


3:8 "Loyalty" in Its First Sense

A fiduciary must be zealous to preserve and
protect the trust res. 

"Loyalty" is a word rich in both meaning and connotation. It appeared first in English in the early 16th Century and brought with it much feudal baggage. In its earliest usage the word was close to its meaning in Old French, through which it came into English. Old French 'Loial(1)' or 'leaul(2)', and "loiaute", meant "lawful" and "lawfulness", referring to the feudal laws of fealty. In modern usage, the word suggests constancy and persistence, as in the phrases "remaining loyal" or "loyal to the end". In this usage it evokes images of brave knights defending their sovereigns to their last drops of blood. The word also connotes "fidelity" or "faithfulness" (in fact, "fidelis" is the Latin word for "loyal"), and in this sense it has a psychological connotation: it focuses on the state of mind of the one who is loyal. In this second usage, the word suggests the refusal of the loyal person to entertain traitorous plans, or to pursue projects or activities which might harm the sovereign.

These two meanings of the word spawn two different duties which modern law imposes on the fiduciary. In the sense of "fidelity", the word comes up in the conflict-of-interest cases; and we discuss that sense of the word in Section 3:18 below, as one aspect of the **duty of preference**. But here, we discuss loyalty as an aspect of the **duty of management**, in its first sense of requiring constancy, or persistence.

Probate Code Sec. 16011 imposes a duty on the fiduciary to defend actions, and Probate Code Sec. 16010 imposes a duty to enforce claims. Each of these code sections requires the trustee to take "reasonable steps" to discharge the duty. It may be asked, "What steps are reasonable?" The answer will always depend on the circumstances; but there may be discernible limits to the steps the trustee is required to take.

Suppose a Pilgrim King leaves his trusted viceroy in charge of his castle while he travels to visit the Holy Land. He says, "I am taking with me but twenty good knights, and the rest, being fully a hundred knights, I leave with you and under your command. Be loyal to me and defend my queen and my castle against all attack." If the castle is attacked, the viceroy must deploy the hundred knights in its defense. And since he is only the viceroy, he has no other resources—no knights of his own—to utilize in the defense of the castle.

But vary the case and suppose the castle is besieged and the attacking forces demand that the queen be delivered to them and declare that only then will they leave. The viceroy defends the queen and the castle vigorously for a week, but it then becomes apparent to him that the whole castle will soon fall to the siege no matter what he does. Is it a breach of his duty of loyalty for him to deliver up the queen in order to save the castle? The answer is No: if his decision to deliver up the queen is made in good faith and is not obviously negligent or grossly preposterous, the court will not "second-guess" him. (See following Section 3:11, regarding the "business judgment rule".)

Vary the case again and suppose our Pilgrim King makes a treaty with the king of the neighboring country that while one of them is on pilgrimage to the Holy Land, the other will defend his queen and his castle against all attack. Like the viceroy, the neighboring king certainly has the duty to

deploy the Pilgrim King's own hundred knights in the defense of the Pilgrim King's castle. But if the castle is attacked by two hundred enemy knights, must the neighboring king order his own knights to defend his neighbor's castle? Does the duty of loyalty, in other words, require self-sacrifice and altruism? And may he deploy the knights in such a way that the greater risks of battle fall on the knights of the Pilgrim King, while his own knights defend the stronger positions? — This variation of the case takes us closer to a consideration of "loyalty" in its second sense, where it concerns the duty of the trustee to prefer his cestui's interests over his own; and we discuss it again in Section 3:18 below. The answer lies in an interpretation of the treaty. If the treaty was merely the entrusting of the Pilgrim King's knights to the neighboring king for purposes of defending the Pilgrim King's castle, then the neighboring king has no duty to contribute troops of his own to discharge the trust. But if the treaty was a mutual defense pact, then each party to it was bound to use all the resources available to him—both his own and those of the trustor—to accomplish the purpose of the pact.

Questions like this arise in the context of fiduciary opportunity cases. As was explained in Section 3:5 above, one of the limitations on the application of that doctrine arises when the cestui is unable to pursue the opportunity even if the opportunity were offered. Let us suppose that a corporation rents a building and uses it as its home office. An opportunity arises to purchase the building, but the corporation is having financial problems. The president informs the corporation of the opportunity, but realizing that the corporation is totally unable to purchase the building, he now uses his own credit and purchases the building for himself. Was he obligated to lend his credit to the corporation so it could purchase the building? Did his duty of loyalty require that much of him? The answer would depend on what assets the president had on his personal balance sheet, other than the stock of the corporation itself (if he had no others, then "his credit" was nothing but the corporation's credit in disguise), and may depend as well on other "fairness" factors, such as whether the real estate market was rising or falling, and the length of time remaining on the corporation's lease, and whether the president, once he purchased the property, sought to raise the corporation's rent. — While no California case speaks directly to this point, the law appears to be that absent agreement to the contrary, the fiduciary owes no obligation to use his own assets for the benefit of the cestui. So, a husband who signs a noncompetition covenant in connection with the sale of a corporation in which the community has a significant interest, is entitled to be compensated by the community for the earnings he loses as a result of having signed that covenant: he is not obligated to sacrifice his own earnings in order to help the community profit from the sale of the community asset: his fiduciary duty does not require that sacrifice. *In re Marriage of Quay* (1993) 18 Cal.App.4th 961, 22 C.R.2d 537. By analogy, we may reason that the fiduciary is not generally obligated to sacrifice his own property for the benefit of the cestui.

Endnotes

1 (Popup - Popup)

Example from 12th Century, *Tristan et Iseut*:

Dinas, le sire de Dinan,
qui a merveille amoit Tristran,
Se lait choier au pie le roi:
"Sire, fait il, entent a moi.
Je t'ai servi molt lunguement
Sanz vilainie, loiaument."

Tristan et Iseut, 72, lines 1985-90 (Daniel
Generale Francaise 1989)

Lacroix & Philippe Walter ed., Librairie

Translation:

Dinas, the father of Dinan,
who loved Tristran marvelously well,
Threw himself at the feet of the king.
"Sire, said he, Hear me out.
I have served thee very long
Without villainy, loyally. . . ."

2 (Popup - Popup)

Example from *Barlaam et Josaphat*, a 13th-Century Old French tale:

Or me dit pare la foi que tu me doiz quel conseil tu me dones sans mentir. Se me sui venuz a toi
conseillier de ceste chose comme a celu cu je conois au plus leaul de ma terre.

L'histoire de Barlaam et Josaphat 41, line 7
Droz 1973)

(Leonard R. Mills ed., Librairie

Translation:

Now say to me what you ought to say and give me your advice without lying. For I have come to seek
your advice in this matter as one whom I know to be among the most loyal in my land.