

## CPLR 302(a): Fiduciary Shield Doctrine Prevents the Exercise of Long-Arm Jurisdiction Over Non-Resident Corporate Officer Acting in Corporate Capacity

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contract for the sale of real property. The Court noted that an action must be directly related to realty for the filing of a notice of pendency to be proper. Reasoning that the ownership of corporate stock and the ownership of real property are mutually exclusive, the Court held that such a direct relationship did not exist.

In *1303 Webster Avenue Realty Corp. v. Great American Surplus Lines Insurance Co.*, the Court of Appeals restricted the use by insurance companies of the shortened limitation periods available under section 3404(e) of the Insurance Law. The Court held that the general six-year limitation period will be used if the insurance policy fails to provide for the shortened period available under section 3404(e).

Finally, *The Survey* addresses the Court of Appeals recent interpretation of section 3407 of the Insurance Law in *Igbara v. New York Property Insurance Underwriting Association*. Stressing the plain language of the statute and the pre-enactment judicial construction of proof of loss provisions in general insurance contracts, the Court held that the failure of an insured to file a written proof of loss is an absolute bar to a successful lawsuit on the policy, notwithstanding the insurer's failure to inform the insured of the 60-day time limit.

The members of Volume 59 hope that the discussion and analysis of the cases contained in *The Survey* will be of interest and value to the New York bench and bar.

#### CIVIL PRACTICE LAW AND RULES

*CPLR 302(a): Fiduciary shield doctrine prevents the exercise of long-arm jurisdiction over non-resident corporate officer acting in corporate capacity*

Section 302(a) of the CPLR authorizes a court to exercise in personam jurisdiction over nondomiciliaries when prescribed "minimum contacts"<sup>1</sup> with the state are established.<sup>2</sup> The scope of the

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<sup>1</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In *International Shoe*, the Supreme Court established a jurisdictional test based on "minimum contacts" with the state, "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Supreme Court has since further refined the "minimum contacts" standard. See, e.g., *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (forum state's interests in providing forum to its residents and regulating insurance industry are not substitutes for requisite contacts with forum state); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("foreseeability that is critical to due process analysis . . . is that the defendant's conduct and con-

"long-arm" statute<sup>3</sup> is limited by the fiduciary shield doctrine, which provides that acts performed in New York by a nonresident officer of a corporation in his corporate capacity may not serve as the basis for the exercise of personal jurisdiction over that individual.<sup>4</sup> The fiduciary shield doctrine<sup>5</sup> has been criticized by authorities with regard to its origin<sup>6</sup> and utility.<sup>7</sup> Recently, however, in

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nection with the forum State are such that he should reasonably anticipate being haled into court there"); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (minimum contacts test applicable in quasi in rem actions); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws").

<sup>2</sup> CPLR 302(a) (1979 & Supp. 1984-1985). Section 302(a) of the CPLR provides in pertinent part:

. . . a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

*Id.*

<sup>3</sup> See, e.g., SIEGEL § 84, at 94 (jurisdiction by state over nonresident pursuant to "minimum contacts" standard is known as "long-arm" jurisdiction).

<sup>4</sup> See, e.g., *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 901-02 (2d Cir. 1981) (case remanded to decide whether defendant's grossly negligent misrepresentations were done in his corporate capacity or whether corporation merely a shell for defendant); *Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87, 92-93 (2d Cir. 1975) (acts done solely in capacity as corporate officer insufficient basis for personal jurisdiction) (dictum); *Laufer v. Ostrow*, 55 N.Y.2d 305, 313, 434 N.E.2d 692, 696, 449 N.Y.S.2d 456, 460 (1982) (no personal jurisdiction when only activity of defendant was to check on New York accounts).

<sup>5</sup> See *Sheldon v. Kimberly-Clark Corp.*, 105 App. Div. 2d 273, 275, 482 N.Y.S.2d 867, 869 (2d Dep't 1984). It is generally acknowledged that the term "fiduciary shield" was first used in *United States v. Montreal Trust Co.*, 358 F.2d 239, 243 (2d Cir.), cert. denied, 384 U.S. 919 (1966). See Comment, *Fiduciary Shield Will Not Bar Assertion of Personal Jurisdiction Over Nonresident Owner of Corporate Shell*, *Marine Midland Bank, N.A. v. Miller*, 61 WASH. U.L.Q. 623, 632 n.43 (1983); Casenote, *Chancellor v. Lawrence, Minimum Contacts and the Fiduciary Shield Doctrine*, 15 J. MAR. L. REV. 251, 254 n.19 (1982).

<sup>6</sup> See, e.g., Sponsler, *Jurisdiction Over the Corporate Agent: The Fiduciary Shield*, 35 WASH. & LEE L. REV. 349, 352-53 (1978) (criticized holding of case which originated doctrine); Note, *The Fiduciary Shield Doctrine: A Rule of Statutory Construction or a Consti-*

*Sheldon v. Kimberly-Clark Corp.*,<sup>8</sup> the Appellate Division, Second Department, reaffirming the continued vitality of the doctrine in New York, dismissed a claim brought against nonresident directors of a foreign corporation, indicating that even if the plaintiff had asserted sufficient jurisdictional facts, the fiduciary shield doctrine

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*tutional Principle?*, 9 J. CORP. L. 901, 906-09 (1984) (doctrine arose from misrepresentation of dictum). The fiduciary shield doctrine emerged from the case of *Rene Boas & Assoc. v. Vernier*, 22 App. Div. 2d 561, 257 N.Y.S.2d 487 (1st Dep't 1965). In *Boas*, a broker brought an action to recover commissions allegedly owed to him under written and oral agreements with the defendant. *Id.* at 562, 257 N.Y.S.2d at 489. The defendant moved to dismiss for lack of personal jurisdiction. *Id.* The trial court granted the motion and the First Department affirmed, holding that since the agreements did not result from the transaction of business in New York, long-arm jurisdiction could not be exercised over the defendant. The First Department added, in dictum: "The writing, moreover, was executed by defendant solely in his capacity as general manager of the corporation, and not in his individual capacity." *Id.* at 563, 257 N.Y.S.2d at 490 (dictum). This sentence is the source of the fiduciary shield doctrine. See Sponsler, *supra*, at 352. However, the next two sentences of the opinion discuss cases involving the issue of substantive liability rather than personal jurisdiction. See *Boas*, 22 App. Div. 2d at 563, 257 N.Y.S.2d at 490. Commentators have therefore suggested that later courts may have misinterpreted the First Department's reason for making the now historic statement. See Sponsler, *supra*, at 353-62; Note, *supra*, at 908-09; Comment, *supra* note 5, at 632. It has been suggested that the sole purpose of the dictum was to point out that if personal jurisdiction had been established, plaintiff's claim still would have failed on the merits. See Sponsler, *supra*, at 353; Note, *supra*, at 908.

<sup>7</sup> See, e.g., Sponsler, *supra* note 6, at 362-63 (doctrine does not address situation in which corporation is mere "vehicle" for individual); CPLR 302, commentary at 35, 38-39 (McKinney Supp. 1984-1985) (doctrine serves no public policy by immunizing individual who acts in interest of corporation). Dean Sponsler suggests that individuals who control small firms and cause harm in a jurisdiction through such corporate entities should not be able to invoke the fiduciary shield to prevent the courts in that jurisdiction from exercising personal jurisdiction over them. Sponsler, *supra* note 6, at 362. These individuals are so involved in the day-to-day activities of the corporation that it would not be unfair to require them to defend against actions brought in a state where they cause injury. *Id.* Moreover, since an officer can be held substantively liable for corporate acts he performs in the forum state, there is little reason why an officer who enters a forum and who would be subject to the state's long-arm jurisdiction if the fiduciary shield doctrine did not exist should not be required to defend the action there. *Id.* at 363-64.

Recently, some courts have begun to question the fiduciary shield doctrine. See, e.g., *Columbia Briargate Co. v. First Nat'l Bank*, 713 F.2d 1052, 1059-60 (4th Cir. 1983) (doctrine "does not appear logical or reasonable or even to comport with the legislative philosophy inherent in the long-arm statutory procedure itself"), *cert. denied*, 104 S. Ct. 1001 (1984); *Kinstler v. Saturday Evening Post Co.*, 507 F. Supp. 113, 115 (S.D.N.Y. 1981) (when plaintiff alleges tortious act within state by nonresident defendant the exercise of jurisdiction would not be "unreasonable and unjust"); *Merkel Assoc., Inc. v. Bellofram Corp.*, 437 F. Supp. 612, 619 (W.D.N.Y. 1977) (fiduciary shield should not be available when defendant officer has committed tort within jurisdiction); *Kossoff v. Samsung Co.*, 123 Misc. 2d 177, 183, 474 N.Y.S.2d 180, 186 (Sup. Ct. N.Y. County 1984) ("[w]hether or not there is any need to graft this added complication onto an already complex body of law, the doctrine has been severely criticized for its dearth of theoretical legitimacy").

<sup>8</sup> 105 App. Div. 2d 273, 482 N.Y.S.2d 867 (2d Dep't 1984) (per curiam).

would have protected the directors.<sup>9</sup>

In *Sheldon*, the plaintiff, an employee of the Kimberly-Clark Corporation, was severely injured when his arms became trapped between two rollers of a machine that he was operating at the corporation's mill in New York.<sup>10</sup> The rollers were not covered by a safety guard and the plaintiff claimed that the lack of such a protective measure was the cause of his accident.<sup>11</sup> The plaintiff brought suit in New York against his corporate employer,<sup>12</sup> its subsidiary,<sup>13</sup> and five senior officers of Kimberly-Clark.<sup>14</sup> The plaintiff claimed that the corporate officers committed a tortious act by formulating a company policy that emphasized productivity at the expense of employee safety.<sup>15</sup> None of the officers lived or worked in New York, and their only nexus with the forum was through their work for the corporation.<sup>16</sup> Alleging lack of personal jurisdiction, the officers moved to dismiss under CPLR 3211,<sup>17</sup> but the motion was denied by Special Term.<sup>18</sup>

The Appellate Division, Second Department, modified the order of the lower court, holding that the motion to dismiss should have been granted.<sup>19</sup> In a per curiam opinion, the Second Depart-

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<sup>9</sup> *Id.* at 275, 482 N.Y.S.2d at 869. *But see* Hasboro Bradley, Inc. v. Coopers & Lybrand, N.Y.L.J., Nov. 12, 1985, at 16, col. 5 (Sup. Ct. N.Y. County) (court refused to recognize validity of doctrine).

<sup>10</sup> 105 App. Div. 2d at 274, 482 N.Y.S.2d at 868.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Plaintiff instituted suit against his employer under various theories of liability, including negligence, strict liability, breach of warranty, breach of contract and fraud. *Id.*

<sup>13</sup> *Id.* A second issue in the case involved the action brought against defendant Peter J. Schweitzer, Inc. *See id.* at 276, 482 N.Y.S.2d at 869. Plaintiff filed suit against two entities, both known as Peter J. Schweitzer, Inc. *See id.* Special Term dismissed plaintiff's cause of action against Schweitzer but failed to identify which of the two organizations was the subject of the order, thus causing considerable confusion. *Id.* Twenty-two years before the plaintiff's injury, the original Schweitzer Co. had merged into Kimberly-Clark Corp., a separate legal entity. *Id.* at 274, 482 N.Y.S.2d at 868. The second Schweitzer Co. was an existing New York corporation that Kimberly-Clark held as a subsidiary. *Id.* at 276, 482 N.Y.S.2d at 869. Given these circumstances, the Second Department held that Special Term meant to dismiss the action only against the first Schweitzer Co., and so ordered. *Id.*

<sup>14</sup> *Id.* at 274, 482 N.Y.S.2d at 868.

<sup>15</sup> *Id.* at 275, 482 N.Y.S.2d at 868. Specifically, the plaintiff alleged that the defendants committed a tortious act outside the state that caused injury in New York. *Id.*

<sup>16</sup> *Id.* at 274, 482 N.Y.S.2d at 868.

<sup>17</sup> *Id.* CPLR 3211(a) lists ten grounds for dismissal of a cause of action. *See* CPLR 3211(a) (1970). The defendants' motion was brought under sub-paragraph (8) of § 3211(a), "that the court has not jurisdiction of the person of the defendant." 105 App. Div. 2d at 274, 482 N.Y.S.2d at 868; *see also* CPLR 3211(a)(8).

<sup>18</sup> 105 App. Div. 2d at 274, 482 N.Y.S.2d at 868.

<sup>19</sup> *Id.* at 276, 482 N.Y.S.2d at 869.

ment stated that the plaintiff failed to establish in personam jurisdiction over the corporate officers under CPLR 302(a)(3),<sup>20</sup> observing that the complaint consisted of "only bare conclusory allegations"<sup>21</sup> that were inadequate to "constitute the 'sufficient start' necessary to merit further discovery."<sup>22</sup> In dictum, the court declared that if the complaint had been sufficient under the statute, the fiduciary shield doctrine would have prevented the court from exercising jurisdiction over nondomiciliary corporate officers.<sup>23</sup> The court concluded that actions undertaken by an officer in a corporate capacity cannot result in personal jurisdiction under the long-arm statute.<sup>24</sup>

Although the Second Department reached the proper outcome with respect to the nonresident officers' motion in *Sheldon*,<sup>25</sup> the court's dictum regarding the fiduciary shield doctrine unnecessarily added to the confusion already surrounding the doctrine.<sup>26</sup>

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<sup>20</sup> *Id.* at 275, 482 N.Y.S.2d at 867. Plaintiff tried to establish jurisdiction under both subparagraphs (i) and (ii) of CPLR 302(a)(3). *Id.*; see *supra* note 2.

<sup>21</sup> 105 App. Div. 2d at 275, 482 N.Y.S.2d at 869.

<sup>22</sup> *Id.* Plaintiff does not have to establish prima facie jurisdiction to overcome a motion to dismiss under CPLR 3211(a)(8), but must show that jurisdictional facts "may exist" in order to have the "sufficient start" required to merit further discovery. *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 466-68, 310 N.E.2d 513, 514-15, 354 N.Y.S.2d 905, 907-08 (1974).

<sup>23</sup> 105 App. Div. 2d at 275, 482 N.Y.S.2d at 869.

<sup>24</sup> *Id.* Actions taken in an officer's personal interest support the exercise of in personam jurisdiction. *Id.* The Second Department acknowledged the "dichotomy" the doctrine creates between the rules governing substantive liability of a nonresident corporate agent for acts in his corporate capacity and principles governing in personam jurisdiction over such an individual. *Id.* (citing *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981)).

<sup>25</sup> See 105 App. Div. 2d at 275, 482 N.Y.S.2d at 868-69; see *supra* notes 21-23 and accompanying text.

<sup>26</sup> See, e.g., *Kossoff v. Samsung Co.*, 123 Misc. 2d 177, 183-84, 474 N.Y.S.2d 180, 186 (Sup. Ct. N.Y. County 1984). The Supreme Court, Special Term, recently refused to dismiss a suit brought against nonresident directors for acts performed in their corporate capacities. See *id.* at 183-84, 474 N.Y.S.2d at 186. Citing *Marine Midland*, Justice Rubin characterized the fiduciary shield doctrine as an equitable principle. See *id.* Finding that the officers were "inextricably link[ed]" with the forum, the court reasoned that it would not be unfair to require them to defend the suit in New York. *Id.* at 184, 474 N.Y.S.2d at 186.

The *Kossoff* court's construction of the doctrine as an equitable one differs from the construction offered by the Second Circuit in *Marine Midland*. See 664 F.2d 899, 903 (2d Cir. 1981). The *Marine Midland* court would confer jurisdictional immunity whenever a corporate officer acts solely in the corporation's interest. See *id.* The *Kossoff* court reduced the scope of the *Marine Midland* rationale by excluding situations in which in the court's discretion it would not be "unfair" to exercise jurisdiction. See 123 Misc. 2d at 183-84, 474 N.Y.S.2d at 186. It is suggested that a comparison of these two cases illustrates the confusion regarding the proper application of the doctrine. Cf. *Laurenzano v. Goldman*, 96 App. Div. 2d 852, 853, 465 N.Y.S.2d 779, 780 (2d Dep't 1983) (mem.) (fiduciary doctrine is both

While it may be appropriate to employ the fiduciary shield doctrine in some circumstances under CPLR 302(a) paragraphs (1) and (2),<sup>27</sup> it is submitted that the doctrine should not be applicable to cases involving paragraph (3).

The fiduciary shield doctrine is used to prevent the unfair situation that results when a nonresident corporate officer is forced to defend a suit brought against him in his individual capacity, predicated on contacts with the jurisdiction, resulting from acts performed solely on behalf of his employer.<sup>28</sup> However, before a New York court can exercise personal jurisdiction over such an officer, it must be shown that his actions have satisfied the minimum contacts requirements of CPLR 302.<sup>29</sup>

Under CPLR 302(a)(3), even if a corporate officer "commits a tortious act without the state causing injury . . . within the state,"<sup>30</sup> New York cannot exercise jurisdiction over such an individual unless he also purposely avails himself of the privilege of conducting business in New York,<sup>31</sup> derives substantial income from

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equitable and flexible and will not automatically bar exercise of jurisdiction when complaint alleges violation of fiduciary duties); *supra* note 7 (courts urging changes in use of doctrine).

<sup>27</sup> See, e.g., *Lancer Prods., Inc. v. Rally Accessories, Inc.*, 597 F. Supp. 440, 442 (E.D.N.Y. 1984) (fiduciary shield used to prevent jurisdiction under CPLR 302(a)(2)); *Goshen Litho, Inc. v. Kohls*, 582 F. Supp. 1561, 1565 (S.D.N.Y. 1983) (fiduciary shield used to prevent jurisdiction under CPLR 302(a)(1)); see also *Sponsler*, *supra* note 6, at 359-65 (discussing circumstances when it would be proper to apply fiduciary shield). Under CPLR 302(a)(1) and (2), jurisdiction often can be established over an officer who has performed corporate acts within the state. See CPLR 302(a)(1), (2). It is submitted that for this reason, the question of whether a court should invoke the fiduciary shield doctrine will often arise in such cases.

<sup>28</sup> See *Merkel Assoc., Inc. v. Bellofram Corp.*, 437 F. Supp. 612, 619 (W.D.N.Y. 1977). The *Merkel* court was especially careful to stress that the fiduciary shield doctrine protects an officer only from the unfair assertion of in personam jurisdiction, and does not shield the individual from liability. *Id.* at 618. It is well settled that a corporate officer is liable for torts committed in his corporate capacity. See, e.g., *Bailey v. Baker's Air Force Gas Corp.*, 50 App. Div. 2d 129, 133, 376 N.Y.S.2d 212, 216 (3d Dep't 1975) (corporate manager negligent for failure to warn of dangerous condition); *Fleck v. Perla*, 40 App. Div. 2d 1069, 1070, 339 N.Y.S.2d 246, 248 (4th Dep't 1972) (mem.) (corporate officer may be liable for conversion of trust funds).

<sup>29</sup> See *supra* note 2; *infra* note 34. See generally SIEGEL § 85, at 95-97 (general discussion of personal jurisdiction); 1 WK&M ¶ 302.01, at 3-56 to 3-58.1 (Supp. 1984) (overview of CPLR 302).

<sup>30</sup> CPLR 302(a)(3) (1972); see *supra* note 2.

<sup>31</sup> CPLR 302(a)(3)(i) (1972); see, e.g., *Newman v. Charles S. Nathan, Inc.*, 55 Misc. 2d 368, 370, 285 N.Y.S.2d 688, 690 (Sup. Ct. Kings County 1967) (when defendant committed tortious act without state causing injury in state and solicited business in New York, court could exercise in personam jurisdiction over defendant); compare CPLR 302(a)(1) (Supp. 1984-1985) ("transacting business" requirement means cause of action must result from transaction) with CPLR 302(3)(i) (1972) ("do[ing] or solicit[ing] business" prerequisite does

corporate activity in the jurisdiction,<sup>32</sup> or receives significant revenue from interstate or international commerce.<sup>33</sup> It would be exceedingly difficult for the typical corporate officer to satisfy any of these criteria since they require contacts with the forum that a corporate officer will not normally engage in on behalf of his employer.<sup>34</sup> It is suggested, therefore, that the fiduciary shield doctrine is unnecessary to protect a nonresident corporate officer.<sup>35</sup> Conversely, when the actions of a corporate officer meet the stringent conditions of CPLR 302(a)(3), it is submitted that the fiduciary shield doctrine should not be invoked to prevent the state from exercising personal jurisdiction over the nonresident officer, because it would be unfair to permit a nonresident officer with such a substantial connection to New York to avoid jurisdiction based on activities that caused harm within the state.

Since the purpose of the fiduciary shield doctrine will not be furthered by its application to situations arising under CPLR 302(a)(3), it is suggested that the New York courts declare the doctrine inappropriate under such circumstances and remove this artificial impediment to jurisdiction.

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not require that cause of action relate to in-state transaction).

<sup>32</sup> CPLR 302(a)(3)(i) (1972).

<sup>33</sup> *Id.* 302(a)(3)(ii).

<sup>34</sup> *See* *Merkel Assoc., Inc. v. Bellofram Corp.*, 437 F. Supp. 612, 619 (W.D.N.Y. 1977) (dictum). Judge Elfvig stated:

[I]n light of the 'regularly does or solicits business', 'persistent course of conduct' and 'substantial revenue' tests of CPLR §302(a)(3)(i) and (ii), a tortious act committed by a corporate officer outside the state causing injury in the state may result in personal jurisdiction without causing problems of constitutional magnitude. . . . [I]t would be the rare corporate officer whose personal contacts or revenue would meet the tests of CPLR § 302(a)(3). . . .

*Id.* But *see* *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974). In *Weller*, the Sixth Circuit stated that if acts taken in one's corporate capacity were deemed sufficient to confer in personam jurisdiction over an individual, such officers "could be sued in every state of the union whenever they make telephone calls or write letters to a customer who claims that they constitute misrepresentations." *Id.* However, the *Merkel* court pointed out that this obviously unfair result could not occur under the stringent "minimum contacts" requirements of subparagraph (3) of New York's long-arm statute. *See* 437 F. Supp. at 619.

<sup>35</sup> *See supra* note 34 and accompanying text. It is submitted that if in personam jurisdiction cannot be established over a corporate officer there is no occasion to invoke the fiduciary shield.