

From the ethic of stewardship to fiduciary duties

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The Calvinist conception of wealth as stewardship has found a legal translation in modern law: the fiduciary duties of those who manage the property of others. Swiss agency law imposes on the agent a duty of care and loyalty; the agent is liable to the principal for the faithful and careful performance of the mandate (Art. 398 para. 2 of the Code of Obligations, CO). Wealth managers, banks and fiduciaries are subject to these obligations, which have been specified and reinforced by financial services law and supervisory law.

Geneva wealth management has also developed a substantial practice in foreign wealth-holding structures, in particular trusts, which Swiss law did not originally recognise. Switzerland's ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition facilitated the recognition of these structures.¹ Since the entry into force of the Financial Institutions Act, professional trustees established in Switzerland have been subject to authorisation.² Geneva has a sizeable community of practitioners in trusts and wealth-holding structures, which carries on the tradition of stewardship in its own way.

The fiduciary duty has several dimensions. Loyalty requires the manager to put the client's interest before his own and to manage conflicts of interest. Diligence demands competent management, based on sufficient knowledge of the client, his objectives and his risk tolerance. Transparency presupposes full information on costs, risks and remuneration. Accountability, finally, obliges the manager to account for his management and to return what he has received in performing the mandate (Art. 400 para. 1 CO). These requirements, which Calvinist morality expressed in terms of fidelity and truth, today form the legal foundation of wealth management.

The case law of the Federal Supreme Court on retrocessions illustrates the practical scope of these principles. Commissions paid by third parties to the

manager in connection with the performance of the mandate must in principle be returned to the client, unless the client has validly waived them with full knowledge of the facts.³ This solution applies to the contemporary financial world a rule of loyalty that the merchants of the sixteenth century would have understood: whoever acts for another must not enrich himself without that person's knowledge.

Worked example. A manager invests CHF 10 million of a client's assets in funds that pay him an annual commission of 0.5 per cent of the amounts invested. The commission amounts to CHF 50,000 a year, or CHF 500,000 over ten years. In the absence of a valid waiver by the client, these sums must in principle be returned to him. The question is far from theoretical: it has given rise to numerous claims and to an adjustment of practices in the financial centre. The figures are fictitious.

1 Notes

1. Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (SR 0.221.371), in force for Switzerland since 1 July 2007 (Federal Decree of 20 December 2006; Art. 149a–149e of the Federal Act on Private International Law, PILA), see Part E, Chapter V. ↩
2. Federal Act of 15 June 2018 on Financial Institutions (Financial Institutions Act, FinIA; SR 954.1), in force since 1 January 2020: Art. 17 (wealth managers and trustees), Art. 22 para. 1 (minimum capital of CHF 100,000 paid up in cash), Art. 23 (own funds), Art. 61 (supervision by FINMA together with a supervisory organisation). ↩

3. ATF 137 III 393 (Federal Supreme Court, 29 August 2011; summary on droitpourlapratique.ch): under Art. 400 para. 1 CO, the manager must “return everything he has received in that capacity, on whatever basis”; an advance waiver is valid only if the principal is informed “completely and accurately about the amounts he is waiving”, knows “their extent and their method of calculation” and “the principal’s intention is expressly apparent from the agreement of the parties”, the burden of proof lying with the agent; CDBF, “Rétrocessions : la créance en restitution des rétrocessions se prescrit par 10 ans” (cdbf.ch/978): “the client’s claim is subject to a limitation period of 10 years (Article 127 CO)”, running “for each claim for restitution, from the day on which the agent received the amount to be credited back to the principal” (ATF 143 III 348). ↩

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