

CITY OF HOPE V. GENENTECH: KEEPING FIDUCIARY DUTIES WHERE THEY BELONG

By Reed C. McBride

Scholars have called the law of fiduciary duties “messy,”¹ “atomistic,”² and “elusive.”³ It is an area of law in which courts have used ad hoc approaches⁴ and have often imposed fiduciary duties through “analogy to contexts in which the obligation[s] conventionally appl[y]”⁵ rather than reasoned analysis, which has led to great “confusion and uncertainty in applying the fiduciary principle to disparate fact situations.”⁶ This uncertainty and the “jurisprudence of analogy”⁷ that followed often resulted in undisciplined application of the law, but in *City of Hope v. Genentech*, the California Supreme Court took a bold and important step toward rectifying the situation.⁸ The court protected parties’ rights to design their relationships through contract and ensured that fiduciary duties would be confined to those relationships with which they truly belong.⁹

This Note will demonstrate why the *City of Hope* decision was correct in view of the history of fiduciary duties, the case law, the academic literature, and sound policy for the business community and nonprofit research institutions of California. Part I of this Note will describe the relevant legal background, while Part II will recount the California Supreme Court’s decision in *City of Hope*. Part III will analyze the decision with reference to the legal history, the academic literature, and the impact on the business community and nonprofit research institutions of California. Part III will

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1. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1400 (2002).

2. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 915.

3. Karen E. Boxx, *The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 15 (2001).

4. Smith, *supra* note 1, at 1400.

5. DeMott, *supra* note 2, at 879.

6. J.C. SHEPHERD, LAW OF FIDUCIARIES 7 (1981).

7. DeMott, *supra* note 2, at 879.

8. *City of Hope Nat’l Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142 (Cal. 2008).

9. *Id.*

also examine the current state of the law and how contracting parties should proceed in the wake of *City of Hope*. Part IV concludes that, according to the law of fiduciary duties and in order to promote sound policy, the California Supreme Court's decision was correct.

I. LEGAL BACKGROUND

A. Introduction to the Law of Fiduciary Duties

1. *The Problem Fiduciary Duties are Intended to Solve*

Fiduciary duties are intended to solve the problem of an “open-ended delegation of power” to another.¹⁰ To describe the factual setting in the abstract, actors enter into a “long-term agency-type”¹¹ relationship in which one party—the fiduciary—accepts a responsibility to act for the benefit of the other—the beneficiary—but for which it would be too costly, burdensome, or otherwise inefficient to define all the details and acceptable courses of action applicable throughout the term of the relationship. In place of contracted duties, fiduciary duties define the fiduciary's standard of behavior—a “duty of unselfishness”—and allow the relationship to be formed efficiently even though not every contour can be defined by contract.¹²

In modern law, “fiduciary duty” refers to “the duty owed by one who is trusted toward the one (or ones) who trust in him.”¹³ Put simply, a person who has a fiduciary relationship to another “is under a duty to act for the benefit of the other as to matters within the scope of the relationship.”¹⁴ All fiduciary relationships are characterized by the fiduciary's duty to put the beneficiary's interests above his own.¹⁵

Historically, several categories of relationships have been recognized to impose fiduciary duties as a matter of law, the most common examples

10. See Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 214-15, 217. See also Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 797, 808-16 (1983) (examining fiduciary relationships and their common characteristics and concluding that relationships that are fiduciary “pose the problem of abuse of delegated power”).

11. Ribstein, *supra* note 10, at 215.

12. *Id.* at 217. See also RESTATEMENT (THIRD) OF TRUSTS, § 2 cmt b. (2003); RAFAEL CHODOS, *THE LAW OF FIDUCIARY DUTIES*, at LIV (2000); Smith, *supra* note 1, at 1439-40 (“[T]he most interesting behavior occurs in the absence of explicit instructions.”).

13. CHODOS, *supra* note 12, at LIII.

14. RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (2003).

15. Ribstein, *supra* note 10, at 217. See also RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b. (2003); CHODOS, *supra* note 12, at LIV; Smith, *supra* note 1, at 1439-40.

being partnerships, joint ventures, and agency relationships. Fiduciary duties are also found in other contexts, with fiduciary obligations being directed from officers and directors of a corporation to that corporation, trustees to beneficiaries, lawyers and other professionals to their clients, certain associations to their membership (retirement associations and labor unions, for example), guardians to wards, public officials to constituents, and members of advisory boards to nonprofit organizations.¹⁶ As mentioned above, all of these relationships are characterized by the fiduciary's duty to put the beneficiary's interests above his own.¹⁷ In general, each of these relationships fit into one or more of the following characterizations: partnerships, agency relationships, or trusts. When at least one of the three characterizations describes the relationship in question, fiduciary duties generally arise.¹⁸

Although confidential relationships are often assumed to be fiduciary, the two are not equivalent. A confidential relationship "refers to an unequal relationship between parties in which one surrenders to the other some degree of control because of the trust and confidence which he reposes in the other."¹⁹ A confidential relationship can exist without a fiduciary relationship,²⁰ and vice versa.²¹ In California, the law clearly divides causes of action for violation of a fiduciary duty existing within a confidential relationship from causes of action for a breach of confidence, in which "an idea, offered and received in confidence, is later disclosed without permission."²² Thus, a confidential relationship does not itself impose fiduciary duties, but it can lead to liability for breach of confidence even in the absence of fiduciary duties.²³

As will be discussed in this Note,²⁴ parties to an agreement will often seek to contract out of or around fiduciary duties, bargaining to block fiduciary obligations from arising in situations in which, given no contractual provision to the contrary, fiduciary duties may arise. This Note will also review the academic literature regarding whether parties should be able to contract around fiduciary duties. For now, one should simply note

16. CHODOS, *supra* note 12, §§ 1:6-1:18.

17. *See id.* at LIV; and Smith, *supra* note 1, at 1439-40.

18. CHODOS, *supra* note 12, § 1:19, at 42.

19. *Id.* § 1:21.

20. *Id.*; RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b(1) (2003).

21. *See Vai v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 364 P.2d 247, 252-53 (Cal. 1961) (holding that a confidential relationship can end while fiduciary obligations remain).

22. *Davies v. Krasna*, 535 P.2d 1161, 1166 (Cal. 1975).

23. *See id.*

24. *See* discussion *infra* Section I.B.2. *See also* discussion *infra* Section III.A.2.b).

that courts do generally leave parties' bargains undisturbed,²⁵ but on rare occasions courts have stated that they do have the authority to find fiduciary obligations despite a contractual provision to the contrary.²⁶ Thus, while courts usually respect the parties' bargain, the contractual language is not necessarily dispositive. A holding that fiduciary duties are applicable despite contractual language to the contrary is only likely if the relationship is inherently fiduciary (i.e., one of agency, partnership, or joint venturers), the contract states otherwise, and the court finds that equity requires its intervention.

2. Case Law

The general rules of fiduciary duties are better understood in the context of cases. This Section will review several cases that were important to the *City of Hope* parties' arguments and the court's decision.

a) *Committee on Children's Television v. General Foods Corporation*

In *Children's Television*, the California Supreme Court made it clear that California law recognizes two distinct sources of fiduciary duties: the actor either (i) "knowingly undertake[s] to act on behalf and for the benefit of another," or (ii) "enter[s] into a relationship which imposes that undertaking as a matter of law."²⁷ This is the framework that the court employed in *City of Hope*.²⁸

b) *Wolf v. Superior Court*

*Wolf v. Superior Court*²⁹ is a 2003 California Court of Appeal decision that the California Supreme Court looked to with approval in deciding

25. See generally Larry E. Ribstein, *Fiduciary Duty Contracts in Unincorporated Firms*, 54 WASH. & LEE L. REV. 537, 570-93 (1997) (explaining that a careful review of the case law demonstrates that parties' rights to alter or waive fiduciary duties through contract "is, in fact, nearly universally accepted by state statutes and courts"). See also CHODOS, *supra* note 12, § 1:23, at 57.

26. See *Universal Sales Corp. v. Cal. Press Mfg. Co.*, 128 P.2d 665, 673-74 (Cal. 1942) (holding that in determining whether the parties formed a joint venture, "[t]he acts and conduct of the parties engaged in the accomplishment of the apparent purposes may speak above the expressed declarations of the parties to the contrary"); *April Enters. v. KTTV*, 195 Cal. Rptr. 421, 428 (Ct. App. 1983) ("[T]he conduct of the parties may create a joint venture despite an express declaration to the contrary.").

27. *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 675-76 (Cal. 1983).

28. See *City of Hope Nat'l Med. Ctr.*, 181 P.3d 142, 150 (2008).

29. 130 Cal. Rptr. 2d 860 (Ct. App. 2003).

City of Hope.³⁰ In *Wolf*, the plaintiff “repose[d] an element of trust” in the defendant in interest, Walt Disney Pictures and Television, by transferring his intellectual property rights to a novel in return for a share of future profits from Disney’s commercialization of the story.³¹ *Wolf* alleged that Disney breached its contractual obligation to pay royalties and thereby violated certain fiduciary duties.³² However, the California Court of Appeal refused to find that a fiduciary relationship had been created, holding that “[e]very contract requires one party to repose an element of trust and confidence in the other to perform.”³³ The court further emphasized that the implied covenant of good faith and fair dealing “cannot create a fiduciary relationship; it affords basis for redress for breach of contract and that is all.”³⁴ Thus, simply reposing trust and confidence in another party cannot create a fiduciary relationship automatically, because otherwise virtually all contractual relationships would be fiduciary, which is clearly not the case.³⁵ Finally, the *Wolf* court made it clear that concerns of equity will not make a relationship fiduciary when it would not be otherwise, stating that “[w]hether the parties are fiduciaries is governed by the nature of the relationship, not the remedy sought,”³⁶ and concluding that “[c]onsiderations of fairness and practicality . . . cannot serve to create a fiduciary relationship where one does not otherwise exist.”³⁷

c) *Stevens v. Marco*

In *Stevens v. Marco*, a 1956 California Court of Appeal held that fiduciary duties can arise from a confidential relationship. In 1942 plaintiff Stevens, an inventor and high-school dropout, entered into a royalty contract to assign an aircraft indicator light system to defendant Marco, an attorney and officer of a company that manufactured aircraft parts.³⁸ Marco was to oversee patent prosecution, manufacturing, and sale of the plaintiff’s invention. In exchange, Stevens was entitled to a percentage of gross sales of the device and later devices embodying improvements thereof.³⁹ Marco later told Stevens that other patents had preempted his idea, which

30. See *City of Hope*, 181 P.3d at 151-54.

31. *Wolf*, 130 Cal. Rptr. 2d at 862-63.

32. *Id.* at 864.

33. *Id.*

34. *Id.* at 865.

35. See CHODOS, *supra* note 12, § 1:21 (clarifying that relationships of trust and confidence should not be thought of as synonymous with fiduciary relationships).

36. *Wolf*, 130 Cal. Rptr. 2d at 867.

37. *Id.* at 868.

38. See *Stevens v. Marco*, 305 P.2d 669, 672 (Cal. Ct. App. 1956).

39. See *id.* at 672-74.

led Stevens to sign an agreement releasing Marco from their contract.⁴⁰ Unbeknownst to Stevens, Marco continued to prosecute the invention, founded a company to manufacture it, and sold millions of units.⁴¹ When Stevens discovered this, he believed he was not receiving the royalty payments he was entitled to and sued for an accounting under claims of fraud and breach of contract.⁴²

The Court of Appeal ruled that the lower court's dismissal of Stevens's case based on nonsuit was erroneous.⁴³ The appellate court seemingly equated confidential relationships to fiduciary ones, reasoning that "[w]here an inventor entrusts his secret idea or device to another under an arrangement whereby the other party agrees to develop, patent, and commercially exploit the idea in return for royalties to be paid the inventor, there arises a confidential or fiduciary relationship between the parties."⁴⁴ Quoting a case decided in 1916, the court further suggested that fiduciary obligations arise in every case "where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding."⁴⁵

While the language of *Stevens v. Marco* seems quite advantageous for a plaintiff who licensed or assigned his technology in exchange for royalties, several legitimate points undermine it. First, the decision has questionable precedential authority, as it is a Court of Appeal rather than a California Supreme Court case. Furthermore, the case was decided more than fifty years ago, and it is hard to reconcile with more recent decisions such as *Wolf v. Superior Court*.⁴⁶ In addition, the California Supreme Court severely limited the scope of *Stevens* as a case of "an inventor reveal[ing] his concept to a patent lawyer" and contrasted the facts of the case to "ideas . . . be[ing] transmitted in the course of arms length negotiations between businessmen who can profit from its exploitation."⁴⁷

Second, the underlying reasoning of the *Stevens* court is not convincing. As suggested by *Wolf* and developed by the literature,⁴⁸ if the contract adequately outlines the terms of the relationship and can itself make the

40. *Id.* at 676.

41. *Id.* at 676-77.

42. *Id.* at 677-78.

43. *Id.* at 686.

44. *Id.* at 679.

45. *Id.* (quoting *Cox v. Schnerr*, 156 P. 509, 513 (Cal. 1916)).

46. *Wolf v. Superior Court*, 130 Cal. Rptr. 2d 860 (Ct. App. 2003) (holding that exchange of confidential information does not by itself create a fiduciary obligation).

47. *Davies v. Krasna*, 535 P.2d 1161, 1166 (Cal. 1975).

48. *See infra* Section I.B.

proposed beneficiary whole, then fiduciary duties should not come into play. This is because fiduciary duties act as efficient gap-fillers for undefined portions of relationships. Thus, if a relationship is amply defined through contract, acceptable remedies are already available and the contractual duty of good faith leaves no need for fiduciary obligations to protect the plaintiff from the defendant's capacity for opportunism.

Third, the *Stevens* decision never stated that the parties attempted to contract out of fiduciary obligations (for example, by explicitly stating that their relationship was not one of joint venturers, agency, or partnership). In designing their relationships, contracting parties often insert such a clause to signify their intent that the relationship will not create fiduciary obligations. Making such declarations as part of the bargain discourages courts from invading the contract of sophisticated parties to find fiduciary duties. The *Stevens* court mentions no such clause, which it likely would have done if such a clause existed, because the court clearly viewed *Stevens* and Marco's relationship as that of "joint venturers."⁴⁹

Finally, *Stevens* involved a high school dropout who had no prior experience with patents or patent applications and was clearly taken advantage of by a person who was not only an attorney, but an executive officer of an aerospace manufacturing company.⁵⁰ *Stevens* was clearly not a case of two sophisticated entities, both represented by counsel, contracting at arm's length, and in that context the California Supreme Court has cast doubt upon *Stevens*'s applicability.⁵¹ While one may presume that a court could be sympathetic to the plaintiff in the former case involving an unsophisticated party contracting with a sophisticated one, concerns of equity should carry little weight in the latter case as far as imposing fiduciary obligations upon a defendant is concerned.

B. Academic Literature

The case law is helpful in characterizing relationships and determining whether the relationship between the parties is, in fact, fiduciary. By contrast, much of the academic literature has focused on finding the scope of fiduciary duties already held to exist rather than determining whether a specific relationship is actually fiduciary. In recent years, however, there have been several novel articles regarding the identification of fiduciary relationships, as well as the interaction of contract and fiduciary law.

49. *See Stevens*, 305 P.2d at 679-81.

50. *Id.* at 672.

51. *See Davies*, 535 P.2d at 1166.

1. *Fiduciary Duties as a Narrow Category of Relationships*

One school of thought characterizes the category of fiduciary relationships as quite narrow, with the duty of unselfishness being an indispensable component.

a) The Critical Resource Theory

With his “critical resource theory,” corporate law scholar D. Gordon Smith contends that the main focus of fiduciary duty cases is the “potential for opportunism,” which courts balance against the proposed beneficiary’s capacity for self-help.⁵² The duty of loyalty, which is meant to protect beneficiaries against opportunistic behavior by their fiduciaries, is at the heart of fiduciary duty.⁵³ According to the critical resource theory, there are three requirements that comprise the duty of loyalty and distinguish fiduciary relationships from non-fiduciary ones: (1) the fiduciary must act on behalf of the beneficiary, (2) the fiduciary must exercise discretion, and (3) that discretion must relate to a critical resource of the beneficiary.⁵⁴

Expanding on these requirements, Smith suggests that the phrase “on behalf of” is a functional synonym for the Restatement’s “primarily for the benefit of.”⁵⁵ This first requirement “distinguishes fiduciary relationships from [other] relationships in which one person exercises discretion over critical resources belonging to another, such as . . . exclusive licenses,”⁵⁶ but this requirement alone cannot always “distinguish fiduciary relationships from many arm’s-length contracts because mutual benefit is a central feature in most contracting relationships.”⁵⁷ This first requirement is particularly helpful when a relationship fulfills both the “critical resource” and “discretion” requirements, but still is not clearly fiduciary or non-fiduciary. However, Smith says a “fiduciary relationship differs from a relationship based on a transfer of rights . . . specifically, a relationship between a licensor and an exclusive licensee,” where both parties act primarily for their own benefit.⁵⁸ Furthermore, Smith points out that courts have generally not found fiduciary duties in close cases in which the plaintiff fails to prove that the proposed fiduciary “‘undertook to act primarily

52. Smith, *supra* note 1, at 1443-44.

53. *Id.* at 1402.

54. *Id.*

55. *Id.* at 1438-39 (citing the RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. g (Discussion Draft 2000)).

56. *Id.* at 1438.

57. *Id.* at 1438-39.

58. *Id.* at 1438-40.

for the benefit of the plaintiff” and fails to demonstrate the “special trust” required to form a fiduciary relationship.⁵⁹

Smith’s “discretion” requirement denotes “the power to use or work with the critical resource in a manner that exposes the beneficiary to harm that cannot reasonably be evaded through self-help.”⁶⁰ He points out that his theory further separates contract from fiduciary duty because a “contracting party exercises discretion with respect to *performance of the contract*,” whereas a “fiduciary exercises discretion with respect to *a critical resource belonging to the fiduciary*.”⁶¹

Smith conceptualizes the proposed beneficiary’s “critical resource” as an abstract concept, flexible in application, but at the same time clarifying that “*something* resides at the core of the fiduciary relationship.”⁶² The critical resource is one that can potentially provide the fiduciary with an occasion to act opportunistically.⁶³ It can be conventional property, confidential information, or even personal data in which the beneficiary has residual control rights. However, since the potential for opportunism is central to his critical resource theory, Smith notes that the argument for finding fiduciary duties is weak “where self-help protection of the critical resource is strong . . . and vice versa.”⁶⁴

Whether or not all fiduciary relationships can truly be characterized by one “unified” theory, as Smith proposes, his theory creates a clear framework to help decide whether a relationship in question maps to the elements needed to constitute a fiduciary relationship. His theory is also appealing because it favors disciplined, objective analysis over more subjective approaches to applying and extending the fiduciary label. As Professor Tamar Frankel noted, courts have a habit of looking to prototypical fiduciary relationships (agency and trust relationships) and then deciding whether to extend the fiduciary label by relying on analogy or metaphor instead of a structured analytical framework.⁶⁵ Smith’s theory applies to relationships that are currently agreed to be fiduciary and also creates a useful, flexible framework for discerning whether a given relationship can properly be classified as fiduciary.

59. *Id.* at 1450 (citing *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 761 A.2d 1268, 1280 (Conn. 2000)).

60. *Id.* at 1449.

61. *Id.* at 1448 (emphasis added).

62. *Id.* at 1443 (emphasis in original).

63. *Id.* at 1444.

64. *Id.* at 1443.

65. Frankel, *supra* note 10, at 804.

b) Fiduciary Duties as Duties of Unselfishness

Professor Larry Ribstein, agreeing with Smith that fiduciary relationships are a distinct category that can be distinguished from other relationships, defines fiduciary relationships even more narrowly than Smith.⁶⁶ Whereas Smith's theory posits that fiduciary relationships have three essential characteristics, Ribstein focuses on only one—that the relationship is structured such that one must act primarily for the benefit of another, which he terms the “duty of unselfishness.”⁶⁷ Ribstein contends that fiduciary relationships are solely a product of this structure and not of any equitable notions resulting from one party's vulnerability as a function of the relationship.⁶⁸ In this respect, his theory aligns with the *Wolf* court's position.⁶⁹

Ribstein primarily attempts to clarify the law of fiduciary duties, for he contends that although courts' dicta can imply a judicial view that fiduciary duties are applicable in a wide range of circumstances, the actual case law concerning fiduciary duties lends itself to only narrow application.⁷⁰ One of Ribstein's core motivations for demonstrating that the case law's real approach is narrow is that “[a]pplying fiduciary duties broadly threatens to undermine parties' contracts by imposing obligations the parties do not want or expect.”⁷¹ He further asserts that when courts limit fiduciary duties to only the most appropriate situations, contractual relations are made more predictable, thereby serving contracting parties better.⁷²

2. *Interaction of Contract and Fiduciary Duties*

Beyond questions of whether fiduciary duties arise in certain relationships, the literature also features a rich discussion pertaining to the interaction of contract and fiduciary duties. Much of this discussion has focused on comparisons of contract's duty of good faith and fair dealing with the

66. Ribstein, *supra* note 10, at 212 n.15. This article focused primarily on the partnership context, but evolved from a working paper that focused on the structure of fiduciary relationships in a broader set of contexts. See Larry E. Ribstein, *The Structure of the Fiduciary Relationship* (Ill. Law & Econ. Working Papers Series, Working Paper No. LE03-003, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=397641 [hereinafter Ribstein, *Structure*].

67. See Ribstein, *supra* note 10, at 214-15.

68. *Id.* at 212.

69. See discussion *supra* Section I.A.2.b) (citing *Wolf v. Superior Court*, 130 Cal. Rptr. 2d 860, 868 (Ct. App. 2003)).

70. See Ribstein, *supra* note 10, at 213.

71. See *id.*

72. *Id.*

fiduciary's duty of loyalty, and questions regarding whether parties should be allowed to contract around fiduciary duties.

Parties often try to contract around fiduciary duties. They attempt this either by limiting the scope of their duty of loyalty⁷³ or by expressly contracting that their relationship does not constitute a partnership or joint venture, which serves as a strong indication that the parties do not intend for their relationship to give rise to fiduciary obligations.

Some academics argue that when fiduciary duties would arise in a given relationship they should govern, regardless of contractual terms to the contrary.⁷⁴ However, this opinion is not shared by many scholars who contend that such a regime would be an unwelcome impedance on the freedom to contract, particularly between sophisticated parties. Professor Tamar Frankel, while conceding that so-called "anti-contractarian"⁷⁵ arguments can have some appeal, writes that the better approach is to view fiduciary duties, when they would arise, as default rules that parties should be free to bargain around when they wish to.⁷⁶ Frankel contends that: (1) if parties wish to deviate from these default rules, freedom of contract should give them the ability to bargain around them within their contract;⁷⁷ (2) if a fiduciary relationship were to arise in conjunction with another legal relationship, the bargain concerning the relationship must be governed initially by the law governing the underlying relationship (e.g., if the relationship is created by contract, the law of contract governs and the contractual provisions therefore trump any fiduciary obligations that have been contracted around);⁷⁸ (3) if the parties are sophisticated, courts are likely to refrain from examining the content or sufficiency of their bargains and to uphold what the parties agreed to;⁷⁹ (4) parties should be free to "design their relationships as they wish, unless there is a good reason to

73. See REVISED UNIF. P'SHIP ACT §§ 103(b)(3), 404(a)-(b) (1992).

74. See, e.g., Lawrence E. Mitchell, *The Puzzling Paradox of Preferred Stock (And Why We Should Care About It)*, 51 BUS. LAW. 443, 458-59 (1996) (contending, not entirely clearly, that because the fiduciary's duty of loyalty differs from contractual good faith and can require the fiduciary to act in a way that defeats his own expectation from the contract, fiduciary duties trump contract when they apply).

75. "Anti-contractarian" meaning they do not believe parties should be free to contract around fiduciary obligations that would apply to a given relationship by default.

76. Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1231-32 (1995).

77. *Id.* at 1232.

78. *Id.* at 1233 (suggesting that if the relationship arises due to any underlying contract, the law of contract should be the first guide in how to navigate disputes that arise in the context of that relationship).

79. *Id.* at 1240 (noting also that new academic theories are not likely to change how courts have operated for long periods of time).

prevent them from doing so,” and there is less of a “good reason” if the party can provide its own self-help through contract;⁸⁰ and finally (5) if a given situation makes it truly necessary, courts will still hold powers to call a fundamentally fiduciary relationship (which has been labeled otherwise by contract) fiduciary should equity require it.⁸¹ Under Frankel’s conceptions, sophisticated entities that contract to expressly denounce the labels of fiduciary relationships should have their bargains respected, not invaded by the court. Frankel’s reasoning is most compelling when the parties have ample power to protect themselves through contract, and fiduciary duties are unnecessary to make them whole. Frankel contends that fiduciary law should not be forced into cases that would invade the contract of sophisticated entities that are capable of self-protection through contract.

Like Professor Frankel, Judge Frank Easterbrook and Professor Daniel Fischel are proponents of the freedom to contract. They write that fiduciary relationships are not entirely distinct from contract law, but should be viewed as “merg[ing] into” contract law “with a blur and not a line.”⁸² Under their theory, a fiduciary duty is a contractual one with very high costs of specification and monitoring, whereby the duty of loyalty acts as a “gap-filler,” taking the place of detailed contractual terms. Thus, the duty of loyalty allows parties to bargain efficiently, because fleshing out all the terms in detail would make bargaining prohibitively expensive.⁸³ Easterbrook and Fischel assert that “when transaction costs are too high, courts establish the presumptive rules that maximize the parties’ joint welfare,”⁸⁴ filling in the gaps of the bargain where high costs of bargaining would otherwise make reaching an agreement inefficient. In their view, the duty of good faith concerns carrying out the contract as defined, whereas the duty of loyalty concerns how the fiduciary behaves when terms have not

80. *Id.* at 1247 (explaining that there is less of a “good reason” if the party can provide its own self-help by enforcing the terms of the contract in a court of law).

81. *Id.* at 1248. For example, if a relationship is a partnership in every way, but the parties contract to say they are not partners, a court can nonetheless find that the relationship is a partnership.

82. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 438 (1993). Easterbrook and Fischel’s theory contrasts somewhat with Smith’s unified theory, which contends that fiduciary relationships are a completely distinct class of relationships.

83. *Id.* at 427.

84. *Id.* at 446.

been defined for the given situation.⁸⁵ The reason they believe that contract and fiduciary duty share a continuum is because, in practice, fiduciary duties do not and should not trump contract as they are mere gap-fillers—efficient tools of contract—and if the contract addresses the situation at hand, courts respect parties’ bargains.⁸⁶ Thus, if the parties use their contract to show they do not intend to be subject to the court’s “presumptive rules,” or the parties have filled the relevant gaps themselves and have not left room for presumptive rules to be applied, fiduciary duties have no application.⁸⁷

Disagreeing with these scholars, Professor Melvin Eisenberg applies his well-known “limits of cognition” arguments concerning actors’ limited rationality, undue optimism, inability to appreciate negative future contingencies, and consistent underestimation (or complete ignorance) of risk. He asserts that core duty of loyalty principles should not be subject to a general waiver, because the waiving party is likely making an irrational choice.⁸⁸ However, Eisenberg’s arguments necessarily carry less weight when the parties are not simple natural persons, but rather sophisticated organizations represented by counsel, as the latter are far less susceptible to irrational decision-making.⁸⁹ Furthermore, it has been said that anti-contractarian⁹⁰ scholars such as Eisenberg tend to view individual clauses in a vacuum when agreements and relationships are more properly viewed

85. *Id.* at 427 (“The duty of loyalty replaces detailed contractual terms, and courts flesh out the duty of loyalty by prescribing actions the parties themselves would have preferred if bargaining were cheap and promises fully enforced.”).

86. *Id.* at 446 (“When actual contracts are reached, courts enforce them . . .”). *See also* discussion *supra* note 25.

87. *See generally* Ribstein, *supra* note 25 (arguing for the freedom to contract with respect to fiduciary duties, refuting arguments against this freedom, and demonstrating the courts’ agreement with the freedom-of-contract theorists); J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439, 441-43 (1997) (focusing on partnership law and RUPA and adding that, in general, “contracts addressing fiduciary duties should enjoy the same treatment as contracts on other matters,” and “the special status of fiduciary duties . . . should be of a default nature only”); DeMott, *supra* note 2, at 879 (warning that courts should be careful in using contract principles to define and discuss fiduciary relationships, particularly when a formal agreement between the parties defines terms of their relationship). DeMott does not attack the central premise of having the freedom to contract around default fiduciary duties, but she is concerned about using contract law’s terminology and concepts to decide issues primarily related fiduciary duty. *Id.*

88. *See generally* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212-13 (1995).

89. One could argue that a major reason parties hire counsel while contracting is so the counsel can give due consideration to risk and negative contingencies.

90. *See* discussion *supra* note 75.

holistically, taking account of all the protections that are afforded to the proposed beneficiary.⁹¹ So framed, allowing a party to shrug off fiduciary obligations in exchange for concessions elsewhere in the agreement may very well be rational.

II. *CITY OF HOPE NATIONAL MEDICAL CENTER V. GENENTECH, INC.*

A. Facts

The background of *City of Hope National Medical Center v. Genentech, Inc.*⁹² began in the 1970s, when Drs. Arthur Riggs and Keichi Itakura, scientists at the City of Hope National Medical Center, developed a revolutionary process for genetic engineering of human proteins.⁹³ Their discovery had the potential for great medicinal and commercial success, and a well-known figure in the field of genetic engineering, Dr. Herbert Boyer, showed great interest in the new technology.⁹⁴ Soon after Riggs and Itakura filed their grant application, Dr. Boyer and venture capitalist Robert Swanson founded Genentech, Inc., hoping to commercialize biotechnology.⁹⁵

After a few months of negotiations, City of Hope and Genentech executed a contract whereby Genentech would obtain and be assigned any patents based on City of Hope's discovery and commercialize the technology in exchange for payment to City of Hope of a two percent net royalty on sales derived from the discovery.⁹⁶ The contract further provided that if Genentech were to license the technology to a third party, City of Hope would receive a royalty as if Genentech had itself used the technology.⁹⁷ In addition, if Genentech were to succeed in a patent infringement suit against a third party for using the patented subject matter from the technology, then the winnings or settlement amount, less reasonable expenses pertaining to the lawsuit, were to be treated as "net sales" for the purposes of the contract.⁹⁸ Both sides were free to transfer their rights under the contract, and Genentech was to keep sufficiently detailed records and

91. See, e.g., Henry N. Butler & Larry E. Ribstein, *Opting out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 32 (1990).

92. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142 (Cal. 2008).

93. *Id.* at 146-47.

94. *Id.* at 147.

95. *Id.*

96. *Id.* at 147-48.

97. *Id.* at 148.

98. *Id.*

grant City of Hope audit rights.⁹⁹ Finally, the parties included a clause stating that their relationship was not an “agency, joint venture or partnership” and that City of Hope was to be considered an “independent contractor” for purposes of the agreement.¹⁰⁰

In the years that followed, Genentech engaged in patterns of behavior that could be construed as less than complete good faith and fair dealing with respect to its performance of the contract. While directly informing City of Hope about some license agreements related to the technology, Genentech was not forthcoming regarding others that arguably related to the same technology.¹⁰¹ During a 1986 inspection of Genentech’s documents, an attorney for City of Hope was allowed to review patent applications, but Genentech’s general counsel ordered a subordinate not to allow inspection of any third party license agreements.¹⁰² Furthermore, while City of Hope received royalties on some products and licenses related to the technology, others employing the same technology did not generate royalties because the parties disagreed regarding interpretation of the contractual language.¹⁰³ Finally, on at least two occasions, Genentech sued and received large settlement amounts from other parties for accusations of patent infringement relating to the technology, and in both instances Genentech resisted paying royalties to City of Hope.¹⁰⁴ The first time this occurred, Genentech and City of Hope reached an agreement.¹⁰⁵ The second time, in 1999, City of Hope sued Genentech for breach of fiduciary duty and breach of contract.¹⁰⁶

B. Procedural History

The first trial ended with a hung jury.¹⁰⁷ Upon retrial, the new jury found in City of Hope’s favor for both counts and awarded City of Hope a total of \$500 million, of which \$300 million was for compensatory damages for unpaid royalties and \$200 million was for punitive damages on the finding that Genentech had breached its fiduciary duty toward City of Hope.¹⁰⁸ On appeal, the California Court of Appeal affirmed both judg-

99. *Id.*

100. *Id.*

101. *See generally id.* at 148-149. Whether the contract covered these other drugs or processes was at issue in the contract portion of the court’s review.

102. *Id.* at 149.

103. *Id.*

104. *See id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 150.

ments.¹⁰⁹ The California Supreme Court then granted Genentech's petition for review.¹¹⁰

C. Decision

The court split its review into two portions, the first pertaining to the alleged breach of fiduciary duties and the second pertaining to the breach of contract claim.

1. *Fiduciary Duty Issue*

Looking to the two sources from which fiduciary duties can arise under California law,¹¹¹ the court quickly disposed of the first possibility, that Genentech might have "knowingly undertake[n] to act on behalf and for the benefit"¹¹² of City of Hope, as there was "no indication in the contract that Genentech entered into it with the view of acting primarily for the benefit of City of Hope. . . . [N]othing in the contract indicates that Genentech was to subordinate its interest to those of City of Hope, a point conceded by City of Hope."¹¹³

As to the second possibility, that the parties might have "enter[ed] into a relationship which imposes [a fiduciary duty] as a matter of law,"¹¹⁴ the court began by noting that the contract expressly stated that the relationship was not one of joint venture, partnership, or agency.¹¹⁵ Conceding that point, City of Hope argued that Genentech had fiduciary obligations under a different, non-traditional category of fiduciary relationship—that of *Stevens v. Marco*,¹¹⁶ where "an inventor entrusts his secret idea or device to another under an arrangement whereby the other party agrees to develop, patent and commercially exploit the idea in return for royalties to be paid the inventor."¹¹⁷ City of Hope had earlier asserted that *Stevens* was its "one theory" and the sole basis of its fiduciary duty claim against Ge-

109. *Id.*

110. *Id.*

111. *See* discussion *supra* Section I.A.2.a).

112. *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 675-76 (Cal. 1983).

113. *City of Hope*, 181 P.3d at 150 (internal citations removed).

114. *Children's Television*, 673 P.2d at 675-76.

115. *Id.* The court neglected to discuss this contractual provision that expressly disclaimed traditional fiduciary relationships and declared that City of Hope was an independent contractor, but clearly this clause demonstrates intent that the parties' relationship not be fiduciary.

116. *See* discussion *supra* Section I.A.2.c).

117. *City of Hope*, 181 P.3d at 151 (quoting *Stevens v. Marco*, 305 P.2d 669, 679 (Cal. Ct. App. 1956)).

nentech, and it identified and submitted a four-factor test to characterize fiduciary relationships.¹¹⁸

The California Supreme Court did not agree. It refused to adopt the reasoning of *Stevens* and called its language “overbroad” while favoring the much more recent California Court of Appeal decision in *Wolf*.¹¹⁹

Agreeing with *Wolf*, the court held that “fiduciary obligations are not necessarily created when one party entrusts valuable intellectual property to another for commercial development in exchange for the payment of compensation contingent on commercial success.”¹²⁰ The court thus implicitly overturned *Stevens v. Marco* by holding that a fiduciary relationship is not necessarily created “when a party, in return for royalties, entrusts a secret idea to another to develop, patent, and commercially develop.”¹²¹ With the Supreme Court’s endorsement of *Wolf*, City of Hope’s “one theory” behind its fiduciary duty claim had failed, and the order for Genentech to pay \$200 million in punitive damages was reversed.¹²²

118. *Id.*

119. *See id.* at 151-52; *see also* discussion *supra* Section I.A.2.b).

120. *City of Hope*, 181 P.3d at 154 (citing *Wolf v. Superior Court*, 130 Cal. Rptr. 2d 860, 864-65 (Ct. App. 2003)).

121. *Id.*

122. City of Hope also tried to rely on two older California Supreme Court cases, which the court distinguished. In the first, *Hollywood Motion Picture Equip. Co. v. Furer*, 105 P.2d 299 (Cal. 1940), the defendant bailee breached an oral contract and misappropriated the plaintiff bailor’s invention. The 1940 court held that “[w]here a bailee of an article has accepted it under definite terms to hold it and to use it for the benefit of the bailor, a confidence has been reposed which should remain inviolate,” *id.* at 301, but the *City of Hope* court rejected this argument because the court of 1940 never addressed the issue of whether bailment necessarily creates fiduciary duties. *City of Hope*, 181 P.3d at 152-53. Furthermore, Chodos’s 2001 treatise states “the law is clear that a mere bailee is not a fiduciary.” CHODOS, *supra* note 12, § 1:19, at 42-43. In the second case, *Schaake v. Eagle Automatic Can Co.*, 67 P. 759 (Cal. 1902), the plaintiff employee entered into an agreement to assign various patents to his employer in exchange for profits if either the company was sold or the inventions were used outside of San Francisco. *Id.* at 760. In holding that the defendant company did breach its agreement with the plaintiff and the plaintiff was entitled to payment, the court stated in dicta that “[t]he relationship thus created was fiduciary, and as to plaintiff’s share or part of the profits realized the corporation was a trustee.” *Id.* Also rejecting this argument, the *City of Hope* court characterized this language as mere dicta and noted that the court of 1902 offered no substantive discussion regarding whether the relationship in question was actually fiduciary. *City of Hope*, 181 P.3d at 153. *Schaake* turned on the contract, and its plaintiff was made whole thereby. The *City of Hope* court stated that the *Schaake* court’s language was mere dicta that was not necessary to *Schaake*’s holding, and therefore it lacked precedential value in deciding whether relationships other cases are fiduciary. *Id.* (citing *Hassan v. Mercy Am. River Hosp.*, 74 P.3d 726, 729 (Cal. 2003) (“[The Court of Appeal] viewed the statement as mere dictum because it was not necessary for the resolution of the case . . . we agree

2. *Contract Issue*

After concluding the fiduciary duty question in favor of Genentech, the court rejected all of Genentech's arguments as to the breach of contract claims.¹²³ The entire \$300 million judgment of compensatory damages for breach of contract was thereby affirmed, and with six years of interest the compensatory damages award was reported to have grown to \$475 million by the time of the California Supreme Court's decision.¹²⁴

III. DISCUSSION

In light of the court's decision, this Note will now argue that the holding of *City of Hope* was correct and will examine the current state of the law. Section III.A will demonstrate why *City of Hope* was decided correctly according to fiduciary and contract law, the academic literature, and sound policy for both the business community and nonprofit research institutions. Section III.B will summarize the state of the law and explore the practical implications of *City of Hope*.

A. Analysis of the *City of Hope* Decision

Viewed from the vantage points of law, theory, and policy, there is a strong justification for the court's decision. Section III.A.1 will demonstrate that *City of Hope* was correct according to the law and stands as a prudent clarification that fiduciary relationships in California constitute a narrow category. Section III.A.2 will explain why the court's unanimous opinion is in accord with the theories of several leading scholars. Finally, Section III.A.3 will demonstrate that the court's decision, on a macro scale, was the better policy choice for both California's business community and its nonprofit research institutions.

1. *City of Hope and the History of Fiduciary Law*

Because *City of Hope* was made whole by its contract, an additional remedy derived from fiduciary law would be extra-compensatory and therefore punitive to Genentech. The relationship was one fully defined by contract, and basic contract law teaches that mere breach of contract gen-

with the Court of Appeal here that it was 'mere dictum, thus lacking in precedential force.'"))).

123. See generally *City of Hope*, 181 P.3d at 154-59.

124. Karen Gullo, *Genentech Must Pay \$300 Million Award, Court Rules*, BLOOMBERG.COM, last updated April 24, 2008, available at <http://www.bloomberg.com/apps/news?pid=20601103&sid=aNNMNMPFBFFw> (last visited Dec. 18, 2008).

erally cannot lead to punitive damages.¹²⁵ In fact, even in the case of insurance contracts, the commonly recognized exception to this rule, the California Supreme Court recently held that “[t]he insurer-insured relationship . . . is not a true fiduciary relationship.”¹²⁶ Thus, *City of Hope*’s holding is consistent with the court’s denial of fiduciary duties or other sources of tortious damages in contract cases.¹²⁷

An award of punitive damages also would have been error because Genentech’s interpretation of the contract, though not agreed to by the court, was objectively reasonable, and its conduct was based in reliance on this interpretation. Genentech’s subjective intent should have been irrelevant as long as the contractual interpretation it relied on was objectively reasonable.¹²⁸ If a reasonable claim existed, City of Hope could have pursued punitive damages for Genentech’s conduct under a claim of fraud, but, notably, fraud was neither pled nor proved. Under contract alone, Genentech’s conduct was grounded in its objectively reasonable position with respect to the contract, standing as yet another reason why punitive damages would have been improper.

125. See, e.g., LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 215 (8th ed. 2006).

126. *Vu v. Prudential Prop. & Cas. Ins. Co.*, 33 P.3d 487, 492 (Cal. 2001) (internal quotation marks omitted).

127. See generally *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 674-80 (Cal. 1995) (overturning *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.* 686 P.2d 1158 (Cal. 1984), and clearly denying tort recovery even for bad faith breach of contract); *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 460-61 (Cal. 1994). The court argued that limiting contract breach damages to those within the reasonably foreseeable contemplation of the parties when the contract was formed:

erves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise. . . . [P]unitive or exemplary damages, which are designed to punish and deter statutorily defined types of wrongful conduct, are available only in actions for breach of an obligation *not* arising from contract. In the absence of an independent tort, punitive damages may not be awarded for breach of contract even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious.

Id. (citations omitted) (internal quotation marks omitted).

128. See *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 127 S. Ct. 2201, 2216 n.20 (2007) (subjective bad faith cannot be held against a party whose position is objectively reasonable); *Applied Equip.*, 869 P.2d at 461 (“[T]he law generally does not distinguish between good and bad motives for breaching a contract.”); Christina J. Imre, *Blurring the Distinction Between Contract and Tort: the Resurrection of Seaman’s?*, 27 CAL. CONTINUING EDUC. OF THE BAR CIV. LITIG. REP. 18 (2005) (illustrating that even in the insurance context, “California courts uniformly hold that, as a matter of law, the carrier’s reasonable, though mistaken, interpretation of its contract is an absolute defense to ‘bad faith’ tort liability”).

Furthermore, in its arguments for breach of fiduciary duty, City of Hope pushed the concept of fiduciary duty to its breaking point, arguing that “Genentech’s fiduciary obligation required merely honesty,” not putting City of Hope’s interests ahead of its own.¹²⁹ City of Hope could not credibly argue that Genentech was to put City of Hope’s interests above its own, so it argued that the extent of fiduciary duties are not the same in all fiduciary relationships, and then jumped to a conclusion that the relationship at issue could be fiduciary even though it “required no subordination of Genentech’s interests to City of Hope’s.”¹³⁰ If such an argument were accepted by the court, it would erase a major line between the realms of arm’s-length and fiduciary relationships, clouding one of the very foundations of fiduciary duties: one party undertaking to act primarily for the benefit of, or with a duty of unselfishness to, the other.

City of Hope’s arguments for the existence of fiduciary duties also looked to Genentech’s “superior position,”¹³¹ but such a consideration should have been immaterial to City of Hope’s case. First, *Wolf* held that concerns of equity cannot create fiduciary duties where they would not otherwise exist.¹³² Second, *Wolf* aside, at the time the agreement in question was signed, City of Hope was a large medical research center and Genentech was a brand new start-up company consisting of little more than its two founders and a charter.¹³³ Therefore, any “superior position” held

129. Answer to Brief of Amici Curiae, at *17, *City of Hope Nat’l Med. Ctr. v. Genentech, Inc.*, 20 Cal. Rptr. 3d 234 (No. B161549) 2004 WL 1080617 [hereinafter *City of Hope Answer Brief*].

130. *Id.* at *17.

131. *Id.*

132. See *Wolf v. Superior Court*, 130 Cal. Rptr. 2d 860, 866-68 (Ct. App. 2003); see also discussion *supra* Section I.A.2.b).

133. At the time the agreement was negotiated, Robert Swanson was only twenty-eight years old, and “Genentech was Swanson and Boyer, period. And that’s what it was.” Sally Smith Hughes, *Arthur D. Riggs: City of Hope’s Contribution to Early Genetic Research* 39, 58-63, Reg’l Oral History Office, The Bancroft Library, Univ. of Cal., Berkeley (2006). Because Genentech had no laboratories and no office space, Dr. Boyer’s workplace was simply his lab at UCSF, and, in fact, “[o]ne of the criticisms was that there was no separation between Genentech and Boyer’s lab at UCSF.” *Id.* Swanson had recently been let go by the venture capital firm Kleiner Perkins (KP), but until he found what he was to do next, he was allowed to use the KP office space and negotiations took place at KP. *Id.*; Sally Smith Hughes, *Robert A. Swanson: Co-Founder, CEO, and Chairman of Genentech, Inc.* 9-10, Reg’l Oral History Office, The Bancroft Library, Univ. of Cal., Berkeley (2001); Sally Smith Hughes, *Keiichi Itakura: DNA Synthesis at City of Hope for Genentech* 29, Reg’l Oral History Office, The Bancroft Library, Univ. of Cal., Berkeley (2006). Thus, if superior bargaining power was held by either party, it was City of Hope, as evidenced by KP named partner and famed venture capitalist Tom Perkins attempting to persuade City of Hope that Genentech would be a suitable collaborator

by Genentech that became a focus of City of Hope's arguments necessarily must have come about after the entities had formed their agreement. Even if one accepted City of Hope's contention that a party's "superior position" can make it a fiduciary, City of Hope never explained how a party that was not in a superior position when the agreement was formed could be transformed into a fiduciary *ex post* by virtue of its growth and commercial success. City of Hope failed to cite a theory in law or equity that can transform a contracting party that is fully at arms-length on the effective date into a fiduciary simply because of its post-execution success.¹³⁴ Viewing City of Hope and Genentech most properly (*i.e.*, at the time of the agreement's formation), it is clear that the court's decision that Genentech did not owe City of Hope any fiduciary duty issue was correct.¹³⁵

City of Hope also emphasized its vulnerability to, and dependence upon, Genentech concerning honesty and the fair payment of royalties as motivations for imposing fiduciary duties upon Genentech, but these "[c]onsiderations of fairness and equity"¹³⁶ were also rightly ignored by the court. City of Hope had express contractual rights to audit Genentech

and assuring the research center that Perkins and his investors would be backing Genentech. Glenn E. Bugos, *Thomas J. Perkins: Kleiner Perkins, Venture Capital, and the Chairmanship of Genentech* 5-6, Reg'l Oral History Office, The Bancroft Library, Univ. of Cal., Berkeley (2002) (Perkins: "I did go down to visit the City of Hope and meet with their management . . . to persuade them to do it. They had other things they could have done instead. We wanted their cooperation.").

134. Rather, the proper time for analyzing whether or not the relationship is fiduciary is the time of formation, for only then do the parties manifest their intents and decide how to structure the relationship in the context of an arm's-length bargain. Unless the bargain is materially changed after the formation point, there is no legitimate reason why factors such as post-formation growth and financial success would impose fiduciary obligations upon a previously non-fiduciary party.

135. The California Healthcare Institute (CHI), a nonprofit, public policy research and advocacy organization for California's biomedical industry of which both Genentech and City of Hope are members, submitted an amicus brief to the California Supreme Court in support of Genentech. In its brief, CHI noted that at the time of the agreement, City of Hope "had been in existence for 63 years" while "Genentech was a startup company in an industry . . . that did not yet really exist." CHI argued that "Genentech's stature and financial health today should not obscure the fact that in the spring and summer of 1976, Genentech was a fragile infant of a company whose future was speculative at best. If either party occupied a superior bargaining position in 1976 . . . it was [City of Hope], not Genentech." Brief of Amicus Curiae Cal. Healthcare Inst. in Support of Defendant and Appellant, at *9, *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142 (No. S129463) 2006 WL 951479 [hereinafter CHI Amicus Brief].

136. *Wolf*, 130 Cal. Rptr. 2d at 868.

and receive periodic accountings.¹³⁷ Therefore, it needed nothing of a fiduciary nature to protect itself in this manner. Furthermore, *Wolf*, which the California Supreme Court cited favorably in *City of Hope*, made it clear that contractual rights to an accounting do not create a fiduciary relationship.¹³⁸ Additionally, California law has long found an implicit contractual right to an accounting in any contract for division of profits or payment of royalties, even if the contract does not expressly provide for one.¹³⁹ Therefore, at least in California, when contractual parties agree to divide profits or revenues, contract law provides a means to audit and renders fiduciary duties unnecessary in obtaining such a right.

City of Hope also looked to the exchange of confidential information as grounds for the existence of a fiduciary relationship, but the California Supreme Court has long distinguished confidential relationships from fiduciary relationships.¹⁴⁰ Had Genentech publicly disclosed *City of Hope*'s confidential information and harmed the collaboration's acquisition of intellectual property rights, California would have recognized a cause of action for breach of confidence. However, the possibility of such an action would have ended when the related patents issued or the patent applications were made public, and *City of Hope* did not suggest that Genentech had breached its confidence. Thus, California distinguishes confidential relationships from fiduciary ones, and after the intellectual property rights were secured, any possible action for breach of confidence would have expired.

Finally, the court's decision was correct because mere confidentiality or the exchange of confidential information, in and of itself, does not make the relationship fiduciary.¹⁴¹ Even assuming, *arguendo*, that the initial granting of information to Genentech did create a fiduciary relationship,

137. See *City of Hope*, 181 P.3d at 148 ("In Article 8, Genentech agrees to compute and pay royalties to City of Hope quarterly, 'to keep regular books of account in detail to permit the royalties payable hereunder to be determined,' and to permit City of Hope to inspect Genentech's books and records."). Although it is true that enforcing audit rights is quite costly, under *Wolf* the cost of protective measures such as audits cannot create a fiduciary obligation where one would not otherwise exist. *Wolf*, 130 Cal. Rptr. 2d at 866-68.

138. See *id.* ("[T]he parties do not dispute that the contract itself calls for an accounting. That contractual right, however, does not itself convert an arm's length transaction into a fiduciary relationship.").

139. See *Nelson v. Abraham*, 177 P.2d 931, 934 (Cal. 1947).

140. See *Davies v. Krasna*, 535 P.2d 1161, 1166 (Cal. 1975) ("Plaintiff's argument confuses a cause of action for breach of confidence with a cause of action for violation of a duty arising from a confidential relationship. . . . 'A confidential relation may exist although there is no fiduciary relation'").

141. See discussion *supra* Section I.A.1.

there is no logical reason why the fiduciary duty created thereby would live on after the patents were prosecuted and the information was publicized through patent. If secrecy or confidentiality was the source of the duty, there would be no reason for Genentech to remain a fiduciary many years after the issuance of patents disclosing the information to the public. Thus, under California law, City of Hope's claim that a fiduciary relationship existed due to confidentiality was tenuous at best, and even if such a relationship had formed there would be no justification for Genentech to remain a fiduciary simply because the information had been secret at one time.

2. City of Hope *and the Academic Literature*

Within the academic literature, some scholars have focused on demonstrating that fiduciary relationships actually form a relatively narrow category, while others have focused on the interaction of fiduciary and contract law.¹⁴² This Section will demonstrate why both groups of theorists would agree with the *City of Hope* result.

a) Fiduciary Duties as a Narrow Category of Relationships

City of Hope was correct because the relationship at issue would satisfy neither Smith's critical resource theory¹⁴³ nor Ribstein's duty of unselfishness.¹⁴⁴ In the eyes of both scholars, it would have been error to define the relationship as anything more than contractual and ignore evidence of the parties' intent to that end.

Smith's primary consideration in imposing fiduciary obligations is how the proposed fiduciary's potential for opportunism balances against the proposed beneficiary's capacity for self-help. In *City of Hope*, Genentech concededly did have the potential for opportunism, but City of Hope had full capacity for self-help through the contract itself. City of Hope contracted for audit and accounting rights (and California courts would have found such rights regardless¹⁴⁵), and was made completely whole through the award of compensatory damages. City of Hope lost no relief because the compensatory damages were sufficient to restore the research center to its rightful condition, and thus the court's decision comports with Smith's theory.

142. See discussion *supra* Section I.B.

143. See discussion *supra* Section I.B.1.a).

144. See discussion *supra* Section I.B.1.b).

145. See *Nelson v. Abraham*, 177 P.2d 931, 934 (Cal. 1947).

In addition, Smith's "on behalf of" requirement, which is synonymous with the Restatement of Agency's phrase "primarily for the benefit of,"¹⁴⁶ is a necessary component of fiduciary relationships according to both Smith and Ribstein. City of Hope conceded that "nothing in the contract indicates that Genentech was to subordinate its interests to those of City of Hope," instead contending that Genentech's fiduciary duty only imposed a duty of honesty.¹⁴⁷ As discussed above, such an argument stretches the concept of the fiduciary relationship beyond its breaking point,¹⁴⁸ and thus the court was also in agreement with Ribstein and Smith's narrow conception of fiduciary duties.

Furthermore, Smith points out that in a close case (regarding whether the relationship was fiduciary or not), courts will look to whether the proposed beneficiary demonstrated the requisite "special trust." Beyond merely "reposing a trust," as a great number of contracting parties do, City of Hope demonstrated no special trust in Genentech when the relationship was formed. As noted,¹⁴⁹ at the time the agreement in question was executed, City of Hope was a national medical center and Genentech was a four-month-old start-up company consisting of only Robert Swanson and Dr. Boyer. Both sides were represented by counsel, but even if the Genentech of today is a multibillion dollar, publicly traded company, at the time that the agreement was formed City of Hope held the bargaining advantage if either of the parties did. In fact, Thomas Perkins worked to persuade City of Hope that Genentech would be an acceptable collaborator and assured the research center that he and his investors would be backing Genentech.¹⁵⁰ In this light, the unreasonableness of City of Hope's argument is apparent, for it asserted that an established national medical research center placed a beneficiary's "special trust" in a four-month-old start-up company, the viability of which had to be assured to City of Hope. Thus, the court's decision sits readily with Professor Smith's "special trust" requirement, as the record makes clear that City of Hope did not place such a trust in Genentech when the agreement was formed.

Smith further asserts that a contracting party exercises discretion with respect to performance of the contract, while a fiduciary exercises discretion with respect to a critical resource belonging to the fiduciary. In this case, the critical resource arguably no longer even "belonged" to City of Hope, as it had assigned all intellectual property from Drs. Riggs and Ita-

146. See discussion *supra* Section I.B.1.a).

147. City of Hope Nat'l Med. Ctr. v. Genentech, Inc., 181 P.3d 142, 150 (Cal. 2008).

148. See discussion *supra* Section III.A.1.

149. See discussion *supra* note 133.

150. See *id.*

kura's discovery to Genentech in exchange for a contractual right to royalties.¹⁵¹ Beyond that, Genentech did not misappropriate a critical resource in the way a disloyal fiduciary does, such as a partner or agent exploiting their respective partnership or principal's rightful business opportunities. Genentech's failure was not in terms of being disloyal in carrying out those opportunities (misappropriating opportunities that should have benefited City of Hope), but rather in terms of its performance of the contract itself. Phrased another way, Genentech did not fail City of Hope in exercising discretion with respect to City of Hope's critical resource; rather, Genentech failed with respect to its performance of the contract.¹⁵²

The California Supreme Court's decision also comports with Ribstein's "duty of unselfishness" theory of fiduciary relationships.¹⁵³ Moreover, the court's decision, like Ribstein's analysis, cut through past dicta and clarified that the category of fiduciary relationships is narrow. City of Hope itself conceded that Genentech had no obligation to put the research center's interests above its own.¹⁵⁴ Ribstein's analysis demonstrates that the fiduciary's duty of unselfishness—putting the beneficiary's interests above its own—is the very core of fiduciary duties, and by arguing that Genentech's fiduciary duty required "merely honesty" and "only good faith, fair dealing, and full disclosure,"¹⁵⁵ City of Hope was asking the court to recognize a murky fiduciary duty that would allow hundreds of millions of dollars in punitive damages while looking dangerously indistinguishable from the central duties of contract law.¹⁵⁶ Despite dicta regarding fiduciary duties, Ribstein argues that "a careful analysis of how courts have applied fiduciary duties shows that the law is largely consis-

151. Under the terms of the agreement, Genentech was the only party that could pursue patent protection. City of Hope could only seek patents if Genentech failed to do so or if it abandoned an application. *See City of Hope*, 181 P.3d at 147.

152. *See also* discussion *supra* Section I.A.1 (relating to California's recognition of claims for breach of confidence and delineation of confidential and fiduciary relationships).

153. *See* discussion *supra* Section I.B.1.b); *see generally* Ribstein, *supra* note 10.

154. *See* City of Hope Answer Brief, *supra* note 129, at *17 ("Genentech's fiduciary obligation required merely honesty, not self-sacrifice. . . . [T]he relevant jury instruction required no subordination of Genentech's interests to City of Hope's . . ."). *See also* *City of Hope*, 43 Cal. 4th at 386 ("There is no indication in the contract that Genentech entered into it with the view of acting primarily for the benefit of City of Hope. . . . [N]othing in the contract indicates that Genentech was to subordinate its interests to those of City of Hope, a point conceded by City of Hope.").

155. City of Hope Answer Brief, *supra* note 129, at *17.

156. *See* *Aas v. Superior Court*, 12 P.3d 1125, 1135 (Cal. 2000) ("A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations.").

tent with the narrow view.”¹⁵⁷ In *City of Hope*, the court established an important guidepost that fiduciary duties should be applied sparingly.

b) *City of Hope* and the Interaction of Contract and Fiduciary Law

Professors Frankel, Easterbrook, and Fischel focus more on the interaction of fiduciary and contract law than on defining and categorizing fiduciary relationships,¹⁵⁸ but their work also provides support for the court’s decision.

i) *Fiduciary Duties as Default Rules*

Under Frankel’s conception, fiduciary duties arise in fiduciary relationships by default, but parties have the freedom to contract around fiduciary obligations. Thus, fiduciary relationships are not unlike many other relationships in that there are defaults that can be altered by contracting parties.¹⁵⁹ Though the court did not discuss whether the language of the contract demonstrated intent to avoid fiduciary obligations, the parties did expressly shrug off the titles of the traditional fiduciary relationships and stated that they were independent contractors. That is a clear demonstration of such intent. The Genentech-City of Hope relationship did not fit any established category of fiduciary relationship, but even if the relationship would have been fiduciary by default, Frankel’s conception of fiduciary duties would say that the parties removed any possibility for fiduciary obligations when they showed intent to, and did, contract out of any fiduciary duties that would have existed by default.

ii) *Fiduciary Duties as Efficient Gap-Fillers*

Easterbrook and Fischel’s characterization of fiduciary duties also provides support to the California Supreme Court’s decision. According to them, fiduciary duties act as gap-fillers¹⁶⁰ that allow for efficient drafting

157. Ribstein, *supra* note 10, at 213; Ribstein, *Structure*, *supra* note 66, at 6.

158. *See* discussion *supra* Section I.B.2.

159. *See* Frankel, *supra* note 76, at 1231-32.

There are good reasons for viewing fiduciary rules as default rules and for enforcing the parties’ bargain around them [P]eople ought to be free to govern their relationship unless good reasons exist to impose mandatory rules upon them [Default] rules are presumed to represent the terms to which most parties would agree had they negotiated the terms. If the particular parties wish to deviate from the default rules, they should be free to bargain around them.

Id.

160. Easterbrook and Fischel’s characterization may be quite similar to Frankel’s; perhaps they are addressing the same subject from alternative perspectives. Indeed, both

when drafting for every possible situation would be too resource-intensive.¹⁶¹ Therefore, fiduciary duties impose a certain standard of acceptable behavior in those situations for which parties cannot draft efficiently.

The court's decision in *City of Hope* comports with this model. Beyond patenting and commercialization, the relationship itself was not at all complex, and the events that took place were easily foreseeable. Royalties were defined by the terms of the contract, and that Genentech would attempt to pay less than the rightful amount of royalties was assuredly a foreseeable circumstance. Most likely, this was precisely why City of Hope required an audit clause be placed in the contract. Therefore, Genentech's breach of contract was not a situation for which the parties needed a "gap-filler," for the terms of the contract filled any potential gap. Genentech was to pay certain royalties to City of Hope, and when Genentech failed to do this, it merely breached the terms of the contract. Since Easterbrook and Fischel view fiduciary duties as efficient gap-fillers, the duties do not apply when the parties have filled the gaps themselves by contract and demonstrated intent not to be subject to fiduciary obligations. Thus, the court's decision comports with their theory, as well.

3. City of Hope and the Business and Research Communities

The *City of Hope* decision will have broad effects on the research and business communities of California. Furthermore, the court's refusal to find fiduciary duties could impact California's business community and affect the formation of future deals similar to that between Genentech and City of Hope. This Section will describe why, from a policy perspective, *City of Hope* was most likely the correct decision for both for the business community and nonprofit research institutions.

a) Business Community

Regarding the business community in California, and specifically the high technology and biotechnology companies that are pillars of the state's economy, the court's decision regarding fiduciary duties was sound from a

theories advocate liberal freedom of contract in designing relationships, even relationships with fiduciary characteristics. Moreover, in contract law (e.g., the U.C.C.), the default rules generally serve as gap-fillers. Thus, Easterbrook & Fischel and Frankel's theories are in agreement, and may actually be quite uniform.

161. This is clear when one thinks about how complicated the agreements between partners, trustees and trusts, directors and corporations, officers and corporations, or actors in other fiduciary-beneficiary relationships would be if the parties had to think of and draft an acceptable course of action for every possible contingency. Assuming this is possible, it would still be inefficient and consume a great deal of resources.

policy perspective. Sophisticated entities prefer certainty and predictability in their deals.¹⁶² Parties want to be able to assess risk and possible future liability. Defining their relationships through contract allows both sides to have full knowledge of their obligations and potential liabilities. Were the California Supreme Court to affirm a holding that effectively inserts open-ended liability and unpredictable, undefined obligations into relationships that were previously defined through precise negotiations and exacting language, the result would grant undeserved windfalls for some parties while depriving others of the benefit of their bargain. *City of Hope* reassured the business community that entities can define their relationships through contract and have their bargains respected by the courts without fear of extra-contractual fiduciary obligations that the parties did not intend to bear.

The California Healthcare Institute (CHI), despite holding both *City of Hope* and Genentech in its membership, still felt the need to submit an amicus brief in support of Genentech, warning the court that imposing fiduciary duties in cases such as these would harm California's biotechnology industry.¹⁶³ CHI further warned that the court should be wary of "judicial attempts to make fiduciaries out of entrepreneurs."¹⁶⁴ This warning is especially powerful when one remembers that doing so would likely impose fiduciary duties ex post based on later success even if no fiduciary duties existed at the time the agreement was formed. Such a conception of fiduciary duties would no doubt harm California's entrepreneurial business culture.

b) Nonprofit Research Institutions

Two of the briefs put forth by amici warned that ruling for Genentech as to the fiduciary duties issue would be detrimental to nonprofit research institutions.¹⁶⁵ These assertions are incorrect for several reasons.

162. See, e.g., Lee C. Buchheit, *Law, Ethics, and International Finance*, 70 LAW & CONTEMP. PROBS. 1, 2 (2007) ("Parties entering into a commercial contract want predictability in its interpretation and enforcement [W]hat commercial parties find intolerable is the prospect of locking themselves into a contractual arrangement that may subsequently be interpreted or enforced in a manner inconsistent with their presigning intentions.").

163. CHI Amicus Brief, *supra* note 135 at *16.

164. *Id.* at *18.

165. See generally Brief for Mem'l Sloan-Kettering Cancer Ctr., et al. as Amicus Curiae Supporting Respondent, *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142 (No. S129463), 2006 WL 951480, at *6-16 [hereinafter *Sloan-Kettering Amicus Brief*]; and Brief for the Acad. of Applied Sci. as Amicus Curiae Supporting Respon-

In their briefs, the nonprofit research institutions (or representative groups thereof) acting as amici paint themselves as vulnerable entities that do not have the same expertise or personnel of private companies when it comes to licensing deals, and therefore, they feel there is a great probability they will be “cheated and taken advantage of.”¹⁶⁶ However, this assumes that research institutions and universities will not retain adequate counsel to prevent their being taken advantage of, which is unlikely, and furthermore is not an issue with which a court must concern itself.¹⁶⁷ In addition, all across the nation, nonprofit research institutions serve as the birthplaces of venture-backed start-ups and spin-offs, as well as the homes of zealous technology transfer offices.¹⁶⁸ In contrast to the amici’s arguments, there is concern that nonprofit research institutions are actually too focused on commercialization and are being distracted from other goals, such as education and conducting less lucrative (but still often publicly funded) research for the public good.¹⁶⁹ In the face of the amici’s argument, there is a great deal of evidence to suggest that nonprofit research institutions are quite capable of protecting their interests in pursuits of commercialization.¹⁷⁰

dent, *City of Hope Nat’l Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142 (No. S129463), 2006 WL 951477, at *5-13.

166. See generally Sloan-Kettering Amicus Brief, *supra* note 165, at *7-9.

167. In a civil action between two large entities, this author does not see why a court would concern itself with a party’s choice of counsel or that counsel’s competence.

168. This has been especially true since the 1980 passing of the Bayh-Dole Act, 35 U.S.C. §§ 200-212 (2007) (allowing universities and other nonprofits to own intellectual property that resulted from government funding).

169. See, e.g., SHELDON KRIMSKY, *SCIENCE IN THE PRIVATE INTEREST: HAS THE LURE OF PROFITS CORRUPTED BIOMEDICAL RESEARCH?* 1-7 (2004) (“[U]niversity science becomes entangled with entrepreneurship; knowledge is pursued for its monetary value; and expertise with a point of view can be purchased.” Furthermore, “[a]s universities turn their scientific laboratories into commercial enterprise zones and as they select their faculty to realize these goals, fewer opportunities will exist in academia for public-interest science—an inestimable loss to society.”); see also MICHAEL CRICHTON, *NEXT*, Author’s Note § 5 (2006) (“As a result of [the Bayh-Dole Act], most science professors now have corporate ties—either to companies they have started or other biotech companies. Thirty years ago, there was a distinct difference in approach between university research and that of private industry. Today, the distinction is blurred, or absent.”). For more on the results of the Bayh-Dole Act, see Bernadette Tansey, *The Building of Biotech: 25 Years Later, 1980 Bayh-Dole Act Honored as Foundation of an Industry*, S.F. CHRON., June 21, 2005 at D1 (explaining that “critics made a case that the 1980 act has had devastating, if unintended, consequences on the integrity of the scientific enterprise” and suggesting that the Bayh-Dole Act led to higher healthcare costs and entangled university researchers in bureaucratic paperwork).

170. See, e.g., Press Release, Royalty Pharma, Royalty Pharma Acquires a Portion of New York University’s Royalty Interest in Remicade(R) for \$650 Million (May 4, 2007),

In addition, CHI, whose membership also includes Stanford University and the University of California, warned the court that ruling against Genentech on the fiduciary duties issue could actually harm universities and other nonprofits by diverting research money that would otherwise be awarded to those research institutions.¹⁷¹ CHI's concerns are sound, for if cooperative agreements formed between corporations and nonprofit research institutions expose corporations to high levels of risk and open-ended liability, efficient deals will either come together at a smaller dollar amount or a lower royalty rate for the institution, or they will be pushed outside of the settlement gap and will not come together at all. When corporations can cap liability and bargain to diminish risk factors with greater certainty, nonprofit research institutions will benefit with enhanced ability to commercialize because the lowered risk will mean more deals will be deemed efficient and thus will come together more easily. Furthermore,

available at http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=ind_focus.story-&STORY=/www/story/05-04-2007/0004581241&EDATE=FRI+May+04+2007,+02:01+PM (last visited Nov. 17, 2008) (announcing NYU's sale of the rights to the anti-inflammatory agent Remicade in exchange for \$650M in cash up-front plus rights to additional royalties based on drug sales); Press Release, Emory Univ., Emory Is Top-Ranked Univ. in Latest Survey of Commercialized Research (Feb. 26, 2007), available at http://whsc.emory.edu/press_releases2.cfm?announcement_id_seq=9180 (last visited Nov. 17, 2008) (announcing Emory's sale of its future royalty rights for the HIV/AIDS drug Emtriva to Gilead Sciences and Royalty Pharma for a one-time payment of \$525M); *Stanford Reaps Windfall from Google Stock Sale*, L.A. TIMES, Dec. 2, 2005, at C-2 (announcing Stanford University's \$336M profit from the sale of Google stock received for allowing the company to use internet search technology developed by Google's founders while they were students at the university—technology that Stanford licenses to Google). See also Association of University Technology Managers, *FY 2006 AUTM U.S. Licensing Activity Survey*, available at http://www.autm.net/AM/Template.cfm?Section=FY_2006_Licensing_Activity_Survey&Template=/CM/ContentDisplay.cfm&ContentID=1804 (last visited Jan. 31, 2009) (listing the single-year 2006 technology licensing revenue for several select universities as follows: University of California System, \$193.5M; New York University, \$157.4M; Stanford University, \$61.3M; Wake Forest University, \$60.6M; University of Minnesota, \$56.2M; Massachusetts Institute of Technology, \$43.5M; University of Florida, \$42.9M; University of Wisconsin-Madison, \$42.4M; University of Rochester, \$38.0M; University of Washington, \$36.2M; Northwestern University, \$30.0M; University of Massachusetts, \$27.2M; University of Colorado, \$21.2; Harvard University, \$20.8M; University of Michigan, \$20.4M); Columbia Univ., *Columbia Univ. Sci. and Tech. Ventures Annual Report 2005*, available at http://stv.columbia.edu/assets/2004-2005_annual_report.pdf (last visited Nov. 17, 2008) (announcing Columbia University's \$159.7M in technology licensing revenues for fiscal year 2005).

171. See CHI Amicus Brief, *supra* note 135, at *17-18. See also Cal. Healthcare Inst., *CHI Member List*, available at http://chi.org/uploadedFiles/CHI%20Member%20List%20for_print%20on%20Ltrhd.pdf (last visited Jan. 31, 2009).

those deals that would have been efficient even with the added risk of fiduciary liability will now likely come together at a higher point in the settlement gap, with the lowered risk to corporations meaning higher royalty rates can be bargained for by the research institutions.¹⁷²

Thus, while it is highly unlikely that the fiduciary duties ruling of *City of Hope* would keep nonprofit research institutions from entering into licensing agreements, the opposite ruling likely would have had a net negative financial impact on such institutions. Such a result would surely have benefited City of Hope itself in the short term, but corporations would have become more conservative in making deals with research institutions. This would have resulted in fewer deals being formed for less money per deal,¹⁷³ creating an overall negative impact on research institutions.¹⁷⁴

172. See CHI Amicus Brief, *supra* note 135, at *17-18 (arguing that “[i]mposing fiduciary duties on sponsored research could push research dollars away from universities and nonprofits,” because “[i]f contracting with such institutions becomes risky or uneconomic, businesses may look for alternatives,” since “[p]otential exposure to punitive damages significantly increases the risk of contracting with academic institutions. Such risk could result in fewer technology transfer agreements, hence fewer new medicines for patients. Academic science can only benefit patients when companies agree to commercialize it.”). See also Michael Dorff, *Attaching Tort Claims to Contract Actions: An Economic Analysis of Contort*, 28 SETON HALL L. REV. 390, 404 (1997).

Awarding nonpecuniary damages could also inhibit commercial transactions. Parties may be more reluctant to enter into transactions knowing that they could face liability for large nonpecuniary losses if they breached the contract. Increasing the expected damages for breach would reduce the expected value of the transaction and commensurately reduce parties' willingness to commit themselves to a contract. . . . This uncertainty becomes even more problematic once risk aversion is taken into account. Parties who would be relatively risk-neutral when faced with limited damages for breach may become more risk-averse when faced with expanded liability. Even a small chance of a disproportionately large nonpecuniary loss award could deter parties from entering into socially beneficial transactions.

Id.

173. Meaning less money than would have been obtained without the added risk of fiduciary liability.

174. See Easterbrook & Fischel, *supra* note 82, at 428 (“Such a decision might produce a windfall for the plaintiff today. What of tomorrow? Prices and practices would adjust.”). This Note assumes that despite any criticisms of the Bayh-Dole Act, nonprofit research institutions themselves believe that obtaining more research money—even from corporate actors—is in their own best interests. The policy arguments do not take a position regarding the desirability of retaining Bayh-Dole, they simply assume that the research centers and universities themselves desire whichever policy will result in a larger number of research-funding agreements for larger amounts of money per agreement. Whether it is sound public policy for nonprofit research institutions to maximize their funding in this manner is beyond the scope of this Note.

B. Looking Forward

In the wake of *City of Hope*, California courts will likely be hesitant to find fiduciary duties if the relationship does not fit a clearly established category of fiduciary relationships.¹⁷⁵ Beyond that, if the relationship is founded on a contractual agreement and the agreement was reached at arms-length, *City of Hope* and its endorsement of *Wolf* will likely deter courts from finding fiduciary obligations even in cases which appeal to one's sense of fairness and equity. This has implications for both technology licensing agreements and questions about fiduciary issues that arise in other settings.

After *City of Hope*, if a contracting party wants the relationship to be fiduciary, the party's counsel should ensure that the agreement has express language to that end. Otherwise, courts in California will likely be reluctant to find any fiduciary obligations arose from the contractual relationship.

IV. CONCLUSION

In *City of Hope*, the California Supreme Court took an important stand to provide much-needed clarity for this area of law, stopping fiduciary duty "creep" and, perhaps more broadly, the "tortification" of contract law.¹⁷⁶

City of Hope reaffirmed the freedom of sophisticated parties to define their relationships through contract. It also avoided imposing punitive measures upon a party whose position concerning its breach, though wrong in the eyes of the court, was objectively reasonable. Furthermore, and perhaps most importantly for the efficiency that contract law provides to the marketplace, the court chose not to cloud contract law by finding fiduciary duties very similar to those imposed by contract.

The court's unanimous decision was also in agreement with some of the leading scholars in this field, including Professors Easterbrook, Fischel, Frankel, and Ribstein. At the very core of fiduciary relationships is

175. The California Supreme Court is quite influential to courts in other states. As such, the court's holding in *City of Hope* may have legal implications outside of California. Furthermore, many corporations and universities that are not based in California but conduct business and enter into cooperative agreements with entities that are residents of California will also be affected by *City of Hope*, so the decision's financial impact will almost assuredly reach outside of California. The decision's importance was evidenced by national interest in the case, which spurred amicus activity from non-California entities such as Microsoft Corp. and the University of Illinois.

176. See Imre, *supra* note 128.

the concept of one party undertaking a duty of unselfishness to work for the benefit of the other. City of Hope itself conceded that it had never expected unselfish behavior from Genentech. Furthermore, freedom of contract allows parties to contract out of fiduciary duties and, as the great majority of sophisticated entities do, rely on contract alone to make them whole. In this case, the parties showed clear intent to be free of fiduciary obligations. In addition, if fiduciary duties are properly viewed as default provisions, or “gap-fillers,” then the agreement in question left no “gap” to be filled—Genentech breached the contract itself, not some extra-contractual duty.

Finally, if the court had not decided the fiduciary issue as they did, *City of Hope* would have had dangerous policy implications, both for business in California and, in the broader scope, for nonprofit research institutions like City of Hope. Deciding in favor of City of Hope on the fiduciary issue would have found (or perhaps created) a heretofore unknown duty that did not exist at the time the agreement was formed, but rather came into being as a result of the entrepreneur’s later success and stature. Such a precedent would clearly be dangerous in a state that depends on technology, start-up companies, and a culture of entrepreneurship to act as one of its major economic engines. Furthermore, judicial action to add so much uncapped and unknown risk to contracting with nonprofit research institutions such as medical research centers and universities would certainly move many otherwise efficient deals out of parties’ settlement gaps. This would result in fewer agreements to fund nonprofit research. In addition, the uncapped risk of fiduciary liability for corporations would mean that deals that still did come together would provide appreciably less money for the research institutions than the same deals without the added risk.

Therefore, in terms of case law, the literature, and sound policy, *City of Hope* was a benchmark decision in which the California Supreme Court held correctly. In doing so, the court provided clarity to the law and rightly chose to keep fiduciary duties where they belong—in that narrow class of relationships for which they are most efficient and appropriate.