current provisions on fiduciary duties in Chinese company law can actually be seen as an ornament and do not play a very effective part in corporate governance.

This essay will explore whether the transplantation of the concept of fiduciary duty and standards of review from US law to Chinese company law legislation can provide incentives for all stakeholders in corporate governance to act as expected to enhance the company's value. The core question that the essay seeks to answer is whether the US solution to fiduciary duties can provide ideas for the problems that currently exist in China. This essay will be developed in four parts: the first part examines the theoretical debate on fiduciary duties and the main contents of fiduciary duties; the second part further summarises the good practices and unresolved issues in the evolution of Delaware's fiduciary duties; then, I will consider how Chinese fiduciary duties differ from those in the United States, as well as summarise the current shortcomings of the "fiduciary duty framework" in Chinese corporate law in the third part; finally, I will attempt to suggest the main paths to improve fiduciary duties in China. By examining the above issues, I believe that complete legal transplantation is the wrong choice and that there is a need to extract the merits of the American-style solution and to systematise the fiduciary duty framework at the legislative level, taking into account current Chinese law and business traditions.

2. A Short Overview of Fiduciary Duties

2.1. The Fiduciary Duties Debate: Contracts versus fiduciary duties

The internal corporate governance issue is the most important one in corporate governance, particularly concerning the distribution of power or balance of power between shareholders and management, including the board of directors and managers.[3] In the view of the "contractual theory of the firm", the contractual relationship that exists within the "firm" already defines and stipulates the responsibilities and obligations between the parties within the firm. Therefore, fiduciary duties are unnecessary in corporate governance based on the efficiency criteria in contract theory.[4] However, legal scholars have raised objections to this proposition, with legal theory arguing that fiduciary duty is a technical legal term in company law, a mandatory rule that cannot be bypassed, and arguing that the contractual theory view of fiduciary duty as a means of contractual relations is a departure from company law.[5]

The question of whether "fiduciary duties are contractual obligations" has not yet reached a consensus position today. According to Easterbrook and Fischel (proponents of contract theory), a fiduciary relationship is a "contractual relationship". The contractual view of fiduciary duties holds that "fiduciary law was always subsidiary to contract" which means that fiduciary obligations are ancillary. Contractualists argue that the corporation can actually be seen as a collection of various contracts. Fiduciary duties can be conceptualised as "a concrete form of contract".[6] For this reason, it can be considered that fiduciary duties are to a large extent indistinguishable from the traditional obligations that people voluntarily agree to accept by contract.[7] Furthermore, the terms of the contract can be adapted to the actual situation, while the law should minimise the imposition of mandatory provisions in contractual relationships.[8]

The position of the "trust traditionalists" is the exact opposite of contractualism. Scholars who support this theory tend to look at the law of trust and agency, potentially drawing on philosophy. Smith observes that "there is a substantial difference between a fiduciary relationship and a contractual relationship".[9] The former requires the fiduciary to avoid "self-interested conduct" that would be detrimental to the interests of the beneficiaries, whereas the latter allows the parties to a contract to act self-interestedly to the detriment of the other party, subject to contractually reasonable considerations. Frankel makes a similar point that in contracts, "egoism" is very common, yet in the law of trusts there is a certain tendency towards "altruism", which requires the fiduciary to "act in the best interests of the beneficiaries".[10] Furthermore, it is noted that fiduciary duties constrain the abuse of power by fiduciaries through preventive rules. Brudney argues that "Traditional fiduciary loyalty strictures more rigorously protect common stockholders against opportunistic behavior by managers and controllers than does classic contract doctrine". Brudney suggests that the corporate parties are not completely free to enter into contracts and are indeed subject to "state-imposed obligations".[11]

An alternative criticism of contractualism tends to focus on the ethical and moral impact. Special ethical and moral implications are implied when wealth or property is entrusted to a fiduciary, and this is where fiduciary duties arise. These duties, therefore, need to be attached to the fiduciary by law to

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prevent abuse of corporate rights by the fiduciary (directors and officers), while ensuring that fiduciaries act in the interests of beneficiaries as a priority. This view is supported by FitzGibbon, who argues that fiduciary relationships are grounded in justice and that they can play a unique role in promoting “virtue” and increasing “freedom”.[12]

To conclude, the descriptive and normative claims asserted by contractualists have been subject to different criticisms, with many scholars explicitly rejecting the contractualist argument that fiduciary duties are rules of default from different perspectives. The key point of this debate in the background of corporate governance is indeed no longer the binary choice of whether to exempt fiduciary duties, but the question of how to balance freedom of contract and protection of the weak - the boundaries of freedom of contract.

2.2. The main content of fiduciary duty in the US

A. Duty of Care

There is a duty of care that obliges company’s management (directors and senior management) to behave with care when making decisions.[13] The Delaware case uses broad terms to define the duty of care. The review of whether a director has breached a responsibility in making a business decision falls within the scope of the duty of care and is separate from the duty of loyalty. In practice, the duty of care of directors and officers is usually judged by the “business judgment rule”. The Court stated that the rule “is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company” in Smith v. Van Gorkomthe. [14] According to the business judgment rule, gross negligence is considered to be the standard for directors’ liability. Directors are not liable in cases of general negligence.[14]

From the point of view of the burden of proof, it is hard for the plaintiff to produce evidence that a director or officer while performing his or her role in business, makes an “uninformed decision”. Moreover, it is hard to prove the cases that directors and officers made decisions which are incompatible with the interests of the company and its shareholders or in “bad faith”, where there is no conflict of interest.To sum up, in the majority of cases, the duty of care imposes very limited restrictions on company directors and officers. The protection that this duty can provide to companies and shareholders is very weak.

B. Duty of Loyalty

The Delaware courts have defined the duty of loyalty as “the rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.” There is a very heated debate among theorists about the nature of the duty of loyalty, with some focusing on trust theory and others on the legal origins of agency theory. Whatever the focus, the duty of loyalty requires the fiduciaries of a corporation (directors and officers) to act only in the best interests of the beneficiaries (the corporation and shareholders).[14] Hence, at the heart part of the duty of loyalty is the requirement that directors and officers (including controlling shareholders in some special cases) prioritise the interests of the company and its shareholders over their interests.

It is an undeniable point that taking into account the human instinct to pursue one's own interests, there is a very high likelihood that fiduciaries will attempt to use their positions for their own interests at the cost of the beneficiaries’ interests. Therefore, the duty of loyalty is actually very demanding on fiduciaries. A duty of loyalty is a more effective legal constraint on managerial misconduct than a duty of care. This is because “care” applies to bona fide decisions, whereas loyalty focuses on motive, which means that the possibility of the fiduciary acting in his or her own interest is eliminated in terms of motive. In view of the difficulty of this requirement, company law discourages breaches of the duty of loyalty by adopting a modified strict precautionary prohibition. The precautionary prohibition is known as the “exclusive interest rule” and is derived from the law of trusts and agencies. This prohibition is achieved by prohibiting the trustees from using their powers over the beneficiaries' assets in any manner that might result in a personal benefit to the trustees. In other words, for the common law of trust and agency, trustees cannot use their powers over the beneficiary’s assets by any means that would bring about a personal benefit, no matter how profitable it would be for both parties. This prohibition, on the one hand, effectively prevents fiduciaries from taking advantage of their specific position to act in their own interests at the cost of the beneficiaries’ interests. On the other hand, it fills a gap that cannot be covered by contractual constraints or strict regulation, considering the continuous nature of the trust relationship and its inherent complexity.A more liberal view was taken with the introduction of the principle of

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exclusive benefit in corporate law. For example, directors and officers are allowed to use their corporate powers, which they have by virtue of their particular position, to carry out business transactions to their advantage, where specific conditions are met - transaction is intrinsically fair. In summary, the requirements of loyalty in company law are more relaxed and flexible than in trust and agency law but are still precautionary rules. At the same time, the company law has always maintained fairness as the "touchstone" for judging the duty of loyalty.

C. Duty of Good Faith

In several Delaware cases, courts developed a "triads" theory to fiduciary duties.The Delaware Supreme Court appeared to make the good faith "a separate duty", redefining "the triads [sic] of their fiduciary duty: good faith, loyalty or due care" in Cede & Co. v. Technicolor, Inc.. But this case does not provide any substance to the specifics of good faith and merely presents a vague notion of it. Subsequently, the Delaware Supreme Court reinforced this concept: directors were expected to observe "the fiduciary duties of care, loyalty and good faith" in Malone v. Brincat. However, this decision still does not provide sufficient guidance on the separate good faith.

The Delaware Supreme Court, Vesey (2003) and Sale (2004) have all argued for the "triads" theory in the debate over whether the fiduciary duty is a dichotomy or a trichotomy.[15] Justice Vesey, a long-time Delaware Supreme Court Justice and a participant in the drafting of Section 102(b)(7) of the Delaware General Corporation Law, argued that good faith as a separate duty was supported by the statute. Section 102(b)(7) provides for separate provisions for breach of a director's "duty of loyalty" and "acts or omissions lacking good faith" and section 141(e) stipulates that directors' reliance on "good faith" is protected by law.[16] Vesey further defined "good faith" as the duty of directors who do not have a conflict of interest to "actively contribute" to the "best interests" of the company, both in aspects of their motives and the decision-making process, in the implementation of positive business decisions.[17

However, later related cases in the Delaware Court of Chancery have questioned the practicality of the Supreme Court's "triads" theory and tended to favour the definition of good faith as ancillary to loyalty, holding that it did not exist independently of the duty of loyalty. Bishop believes that good faith is not an independently actionable fiduciary duty and that forcing good faith out of the duty of loyalty would create uncertainty in the concept of fiduciary duty.[18] Professor Bainbridge points out that fiduciary duties consist only of a duty of care, which takes "reasonableness" as the standard, and a duty of loyalty, which takes "the interests of the company first" as the standard.[19]

3. The Evolution of Fiduciary Duties in Delaware

3.1. The boundaries of freedom of contract: modifying fiduciary duties in Delaware

In recent decades, Delaware courts have long attempted to extract a uniform definition of fiduciary duty in statutory and case law. At present, the definition of fiduciary duty remains to some extent controversial and confusing, and corporate fiduciary law is considered to be incoherent.[20] However, it is undeniable that an examination of the balance and boundaries between implied fiduciary duties and freedom of contract in the revision process of Delaware's corporate trust law can provide a wealth of extraterritorial experience for the revision of fiduciary duties in Chinese corporate law.

In terms of developments in substantive law, following Smith v. Van Gorkom, Delaware has gradually weakened the application and enforcement of the fiduciary duties at the legislative level and the judicial level after the 1980s. The Delaware legislature amended the General Corporation Law section 102(b)(7) that would allow a Delaware corporation, with shareholder approval, to "eliminate the personal liability of directors for breach of the duty of care" by amending the corporation's "certificate". It is important to note that the exclusion clause only eliminates the "personal financial liability" of a director for breach of a duty of care, but does not eliminate indemnifications resulting from a director's breach of a duty of loyalty or eliminate indemnifications resulting from bad faith. At the same time, it means that directors are still subject to the business judgment rule when making decisions and are still liable for breaches of their duty of loyalty and good faith.[21] In 2000, the Delaware legislature amended the law to further allow corporations to limit the duty of loyalty. The General Corporation Law section 122(17) allows a corporation to waive a specific business opportunity or make a specific business opportunity available to directors and officers through the "certificate of incorporation" or "the actions of the board of directors".

In terms of the rapid evolution of alternative entities, the rapid rise and development of alternative

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entities including limited partnerships and limited liability companies have outpaced the growth of companies since the 1990s. The Delaware Substitute Entities Act is structured around the principle of maximising "freedom of contract". In 2004, Delaware amended the relevant law to give alternative entities the right to modify or even eliminate fiduciary duties in their "uncorporation agreements". A "uncorporation agreement" may limit and eliminate "any and all" liability which arises from fiduciary duties, but a contract may not "limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing". This means that freedom of contract is hardly restricted in the modification of fiduciary duties.

In response to this trend towards modification, Professor Miller raises the question of the boundaries between "default fiduciary duties and freedom of contract" in alternative business entities.[22] Miller argues that caution should be exercised in relation to the provision allowing unincorporated agreements to modify fiduciary duties: supporting the idea of allowing unincorporated agreements to modify or waive fiduciary duties, but limiting the scope of what can be modified to "specific types or categories of activities".[23] Miller gives further advice that in "publicly traded uncorporations", the complete removal of fiduciary duties by covenant should be prohibited.[24]Currently, the general approach taken in Delaware is that the fiduciary duties of care and loyalty apply to alternative entities in the absence of a contrary provision in the uncorporation agreement.

3.2. Business judgment rule

Compared to US law, the Chinese company law on fiduciary duties neglects the introduction and application of the business judgment rule (which will be discussed in detail in the next section). Therefore, the application of the rule in Delaware provides an important resource for the law transplantation of the law in China. The business judgment rule originated from courts' discussions of the duty of care.[25] The Delaware Supreme Court's decision in Aronson v. Lewis made three major contributions to the maturation of the business judgment rule in 1984. Firstly, the rule was defined as "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company". Thus, the business judgment rule is a legal presumption. It is process-oriented and gives great deference to all good-faith board decisions to protect directors who exercise their powers in good faith and with reasonable care from liability (even if the action taken leads to an unfortunate outcome in hindsight). Secondly, the case established the principle that the "burden of proof is on the plaintiff". Because of a "presumption", the plaintiff could rebut the court's presumption of application of the business judgment rule by proving three elements: (1) that the directors did not make their business decisions on the basis of adequate information and were grossly negligent; (2) that the directors did not act in good faith; and (3) that the directors did not act in the best interests of the company.[26] Thirdly, the use of "gross negligence" as a criterion for reviewing a director's breach of duty of care prevents judges from abusing their discretion to influence a director's business judgment. Delaware courts have, in response to specific facts, applied the business judgment rule to decide whether a director had breached the duty.

However, it is also valuable to consider the limitations of the business judgment rule when examining it. If any one of the three conditions above is lacking, then such a standard of review will no longer apply. For example, there is an "inherent conflict" of interest in a takeover defence. For this reason, the "Unocal Test" will be introduced to ensure that decisions are fair to the company and its shareholders, both in terms of process and substance, through a higher level of judicial review. In addition, the business judgement rule will not apply where the dissolution or sale of the company is inevitable, when the duty of the Revlon is introduced and the directors must consider the best interests of the shareholders - maximising the value of the company.

In summary, the rule encourages directors, on the one hand, to act with reasonable care, taking into full consideration the facts and circumstances known at the time, to pursue the best interests of the company and its shareholders, on the other hand, the rule attracts and encourages highly qualified individuals to become directors of companies by reducing the risk of litigation for directors. However, there are circumstances in which the business judgment rule does not apply, and there is still doubt as to whether the standard applies to officers.

3.3. Fiduciary duties of controlling shareholders to minority shareholders

Tensions among shareholders sometimes exist in the internal governance of companies, and how to replace such tensions and achieve fairness among shareholders has become an important issue in the development of fiduciary duties. In response to this issue, the United States has sought to harmonise the interests of shareholders by imposing prior fiduciary duties on controlling shareholders through case law. Traditional fiduciary duties usually apply to directors and officers, but controlling shareholders also have fiduciary duties in certain circumstances. Controlling shareholder liability arises from the "ability to control the members of the board of directors". When a controlling shareholder exercises its control, it is expected to bear fiduciary duties to minority shareholders like a director. A shareholder must not take advantage of its position as a controlling shareholder to benefit itself in a way that is detrimental to minority shareholders. In many cases, a controlling shareholder may abuse its position of control to benefit itself rather than the company and all shareholders. For example, a controlling shareholder may force a minority shareholder to sell its shares at an unfairly low price. Also, controlling shareholders may also retaliate against minority shareholders who vote against them.

Although the Delaware General Corporation Law does not directly impose liability on shareholders for breach of fiduciary duty, there has been considerable discussion in the case law. The Delaware Supreme Court discussed whether "business judgment is the appropriate standard of review for a merger between a controlling stockholder and its subsidiary" and then adopted a more narrow standard of review for the business judgment rule for controlling shareholders in Kahn v. M&F Worldwide Corp.. However, the court took a different view of controlling shareholders in a close corporation, holding that the controlling shareholder has no special fiduciary duties to minority shareholders by "entire fairness test" in Nixon v. Blackwell. Consequently, although controlling shareholders are among the fiduciaries with fiduciary duties, they are only liable in a few exceptional cases and applied to a more narrow standard.

Fiduciary duties are the primary vehicle for judicial involvement in corporate governance. Based on the legislative and judicial practice of the fiduciary duty in the United States (especially in Delaware), it is clear that this operation of fiduciary duty allows corporate managers to exercise free judgment and flexibility in dealing with transactions - creating value for the company and its shareholders.

3.4. The unresolved issues of Fiduciary Duties in Delaware practice

A. Creditor protection

Delaware corporate law is still wavering on "whether directors and officers have a fiduciary duty to the company's creditors".[27] In the general context, directors do not bear a fiduciary duty to creditors. However, in the exceptional case of insolvency, the question of whether creditors are worthy of the protection of fiduciary duty is a valid issue to be discussed.[27] The current approach taken by the Delaware courts virtually denies protection to creditors of insolvent companies. In Gheewalla, creditors were not entitled to bring a fiduciary duty claim against the directors when the company was in "zone of insolvency". However, this adjudicative view grossly ignores the inability of contracts to protect involuntary creditors. As a result, it is difficult for creditors to obtain protection through other areas of law (such as insolvency law and contract law). The UK company law takes a different approach. The directors of a company which is in an insolvency zone, owe a clear fiduciary duty to the company's creditors. How to treat creditors fairly in a near-insolvency environment remains a controversial topic.

B. Horizontal fiduciary duties of directors

Fiduciary duties are often defined as the vertical relationship between directors and officers to the company and shareholders. The need to supplement the legal framework of fiduciary duties with a horizontal fiduciary duty between directors has not been determined. Scholars who support supplementing horizontal duties cite the following reasons. Bainbridge notes that the proper functioning of a corporation relies on mutual trust between directors.[28] Eckstein and Parchomovsky believe that horizontal liability provides an incentive for directors to work diligently and cooperate more. Ibrahim, based on the company's decision-making mechanism, suggests that the collective decision-making mechanism results in all directors (even including directors with opposing views) being potentially liable for breaches of fiduciary duties.[29] Hence, a dissenting director, even if he or she chooses to withdraw, will have to bear a heavy cost - resignation does not absolve liability. If it is possible to supplement the fiduciary duties with horizontal responsibilities between directors, directors may be empowered to bring proceedings against the director. Although there is no definitive conclusion on whether to introduce horizontal liability to supplement fiduciary duties, this essay suggests that horizontal fiduciary duties should be recognised in the revision of China's fiduciary duty legislation to enhance the basis of trust within companies and improve the effectiveness of corporate governance.

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4. The Chinese fiduciary duties as a comparative example

4.1. The scope of Fiduciaries

The Chinese Companies Act limits the fiduciary for fiduciary duties to “directors, supervisors and senior managers”. The main inconsistency with the US is that only directors and officers are subject to fiduciary duties under Chinese company law. The fiduciary duties of “controlling shareholders to minority shareholders” are not recognised. Due to the special historical background, in most companies in China, especially listed companies, controlling shareholders can control the company through the principle of majority voting based on capital. Therefore, abuse of power by controlling shareholders is a common occurrence in Chinese business practice. The controlling shareholder's abuse of power directly or indirectly affects the rights and interests of minority shareholders. In a typical case, the controlling shareholder of Yunnan Green Earth Biotechnology Co., LTD took advantage of its dominant position to control the company to engage in numerous financial fraudulent activities and fraudulent share issuance before and after the listing. It is worth noting that Listed Companies Governance Code Article 19 stipulates that “controlling shareholders have a duty of good faith to listed companies and other shareholders”. The Code sets out specific requirements for the conduct of controlling shareholders. However, the Code is of low rank in the Chinese corporate legal system and its application is restricted only to listed companies, which makes it difficult to meet the needs of corporate governance practice.

4.2. The content of fiduciary duties

The “dichotomy” and “trichotomy” theories of fiduciary duties in US corporate law have been hotly debated. In Stone v. Ritter, the "dichotomy" position upheld by the Delaware Supreme Court has become the prevailing view of the concept of fiduciary duty in the United States. The duty of loyalty and the duty of care have different concerns, but together they constitute fiduciary duties. In China, the Company Law was amended in 2005 and the duty of care was firstly introduced in the content of the fiduciary duty system. However, when viewed as a whole, the legislative focus of the Company Law is clearly skewed towards the duty of loyalty. The Act imposes a duty of loyalty on directors in detail through a large number of specific provisions, but the duty of care is only set out in principle, without defining the meaning of and the mode of conduct. According to Jianbo Lou, the principle of the duty of care in the company law is actually a kind of “decoration”.

4.3. Standards of review

The US courts have created the business judgment rule through a long accumulation of case law. The business judgment rule is the standard by which US courts review whether a director has breached his or her duty of care. The rule provides for “gross negligence” as the standard for reviewing a breach of a director’s duty of care. Thus, the US-style “business judgment rule” prevents judges from abusing their discretion and tends more to protect the autonomy of professional managers in their business decisions.

However, while the Chinese Company Law was amended to add a duty of care for directors, it did not introduce the business judgment rule or further clarify the standard of review for breaches of the duty of care. Chinese Company Law Article 147 imposes a duty of care on directors, but its provisions on the duty of care are overly general at the legislative level. Article 147 only provides a general principle but does not set out detailed standards for the application of this principle. Therefore, in judicial practice, different courts have applied different standards to the application of this principle.

The lack of clarity in the standard of review of directors' duty of care has led to two extremes in Chinese courts when considering cases relating to the duty of care. At one extreme, some courts may refuse to file or adjudicate cases on the grounds that “there is no relevant provision in the law” or that “the legal conditions for adjudication are not met”, thereby avoiding internal corporate governance disputes. At the other extreme, some courts may abuse their discretion and adopt the “general negligence” standard rather than the “gross negligence” standard, or even consider the normal business judgment of directors as “business negligence”. Therefore, the Chinese courts need a clear standard of review so that they can judge whether a director has breached the duty of care in a specific case.

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5. Implications of Chinese fiduciary duties development

5.1. Add controlling shareholders to the scope of fiduciaries

The Chinese Company Law is currently undergoing its fifth amendment. It is suggested that the Company Law may supplement the fiduciary duties of controlling shareholders under specific circumstances and further clarify the allocation of the burden of proof and the standard of civil compensation. On the other hand, it should also clarify the corresponding rights of action for shareholders to pursue the controlling shareholder’s liability. Because the controlling shareholder's abuse of power infringes not only the interests of the company but also the interests of minority shareholders, shareholders should be allowed to bring direct and derivative actions. The behaviour of controlling shareholders should be deterred by increasing the likelihood that they will bear the risk of litigation.

5.2. Supplement the detailed content and standard of review of the duty of care

It is recommended that the specific content of the duty of care and the standard of review be supplemented by legislation. Firstly, it is possible to suggest that the company law should be supplemented with specific content on the duty of care, including a definition and a model of conduct that summarises compliance with the duty of care. Secondly, it is recommended that the Supreme People’s Court should provide in its legal interpretation that courts should apply the business judgment rule as the standard of review when reviewing whether a director has complied with the duty of care. The reason is that the absence of a standard of review increases the difficulty for companies and shareholders to hold directors liable for breaches in litigation. In addition, it is worth noting the question of whether the fiduciary duties can be modified or limited by contract. I would support a more cautious approach. This is because an over-emphasis on contractualism may affect the logical framework of company law as statutory law and increase the uncertainty of the provisions on fiduciary duties in company law. However, reference can be made to Miller’s view that the freedom to modify by contract is limited to certain “particular circumstances” which may change as the market evolves. This will go some way to preventing an increase in uncertainty of the definition.

Taking into account the strengths and weaknesses in the US solution and the differences between the Chinese and US legal systems, complete transplantation of the law is not advisable. Therefore, the construction of the fiduciary duties in China needs to extract the merits of the US solution, on the basis of a full balance between legal transplantation and Chinese legal tradition, and then be further improved by legislative amendments to the company law or legal interpretations by the Supreme People’s Court.(As shown in table 1)

Table 1: The comparison of fiduciary duties in the US and China

	Delaware	**China**	**Paths**
The scope of Fiduciaries	1. Directors 2. Officers 3. Shareholders (in particular cases)	1. Directors 2. Officers (including supervisors and senior managers)	Add controlling shareholders to the scope of fiduciaries in Chinese Company Law
The content of fiduciary duties	1. Duty of loyalty 2. Duty of care (including good faith)	1. Duty of loyalty 2. Duty of care as “decoration”	Additional provisions on the duty of care in Company Law
Standard of review	Business Judgement Rule Entire Fairness Test	No Clear Standard (Only examine whether the director's actions were authorised by the company and within the scope of his authority)	Introduction of a detailed standard of review in the judicial interpretation of the Supreme People's Court

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6. Conclusion

The development of fiduciary duties in the US is to a certain extent ahead of other jurisdictions. The fiduciaries with fiduciary duties have expanded from directors and officers to controlling shareholders. In balancing fiduciary duties and freedom of contract, Delaware has gradually allowed fiduciary duties to be modified by contract, while still maintaining a minimum standard of care. From a standard of review perspective, the business judgment rule helps courts analyse whether directors are complying with their duty of care in specific situations. However, the issues of whether fiduciary duties can provide protection for creditors in the "insolvency zone" and the need to supplement the content of fiduciary duties with horizontal duties between directors have not been clarified in the current discussion. I would tend to support the idea of creditor protection and the addition of a horizontal duty between directors to the fiduciary duty.

In contrast, China's current legislation on fiduciary duties does not play a very significant part in corporate governance. Firstly, in terms of the understanding of the concept of fiduciary duty, Chinese company law limits the scope of fiduciary duties to directors and officers, ignoring the fiduciary duties of controlling shareholders to minority shareholders in special circumstances. Meanwhile, at the legislative level, the duty of loyalty is clarified in detail in the substantive law, but the duty of care is only provided for in principle in the substantive law, and there is a lack of clarification on the standard of review of the duty of care. This problem has caused confusion for the courts when considering related cases.

A detailed discussion of fiduciary duties in the US can provide a strong blueprint for the possible objectives of the development of fiduciary duties in China, helping the Chinese fiduciary duty regime to gradually become the main institutional basis for judicial intervention in corporate governance. Considering that China is a codified law jurisdiction, the improvement of the fiduciary duty framework needs to start from the legislative level. Complete transplantation of the law is not advisable. The main routes would be to amend the specific provisions on fiduciary duties in the Chinese company law or provide a detailed legal interpretation of fiduciary duties by the Chinese Supreme People's Court, with more detailed provisions and explanations on the scope of fiduciaries, the content of fiduciary duties and the standard of review.

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