

FIDUCIARY DUTIES AND CORPORATE LIABILITY:  
DEFAULT RULES AND OPTING OUT

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## ABSTRACT

The research focuses on the problem of the optimal constraints on the opting out of fiduciary duties of managers and controlling shareholders in case of particular corporate transactions (mergers, freeze outs, squeeze outs).

In the first chapter the paper asserts that only a few of the rules governing fiduciary duties have already been outlined (by the legislative or the judiciary) and are thus directly enforceable. In most cases, rules imposing fiduciary duties and ascribing liability arising from the breach of fiduciary duties have still to be shaped as optimal “default rules”. The research suggests that defaults should be drafted tackling the goal of the reduction of the transaction costs borne by corporate actors. Once all the rules imposing fiduciary duties and ascribing liability have been identified, the problem of the shape of these rules comes to the fore. Do these rules have to be considered as mandatory or mutable by the parties? And in this case, to what extent?

The paper tries to address this problem with a twofold perspective. On a general level, the main question regards the limits of contractual freedom in corporate law. The paper argues that the shape of the rules of corporate law should be defined taking into account the transaction costs arisen or avoided by each single rule. On a more concrete level, the research focuses on the agreements opting out of the rules imposing fiduciary duties and ascribing the liability to the managers and the controlling shareholders. It describes how these rules can be waived by original charter provisions, successive charter amendments, single shareholders’ meeting decisions, and, to a limited extent, simple board resolutions. It outlines the relevant factors (nature of the decision, kind of outcomes, rate of predictability, rate of consent) increasing or reducing the transaction costs in each single case. Finally, the paper reaches some specific conclusions, regarding the optimal (*i.e.* most efficient) constraints on the single opt-out agreements.

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