1 Breach of Fiduciary Duties

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I. INTRODUCTION

Breach of fiduciary duty is a broad concept that may arise in many different situations. However, three questions necessarily arise when any breach of fiduciary duty is alleged:

1. Did a fiduciary relationship exist at the time of the alleged misconduct?
2. If so, what was the scope of the relationship?
3. Was there a breach of the duties that arose within the scope of the relationship?

There are two types of fiduciary relationships:

1. Those created under the law, (a) as applied to particular relationships governed by statute (such as partner and partnership) or by legal proceedings (such as administrator and heir), or (b) as applied to contractual relationships (such as principal and agent or attorney and client); and
2. Those that are created by case law as a result of the factual circumstances underlying the relationship of the parties and the transactions at issue. These types of unique fiduciary duties occur in various factual circumstances.[1] While there is no definitive description of a fiduciary relationship, one source describes it as:

> [T]he acting of one person for another; the having and the exercising of influence over one person by another; the reposing of confidence by one person in another; the dominance of one person by another; the inequality of the parties; and the dependence of one person upon another. In addition, courts have considered weakness of age, mental strength, business intelligence, knowledge of the facts involved or other conditions giving to one an advantage over the other.[2]

Whenever one party places trust and confidence in a second person with that second person's knowledge, it is possible that a fiduciary relationship is created. Such a relationship imposes on the fiduciary the duty to act in the best interest of the person who has placed his or her trust and confidence in the fiduciary. As a result, the fiduciary may not simply deal with that party at arm's length, guided only by the morals of the marketplace.[3]

The following analysis provides an overview of the law regarding breaches of fiduciary duties that most frequently arise in business contexts.

II. ELEMENTS OF THE CAUSE OF ACTION

Traditional tort principles—for example, those regarding duty, breach, causation, and damage—apply to a breach of fiduciary duty cause of action. Damages are addressed in a separate chapter discussing remedies, while the remaining elements are addressed below.

A. Duty

Numerous fiduciary duties arise in everyday business contexts. The most common of these are:

1. Duty of care;
2. Duty of loyalty;
3. Duty to account;
4. Duty of confidentiality;
5. Duty of full disclosure;
6. Duty to act fairly; and
7. Duty of good faith and fair dealing.

The most typical contexts in which these duties arise are discussed below.

1. Corporate Fiduciary Duties

As a matter of law, corporate officers, directors, and controlling shareholders owe a duty, which will be enforced by the court, to the corporation and, through the corporation, to the shareholders.[4] State law generally delineates that duty.[5] The precise definition of that duty is anything but clear. Justice Frankfurter identified the problem best in a frequently quoted passage from *SEC v. Chenery Corp.*:

> But to say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry. To whom is he a fiduciary? What

> obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?[6]

It is sufficient to say that the fiduciary duty of officers and directors is generally subdivided into the duty of care and the duty of loyalty.[7] A majority of the states have adopted, at least in part, the Model Business Corporation Act (MBCA). MBCA section 8.30 defines a corporate director's duty of care.[8] MBCA section 8.42 imposes substantially the same duty of care on corporate officers possessing discretionary authority. These two sections focus on the manner in which directors and officers perform their duties, not the correctness of their decisions. Directors and officers are required to perform their duties in good faith, with the care of ordinarily prudent persons in like positions and in a manner that they believe to be in the best interest of the corporation. However, under the "business judgment rule," they are not responsible for mere bad business judgment.[9]

Historically, the scope of a director's duty of loyalty to a corporation has been defined by jurisprudence rather than by statute. Today, a corporate director's conflicting interest in a transaction is addressed in MBCA sections 8.60-8.62.[10] MBCA section 8.62, as well as "safe harbor" rules enacted by several states,[11] rejects the common law view that all conflict of interest transactions entered into by directors are automatically voidable at the option of the corporation without regard to the fairness of the transaction or the manner in which the transaction was approved by the corporation. MBCA section 8.62(a) makes any automatic rule of voidability inapplicable to transactions that are fair or have been approved by directors in the manner provided by the balance of section 8.62. However, approval generally must be granted by disinterested directors who have exercised due care relative to the transaction at issue.[12]

Judicial determination of whether actions by directors fall within the protection of the business judgment rule is often factually sensitive and, despite the exercise of good faith, directors may "unintentionally" breach their duty of loyalty.[13] Duty of loyalty issues may arise in the context of a variety of transactions, including the following:

1. Sales to or purchases by the corporation from directors or entities in which the directors have an interest;
2. Dealings between a parent corporation and its subsidiary;

3. Unfair treatment of minority stockholders by a majority stockholder in matters such as corporate acquisitions and reorganization transactions;
4. Use of corporate funds to perpetuate control;
5. Sale of control;
6. Demands of stockholders to commence derivative suits;
7. Excessive compensation;
8. Insider trading;
9. Usurpation of corporate opportunities;
10. Competition with the corporation by officers or directors; and
11. Improper use of corporate position, property, or information.[14]

The question of whether a director has breached a duty of loyalty generally may arise if it is shown that the director has an interest in the transaction at issue. Directors are typically considered to be "interested" if they "appear on both sides of a transaction" or if they "expect to derive personal financial benefit from it in the sense of self-dealing, as opposed to a benefit that devolves upon the corporation or all stockholders generally."[15]

Even if a director is not interested, he or she must nevertheless be capable of rendering independent judgment to avoid violating his or her fiduciary duties.[16] A director who can demonstrate that a decision is governed by the merits of the particular transaction rather than by extraneous considerations or influences is generally considered independent.[17] Directors enjoy a presumption of independence that is rebuttable by proof regarding their relationships or behavior relative to a given transaction.[18]

2. Partnership Fiduciary Duties

Forty-nine states as well as the District of Columbia and several territories adopted the Uniform Partnership Act (UPA) of 1914, and 49 states also adopted the Revised Uniform Limited Partnership Act (RULPA).[19] With regard to general partnerships, the fiduciary duties of partners to one another and to the partnership are provided for generally in UPA section s 9, 13, 14, 20, and 21.[20] The fiduciary duties of a general partner in a limited partnership are provided for in RULPA section 9.[21] These provisions require that partners deal fairly with each other, with the partnership and, if applicable, with limited partners, or else they are subject to liability for breach of fiduciary duty.[22] However, partners are not fiduciaries with respect to former partners.[23]

3. Duties of Trustees

The term "fiduciary" was originally used in the common law to describe the nature of the duties imposed on a trustee. Fiduciary principles are still deeply imbedded in the law of trusts.[24] Among the duties typically owed by a trustee are the duty to administer the trust solely in the interest of the beneficiary; the duty of full disclosure of material facts by the trustee when dealing on his or her own account; the duty to keep and render clear and accurate accounts of the administration of the trust; and the duty to take reasonable steps to take, keep control of, and preserve the trust's property.[25] One who purports to be a trustee may be burdened with fiduciary obligations even when no trust has been created.[26]

4. Agency Duties

Agency may be the most basic fiduciary relationship arising under the law. It serves as the basis for other, more specialized fiduciary relationships such as broker/customer and attorney/client. Agency results from "the manifestation of consent by one person to another that the other shall act on his behalf and be subject to his control, and by the consent of the other so to act."[27] Among the fiduciary duties imposed on agents as fiduciaries are the duty of full disclosure, loyalty, and faithfulness to the principals.[28]

5. Fiduciary Duties of Estate Representatives

Fiduciary duties are imposed on estate representatives generally upon appointment by the probate court. Once appointed, the estate representative has a fiduciary relationship with heirs of the estate pursuant to which the representative must act fairly and make full disclosure.[29] The estate representative also owes a duty to the estate itself, for the benefit of both heirs and creditors of the estate.[30]

6. Fiduciary Duties of Stockbrokers and Investment Advisers

The most common basis for imposing fiduciary duties on stockbrokers is the common law agency status they occupy in relation to their customers.[31] In the federal context, investment advisers may be held to fiduciary standards contained in the Investment Advisers Act of 1940.[32] Courts have examined both stockbroker and investment adviser conduct in determining whether to impose fiduciary liability under various statutory and administrative regulations, such as section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.[33] However, there must be some relationship in order to establish liability.[34] In addition, rules of the various stock exchanges[35] have been used by courts to impose fiduciary liability on stockbrokers for failure to live up to industry standards.[36]

The recent surge in criminal investigation and prosecution by both the Securities and Exchange Commission and state attorney generals is liable to produce more extensive regulations, which undoubtedly will have some impact on civil suits for breaches of fiduciary duty.[37]

7. Fiduciary Duties of Real Estate Agents and Brokers

In general, a real estate agent or broker is charged with the duty of fullest disclosure of all material facts concerning the transaction at issue.[38] Like other fiduciaries, the real estate agent must act solely in the interest of his or her principal.[39] However, unlike other fiduciaries, this one may even be answerable to parties with whom he or she has no fiduciary relationship, such as a prospective purchaser pursuant to the statutory requirements associated with his or her license.[40]

8. Fiduciary Duties Under ERISA

A frequently litigated area of business tort litigation involves disputes arising under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. section 1001, et seq. ERISA was enacted by Congress to provide, inter alia, a comprehensive scheme of federal regulation of employee benefit plans, including retirement and medical plans.[41]

Generally speaking, a person is a fiduciary under ERISA to the extent he or she exercises discretionary authority over the assets of an ERISA plan, renders investment advice for a fee with respect to the assets of the plan, or has any discretionary authority in the administration of the plan. It is a functional definition, not a formal one.[42]

The ERISA statute clearly delineates that plan fiduciaries shall discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries.[43] Plan fiduciaries who breach any of the responsibilities, obligations, or duties imposed on them by the ERISA statute are burdened with personal liability to make good to the plan any losses sustained by the plan as well as ill-gotten profits resulting from each such breach.[44]

The importance of the fiduciary provisions of ERISA continues to grow as institutionally sponsored ERISA plans proliferate. Almost anyone who exercises discretionary authority over a plan can be considered a fiduciary. However, the Department of Labor, authorized by Congress to regulate ERISA, has declared that stockbrokers do not necessarily meet the definition of investment adviser for purposes of fiduciary liability under ERISA,[45] nor can employees, directors, or insurers be liable under certain circumstances.[46]

9. Fiduciary Duties of Lenders

Generally speaking, the relationship between a lender and a borrower, absent special circumstances, is merely that of creditor-debtor.[47] However, the policies in favor of imposing fiduciary duties on lenders in certain circumstances have been implicitly, if not expressly, recognized by courts as deviating from the general rule.[48] For example, a lender may be deemed a fiduciary when it takes control of a borrower.[49] A lender may also be deemed a fiduciary when "moral, social, domestic, or purely personal relationships" are shown to exist between the parties.[50] Indeed, fiduciary status is probable when a lender undertakes to perform a task on behalf of its borrower, thereby triggering the fiduciary principles that stem from the law of agency.[51]

10. Fiduciary Duties of the Church and Its Representatives

A newly emerging realm of fiduciary duty obligation concerns the duties of clergy to those they advise or over whom they have supervision. These cases have most often arisen in connection with some sexual impropriety on the part of the clergy. While such claims have historically been brought either under a negligence standard and/or intentional tort standard, several cases now recognize that, given the proper fact circumstance, a member of the clergy can breach his or her fiduciary duty by engaging in sexual impropriety.[52] As in all other cases, the existence of a fiduciary relationship is based upon a situation where one person occupies a superior position relative to the other and assumes a duty and breach of that duty.[53] Such a claim must be based on a factual determination by the jury that a duty existed and that there was, in fact, a breach of that duty. The liability of the member of the clergy, as well as the religious institution, is premised on such a finding.[54]

11. Fiduciary Duties of Professionals

While it is clear that attorneys have a fiduciary duty to their clients even after termination of the relationship, the fiduciary duties imposed on other professionals, such as accountants, are less clear. As with all other such determinations, the existence of a fiduciary relationship is fact driven. For example, in order for an accountant to have a fiduciary obligation, it is necessary to establish reliance by the accountant's client on the judgment and advice of the accountant.[55] Other professionals, such as physicians can also be held liable for breach of fiduciary duties.[56]

12. Other Fiduciary Relationships

Given the intense factual determination that is necessary in order to find the existence of a fiduciary relationship, there are a number of different cases asserting the existence of fiduciary standards. Such cases almost uniformly survive the summary judgment standard, given the necessity for factual resolution. Among those circumstances where fiduciary standards and their subsequent breach have been asserted are an action brought by a church against its former public relations firm after the firm terminated the contractual relationship.[57] A fiduciary duty was also successfully asserted against a purchaser of an automobile dealership who operated the dealership before the final sales price was determined.[58] In other cases, auctioneers have been found to be fiduciaries.[59]

The franchisor/franchisee relationship is an area where plaintiffs have been unsuccessful in establishing the existence of a fiduciary duty, despite several courts' acknowledgment that a franchise agreement can, in certain circumstances, create a fiduciary standard. However, generally speaking, franchise agreements, even despite their potential one-sidedness, and other indicia of a fiduciary relationship, do not ordinarily rise to the level of a fiduciary relationship.[60] In certain circumstances, a manufacturer/sales representative relationship can be based on a fiduciary standard as well.[61] The same rule applies with respect to a contractor/subcontractor relationship,[62] employer/employee relationship,[63] doctor/patient relationship,[64] nursing home/patient relationship,[65] and actuary/insurer relationship.[66] Conversely, other courts have held that no fiduciary relationship existed between the provider of electronic credit transaction processing services and a credit card company,[67] between the publisher of a scientific journal and the corporation that edited the journal,[68] between a corporate sponsor of an acquisition and the acquirer,[69] a manufacturer and retailer,[70] an artist and a giftware marketer,[71] and a buyer and seller of real estate.[72] Suffice to say that any relationship defined by trust and confidence has the potential to be governed under the appropriate fiduciary laws and statutes.[73]

B. *Breach*

There are literally hundreds of ways in which fiduciaries may breach the duties correlative to their special status. Among the most common breaches are the following:

- self-dealing (i.e., through conflict of interest or reaping of extra profits);
- usurpation of business or corporate opportunity;
- misappropriation of funds or property;
- neglect, imprudence, or want of skill (e.g., failure to administer trust property as prudent administrator, failure to properly diversify ERISA plan investments, or improper reliance on professionals);
- failure to act in another's best interest;
- misrepresentation/omission as to a statement of fact (e.g., financial condition/statement of affairs);
- inducement;
- breach of an assumed duty (e.g., to provide accurate information);
- misuse of confidential information/breach of confidentiality;
- misuse of superior knowledge;
- failure to disclose;
- aiding and abetting or acting in concert with another;[74]
- rendering inappropriate advice (e.g., bad business or investment advice); and
- misuse of superior or influential position (e.g., refusal to release security interest, wrongful exercise of payment-acceleration clause, or refusal to loan or extend credit).

The following is a discussion of breaches that frequently occur in the contexts described above.

1. Corporate Nonfeasance

A director's duty is generally determined by the laws of the corporation's state of incorporation.[75] Corporate directors may be held liable for breach of fiduciary duty for nonfeasance. For example, corporate directors may be held responsible for failing to keep informed about the activities of the corporation. In *Francis v. United Jersey Bank*, the court held that corporate directors:

> [S]hould acquire at least a rudimentary understanding of the business of the corporation. Accordingly, a director should become familiar with the fundamentals of the business in which the corporation is engaged. . . . Because directors are bound to exercise ordinary care, they cannot set up as a defense lack of the knowledge needed to exercise the requisite degree of care. If one "feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act."[76]

The law of directors' and officers' nonfeasance was, until recently, largely developed by state courts. However, federal courts have started to develop different ideas of the proper role of corporate fiduciaries, particularly under the federal securities laws. For example, in *Gould v. American-Hawaiian Steamship Co.*,[77] the United States Court of Appeals for the Third Circuit affirmed a decision holding an outside director liable for failing to prevent the dissemination of a misleading proxy statement issued in connection with a corporate merger. Although an outside director (a position often bestowed as an honor on present and former business and civic leaders), the director in *Gould* violated the duty of care he owed to the corporation's stockholders. The court held that this duty of care was implied from the prohibition contained in SEC rule 14a-9 prohibiting fraudulent proxy solicitations.[78]

2. Corporate Malfeasance and the Business Judgment Rule

Corporate directors are generally entitled by law to the presumption that their conduct is based on "a bona fide regard for the interest of the corporation whose affairs the stockholders have committed to their charge."[79] This presumption is an important aspect of what has generally come to be known as the "business judgment rule." The rule applies with regard to the sale of corporate assets as well as to other corporate affairs in general. Succinctly stated, the rule provides as follows: "A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose. A court under such circumstances will not substitute its own notions of what is or is not sound business judgment."[80]

Normally, a challenging shareholder has the burden of proving a breach of fiduciary duty under the business judgment rule.[81] However, before action by a corporation's board, in the context of enactment of takeover defenses, can fall within the protective scope of the business judgment rule, the directors must prove the following: (1) they had reasonable grounds to believe that a danger to corporate policy existed, which can be satisfied by a showing of good faith and reasonable investigation, and, (2) the defensive measure adopted is reasonable in relation to the threat imposed.[82] No such requirement is called for in other contexts involving day-to-day business decisions, including management of litigation matters.[83] However, the usurpation of corporate opportunities will not normally receive business judgment protection .[84]

3. Conflict of Interest Transactions Involving Corporate Officers and Directors

The fiduciary duty of loyalty imposed on corporate officers and directors is designed to ensure the fairness of corporate transactions in which the officer or director has an interest, direct or indirect. The rule formerly prevailing in the courts altogether precluded dealings between officers or directors and the corporation.[85] Now, courts have opined that a corporate officer or director may deal with the corporation, provided of course he or she acts fairly and in the best interest of the company.[86]

The American Law Institute (ALI) Corporate Governance Project published a work entitled "Principles of Corporate Governance: Analysis and Recommendations." Part 5 of this treatise deals with conflict of interest or self-interested transactions. Section 5.02 differs from the state "safe harbor" statutes mentioned above in that approval of a transaction by a majority of disinterested directors after full disclosure does not validate the transaction under the ALI draft "unless the transaction could reasonably be believed to be fair to the corporation at the time of such authorization."[87] Conversely, recent revisions to the MBCA advocate a different approach. The 1989 revision to the MBCA provides that disinterested director or shareholder approval, whether previously authorized or through subsequent ratification, or proof of fairness constitute two separate and distinct means of validating a conflict-of-interest transaction.[88]

4. Conflict of Interest Transactions Involving Majority or Controlling Shareholders

Majority or controlling shareholders also have a duty of loyalty to the corporation. Thus, majority shareholders carry a heavy burden in establishing the fairness and propriety of conflict-of-interest transactions with respect to the corporation. The Supreme Court of the United States addressed the issue in the landmark case of *Southern Pacific Co. v. Bogert*. "The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors."[89] The same duty of good faith and fidelity is imposed on 50 percent owners of closely held corporations.[90]

5. Breach of Partnership and Other Juridical Entities' Fiduciary Duties

The broad fiduciary duty between partners is one of the more important aspects of a partnership. The duties between partners are reciprocal. The very nature of partnership in general necessitates that all partners deal fairly with one another. Partners may not deal with one another at arm's length.[91]

The provisions of the UPA typically apply to limited partnerships to the extent they do not conflict with the RULPA. The courts are virtually uniform in holding that general partners are burdened with fiduciary duties in the context of a limited partnership.[92] General partners may be held liable for breach of fiduciary duty, even where the transaction at issue has been approved by over three-fourths of the limited partnership interests.[93] Additionally, limited partners are empowered to enforce the duties owed to the partnership by general partners, even if the partnership itself is unwilling to do so.[94]

According to a relatively recent addition to the law, members and managers of limited liability companies also owe fiduciary duties.[95] The Uniform Limited Liability Company Act has adopted the UPA's standard of handling fiduciary duties.[96]

6. Liability of Trustees for Breach of Fiduciary Duties

Trustees are burdened with fiduciary obligations pursuant to the very nature of the trust relationship. Trustees will be held liable for negligence in dealing with trust property as well as conflicts of interest. For example, trustees lacking in investment experience must seek out expert advice, but they must nevertheless exercise independent judgment.[97] In addition, trustees who have engaged in self-dealing will be accountable for such acts.[98]

The “prudent person” standard is the traditional measure of trustee conduct in breach of fiduciary duty cases. Although trustees can conceivably violate this standard rather easily, it is not impossible to survive its scrutiny.[99] If successful, a wrongfully accused trustee may, in the discretion of the court, recoup attorney’s fees as well as expenses.[100]

7. Fiduciary Liability Arising From Agency Status

An agent, like a trustee, owes the duty of fidelity to a principal in carrying out the duties with which he or she is charged. Anything less than the highest ethical conduct can result in liability. For example, agents may be held liable for serving their own interests above those of their principal.[101] An agent is accountable for full, fair, and prompt disclosure of all facts that threaten the principal’s interests or influence the agent’s actions.[102] An agent may deal with the principal on an arm’s-length basis after termination of the agency relationship.[103] However, certain duties persist after the agency relationship has ended, such as the duty not to act as an agent after termination and the duty not to disclose confidential information.[104]

8. Improper Administration of Estates

Like trustees, estate representatives will be held liable for failing to administer property of the estate as prudent administrators.[105] Estate representatives also will be responsible for conduct that conflicts with the best interests of beneficiaries of the estate.[106] In addition, as with trustees and agents, estate representatives must also account for all assets under their administration.[107] However, estate representatives are typically not liable for the wrongful acts of their co-representatives.[108]

9. Actions Against Stockbrokers

Some courts have imposed fiduciary liability on stockbrokers based on the agency relationship between a stockbroker and the customer.[109] Others have used the rules of the various stock exchanges as industry standards in determining whether a broker has breached a fiduciary duty with regard to the handling of an investor’s account.[110] Regardless of the source, it is clear that a stockbroker is burdened with the fiduciary duty to act in the best interest of the customer. The question thus becomes one of scope. In *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the district court held that where a broker was executing orders to buy and sell for a customer, the only duty owed to the customer was to properly answer the order.[111] The U.S. Court of Appeals for the Tenth Circuit went one step further in the case of *Hill v. Bache, Halsey, Stuart, Shields, Inc.* There, it held that, even when a broker does undertake to give a customer trading advice, the broker cannot be legally responsible if the opinion turns out to be incorrect.[112] The California Court of Appeals in *Duffy v. Cavalier* opined that the scope of a stockbroker's fiduciary duty to a customer depends on the specific facts and circumstances presented in a given case. "These include the relative sophistication and experience of the customer; the customer's ability to evaluate the broker's recommendations and exercise an independent judgment thereon; the nature of the account, whether discretionary or nondiscretionary; and the actual financial situation and needs of the customer."[113]

10. Fiduciary Liability of Real Estate Agents and Brokers

As previously mentioned, real estate agents (and brokers) owe the fiduciary duties of good faith and loyalty to their principal. These duties may be breached in several ways. For example, a real estate agent may be held liable for failure to exercise due diligence in pursuit of a sale.[114] A real estate agent may also be held liable for misrepresenting the condition of the property to the purchaser.[115] A real estate agent may even be held liable for failure to advise a seller to take security for the buyer's performance.[116] However, as in other fiduciary contexts, a real estate agent is not subject to liability for breach of fiduciary duty where no fiduciary relationship is present, as in the case of a non-client.[117]

11. ERISA Violations

A person is a fiduciary for purposes of ERISA with respect to those aspects of an ERISA plan over which he or she exercises discretionary authority or control.[118] The legislative history of ERISA indicates that courts are to be sensitive to the need for uniformity in the interpretation of a fiduciary's obligations.[119] Most courts have acknowledged that the duties imposed on ERISA fiduciaries are derived from the common law of trusts, and therefore, are to be measured by a prudent person standard.[120] Moreover, even a nonfiduciary may be liable for a breach of trust under ERISA.[121]

The biggest source of frustration for individual ERISA plaintiffs alleging breach of fiduciary duty has been the U.S. Supreme Court decision in *Massachusetts Mutual Life Insurance Co. v. Russell*.[122] In *Russell*, the specific question before the Court was whether an ERISA fiduciary may be held personally liable to a plan participant or beneficiary for extracontractual compensatory or punitive damages caused by improper or untimely processing of benefit claims. The Supreme Court recognized that the civil enforcement provisions of ERISA, 29 U.S.C. section 1132, et seq.,[123] allow a plan participant or beneficiary to bring an action against a fiduciary who has violated the fiduciary liability provisions of ERISA.[124] However, the court ultimately held that recovery for violations of 29 U.S.C. section 1109(a) inures only to the benefit of the plan as a whole, not to plan participants and beneficiaries.[125] As a result of this ruling, the millions of ERISA plan participants cannot seek redress against their health insurers or other ERISA fiduciaries for breach of fiduciary duty.

Thus, it is clear that 29 U.S.C. section 1109(a) was not enacted to establish a private right of action on behalf of an ERISA plan participant or beneficiary against an ERISA fiduciary for recovery of benefits due. Instead, such an action should be brought against the plan that is the proper party defendant pursuant to the civil enforcement provisions of ERISA, specifically 29 U.S.C. section 1132(a)(1) and 29 U.S.C. section 1132(d) (1).[126]

12. Breach of Fiduciary Duty in Lender-Liability Cases

Generally, the relationship of a bank and its borrower is that of creditor and debtor and, in the absence of special circumstances, a lender is not considered a fiduciary.[127] Unless those "special circumstances" can be shown, the conduct of a lender will generally be measured against the morals of the marketplace rather than the higher ethical standards imposed on fiduciaries.[128]

The touchstone of liability for breach of fiduciary duty in the lender-borrower context is when a special relationship of trust or confidence is present.[129] For example, fiduciary liability will attach where a creditor renders advice to the borrower, and thereby, induces the borrower to enter into a loan transaction.[130] In addition, where a lender is found to be in control of the debtor, the lender assumes fiduciary obligations to the debtor as well as to other creditors.[131] However, a lender is usually free to take steps to monitor the performance of its loans, to refuse to make further loans, and to enforce collection of outstanding loans when due.[132]

13. Deepening Insolvency Liability

One theory of recovery that appears to be growing in acceptance is that of "deepening insolvency."[133] Courts that have accepted this theory have addressed it in the context of claims against a variety of parties, including attorneys,[134] trustees,[135] lenders,[136] officers and directors,[137] auditors,[138] and financial advisers.[139] The claim is essentially one resulting from the fraudulent expansion of corporate debt and prolongation of corporate life, which may give rise to a "cognizable injury to corporate debtors."[140] Defendants may assert the affirmative defense of in pari delicto[141] and raise questions of standing.[142] Although sometimes characterized as a "tort,"[143] the doctrine has also been referred to as merely a "damages theory" utilized to quantify damages for other causes of action.[144]

14. Usurpation of Business Opportunity

One cause of action that has been pleaded in numerous cases over the past few years is the tort of usurpation of business opportunity. The tort is inextricably intertwined with fiduciary principles in that the duty not to usurp a business opportunity only arises by virtue of a fiduciary relationship. Thus, the typical scenario involves a recognized fiduciary, such as a corporation officer or director or a partner of a partnership, diverting a business opportunity for his or her own benefit in violation of a fiduciary duty of loyalty. The tort generally arises where fiduciaries obtain confidential information from another party and use that information to divert a prospective economic advantage to themselves.

For example, corporate officers have a duty to refrain from purchasing property for themselves if the corporation has an actual or expectant interest in the property or if the purchase would hinder or defeat the corporation's legitimate business plans and purposes.[145] Similarly, corporate directors may not receive compensation for services they perform personally that ordinarily may be performed by the corporation.[146] The same principles hold true with regard to partners,[147] joint venturers,[148] employees,[149] attorneys,[150] and trustees,[151] as well as with other types of fiduciaries.

However, a fiduciary relationship must be present for the tort of usurpation to lie. For example, since a purchaser of property is not a fiduciary of the seller, the purchaser owes no duty to the seller to inform the seller of a prospective business opportunity relative to the property.[152]

With regard to corporate opportunities, other factors also must be present. The opportunity must be of practical advantage to the corporation and must fit into the business of the corporation or an established corporate policy that the acquisition of the opportunity would forward.[153] In addition, there must be a tangible expectancy of an opportunity for profit.[154] Finally, no liability will attach unless the corporation is financially capable of taking advantage of the opportunity.[155]

C. *Causation*

The causation element of a breach of fiduciary duty cause of action is often analyzed using principles of traditional tort analysis. Generally speaking, causation may be difficult to establish when the alleged misconduct involves nonfeasance (as opposed to malfeasance) and when the breach is based on violations of special statutes or administrative provisions, such as SEC Rule 10b-5.

Cases involving nonfeasance present a much more difficult causation question than those involving an affirmative act of negligence or other wrongdoing. Cases of nonfeasance call for a determination of the reasonable steps the tortfeasor should have taken and of whether that course of action would have averted the loss. Nonfeasance does not result in liability unless it is a proximate cause of the loss.[156] "But for" causation is not always necessary in such situations; rather, the burden of proving causation may be fulfilled by showing that the misconduct was a substantial factor contributing to the loss.[157] In contrast, some courts have presumed causation in the case of an act of malfeasance.[158]

III. AFFIRMATIVE DEFENSES

Affirmative defenses to a breach-of-fiduciary-duty cause of action include:

- business-judgment rule;
- majority approval (i.e., by corporate shareholders);
- lack of fiduciary relationship (e.g., debtor-creditor relationship);
- failure to exercise due diligence; and
- preemption (i.e., ERISA).

More traditional affirmative defenses also apply, such as:

- statutes of limitations (tort and contract);
- estoppel/ratification (e.g., acceptance of benefits);
- failure to plead fraud with particularity;
- waiver (of known right);
- laches (failure to exercise right); and
- lack of standing.

However, the following illustrative analysis will focus primarily upon those affirmative defenses peculiar to actions for breach of fiduciary duties.

A very effective affirmative defense is the presumption of propriety afforded corporate directors under the business judgment rule. Plaintiffs may not rely on vague assertions of bias, domination, or control to establish a conflict of interest or overcome the presumption.[159] In order to rebut the presumption in the duty of loyalty context, plaintiffs must demonstrate that the interests of the directors in the transaction at issue could have affected the outcome of the vote by the corporation's board of directors.[160]

Similarly, where an informed majority of disinterested stockholders has approved a challenged transaction, the burden shifts to plaintiffs to demonstrate that the transaction was unfair to the minority of disinterested stockholders.[161] In addition, where dissatisfied shareholders are aware of the facts underlying a claim for breach of fiduciary duty beforehand but fail to take legal action until after the proposed transaction takes place, the defendant can plead the affirmative defense of laches.[162]

A defense that most frequently arises in the less traditional fiduciary contexts is that no fiduciary relationship exists.[163] Where no fiduciary relationship exists, the chances of recovery on that basis are nil. Along the same lines, if a fiduciary relationship once existed but was terminated, recovery will be denied for post-termination acts.[164]

Of course, to the extent a breach of fiduciary duty cause of action is grounded in fraud, an effective affirmative defense may be failure to plead fraud with particularity.[165] Thus, in the instances where fraud is the basis for an action for breach of fiduciary duty, the relevant facts and circumstances must be clearly set forth in the complaint.[166] This defense, of course, is short-lived, since the remedy is an amended complaint.

Finally, a powerful affirmative defense that arises frequently in the context of ERISA is the doctrine of preemption. ERISA, 29 U.S.C. section 1144, et seq., and the cases interpreting that section effectively preclude any and all state law breach of fiduciary duty actions, whether arising from statutes or common law.[167] However, some cases have acknowledged that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 're-lates to' the plan."[168]

The Supreme Court has recently addressed ERISA preemption in a series of cases dealing with health insurance, holding that certain state statutes regulating insurance may fall within ERISA's "saving clause," which save from ERISA's preemption provisions state laws that regulate insurance.[169]

IV. SPECIAL REMEDIES

Generally speaking, there are no special remedies peculiar to a breach of fiduciary duty cause of action.

A possible exception is the equitable doctrine of constructive trusts.[170] Imposition of a constructive trust is an appropriate remedy for breach of fiduciary duty.[171] For example, a constructive trust will be imposed on a fiduciary who has derived illicit profits from a breach of loyalty.[172] Similarly, where a fiduciary uses funds obtained in contravention of a fiduciary duty to acquire property, the fiduciary holds the property as a constructive trustee and has a duty to account to the beneficiary.[173]

When a plaintiff has been deprived of business by the defendant's breach of fiduciary duty, the plaintiff is generally entitled to be restored to the extent equity may fashion a remedy, including the imposition of a constructive trust and disgorgement of gains.[174] A court may allow an injured plaintiff to participate in present and future business opportunities that, absent the defendant's breach of fiduciary duty, the plaintiff would have enjoyed.[175] A court may even order the defendant to transfer ownership of property where the defendant has unlawfully withheld from the plaintiff the right to own the property.[176]

Legal and equitable remedies may generally be sought in the same action, both collectively and in the alternative. For example, a partner may claim damages as well as the right to an accounting for a partner's breach of fiduciary duty.[177] Similarly, a principal may seek legal and equitable redress as a result of a fiduciary's tortious conduct.[178]

In the corporate context, appraisal rights of shareholders are appropriately exercised in cases involving allegations of undervalued shares.[179] Of course, other remedies are applicable depending upon the circumstances. Yet the courts generally agree that appraisal may not afford a complete remedy to dissenting shareholders in a merger transaction and, therefore, a claim for equitable relief, including rescission of the merger, should be entertained.[180]

Of course, other remedies are available, depending upon the circumstances. For example, agents are liable for return of the compensation paid to them.[181] Brokers are held responsible for restitutionary recovery of secret profits.[182] In addition, trustees may be held liable, not only for losses to the trust and secret gains made by the trustee personally, but also for gains that would have been enjoyed by the trust were it not for the trustee's breach of fiduciary duty.[183] However, at least in the context of ERISA and under various state laws, no recovery for extracontractual or punitive damages is available.[184]

The most peculiar aspect of a claim for breach of fiduciary duty is that the claim is, by its very nature, a claim grounded in equity. As a result, courts generally feel free to fashion whatever remedies they feel are appropriate under the circumstances, including injunctive relief. To the extent breach of fiduciary duties gives rise to liability in other specific contexts, such as in cases involving allegations under the Racketeering Influenced and Corrupt Organizations Act (RICO), the applicable remedies are discussed in other chapters of this deskbook. The issue of damages is specifically addressed in chapter 10.

V. RECURRENT PROBLEMS

A. *Proof of Fiduciary Relationship*

In many situations, establishing a fiduciary relationship is not always easy. To the extent the relationship at issue is not specifically defined as fiduciary under the law, a plaintiff must rely on such special factual circumstances necessary to establish the relationship. The advantage, of course, is that such a determination is always fact-based and a properly pled complaint can often survive summary judgment.

B. *Scope of Fiduciary Relationship*

Once a fiduciary relationship has been established, its scope must be defined. The scope of a fiduciary's duty is sometimes provided for by statute. Uncertainty usually arises in circumstances where the duty is created by common law. In these situations, it is quite possible that a person or entity is only a fiduciary with regard to a particular undertaking. Under any circumstance, this scope should be clear from the complaint.

C. *Nonfeasance Versus Malfeasance*

A fiduciary usually breaches a duty in one of two ways: he or she can either take inappropriate action or fail to take any action at all. The distinction is not always clear, especially in cases that involve both acts and omissions. In any event, the precise nature of the alleged misconduct must be determined in order to assess causation. Generally speaking, causation is much easier to prove when the alleged misconduct stems from actions as opposed to omissions.

VI. LITIGATION TIPS

A breach of fiduciary duty claim is generally no different from other business torts, and in general, like any other tort, a plaintiff has the burden of proving the existence of a duty (fiduciary relationship), a breach of that duty, causation, and harm.[185] Therefore, a breach of fiduciary duty claim should be approached in much the same way as any other business tort claim. However, the following pointers may prove helpful.

A. *Plaintiffs*

Practically speaking, the most important thing to keep in mind when initiating a claim for breach of fiduciary duty is to make sure that all the elements of the cause of action are sufficiently set forth in the complaint. This will obviously help avoid problems with dispositive motions.

On a more strategic level, plaintiff's counsel usually should focus on the unfairness and inequity of the complained-of misconduct, as well as the relative bargaining power of the parties. This is especially true since the whole concept of a fiduciary relationship stems from the idea that the highest duty of fidelity is owed by one in whom trust and confidence is reposed by another.

Obviously, if there is a question as to whether a fiduciary relationship in fact existed, plaintiff's counsel should focus discovery efforts on information that will help establish a fiduciary relationship. Discovery should be aimed at uncovering communications between the parties, including any representations and/or guarantees made by the defendant, as well as any statements by the plaintiff that indicated or should have indicated to the defendant that the plaintiff placed trust and confidence in him or her. In addition, any evidence tending to show that the defendant exercised control over the affairs of the plaintiff is significant.

Finally, plaintiff's counsel should try to establish that the alleged misconduct took place while in the course and scope of the fiduciary relationship. If the scope is not clearly defined, plaintiff's counsel should attempt, in its pleadings, to expand the scope of the relationship as broadly as possible, so as to not be precluded from introducing evidence gleaned from discovery.

B. *Defendants*

Breach of fiduciary duty cases can present an opportunity for defendant's counsel to take advantage of pretrial motion practice. For example, a motion to dismiss for failure to state a claim upon which relief may be granted, based on the absence of a fiduciary relationship or of the scope of the relationship, is often appropriate, although a summary judgment is rarely successful. Such motions can force a plaintiff to flush out vague and ambiguous claims as well as educate the court as to the nature of the case.

As with plaintiffs, defendants' discovery efforts should investigate the nature of the relationship at issue. Any mitigating evidence, such as exculpatory clauses in contracts between the parties, or any of the previously mentioned affirmative defenses, is, of course, quite helpful, and should be timely raised.

The affirmative defenses available to the defendant are numerous. Defendant's counsel should take advantage of these defenses by pleading them in the answer and using them, to the extent appropriate, as the basis for pretrial motion practice.

Depending on the circumstances, it may prove particularly helpful to focus on the causation element. As previously mentioned, where the alleged misconduct is grounded upon omissions, as opposed to actions, causation may very well be quite difficult to prove.

It is also advisable for defendant's counsel to attempt to limit damages as much as possible. The logical approach is to focus discovery on financial records of the plaintiff in an attempt to show that the plaintiff was not damaged monetarily or that the damage was not caused by the defendant.

Any evidence tending to reduce or eliminate sympathy for the plaintiff is also quite helpful. If the plaintiff is placed on equal footing with the fiduciary, the unequal bargaining position that gives rise to the fiduciary duty to begin with is eliminated, as well as any potential jury sympathy.

Notes

1. *See* Black's Law Dictionary 626 (6th ed. 1990) (defining the term "fiduciary or confidential relation" and citing *In re* Heilman's Estate, 345 N.E.2d 536, 540 (Ill. Ct. App. 1978)).

2. First Bank of Wakeeney v. Moden, 681 P.2d 11, 13 (1984). *See also* Broomfield v. Kosow, 212 N.E.2d 556 (Mass. 1965); M.L. Stewart & Co. v. Marcus, 207 N.Y. S. 685 (N.Y. Sup. Ct. 1924).

3. Old Colony Ventures I, Inc. v. SMWNPF Holdings, Inc., 918 F. Supp. 343, 349 (D. Kan. 1996). A fiduciary relationship is defined by the *Restatement (Second) of Torts* § 874 cmt. a (1979) as existing between two persons "when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." "A fiduciary relationship places on the fiduciary a duty of candor, and concomitantly excuses the principal from having to take the same degree of care that is expected of a participant in an arm's-length contractual relationship." Carr v. CIGNA Sec., Inc., 95 F.3d 544, 547 (7th Cir. 1996).

4. *See generally In re* Reading Co., 711 F.2d 509, 517 (3d Cir. 1983) (holding a majority shareholder has a fiduciary duty to corporation and minority shareholders if majority shareholder "dominates the board of directors and controls the corporation"); Singer v. Magnavox Co., 380 A.2d 969, 977 (Del. 1977) (holding classic definition of the duty of loyalty is equally applicable to both directors and majority stockholders). *See also* Innes v. Howell Corp., 76 F.3d 702 (6th Cir. 1996); Emery v. American Gen'l Finance, Inc., 71 F.3d 1343 (7th Cir. 1995); Farr v. Farm Bureau Ins. Co. of Neb., 61 F.3d 677 (8th Cir. 1995); Gateway Tech., Inc. v. MCI Telecom. Corp., 64 F.3d 993 (5th Cir. 1995); *In re* Stat-Tech Int'l Corp., 47 F.3d 1054 (10th Cir. 1995); Industrial Gen'l Corp. v. Sequoia Pacific Sys. Corp., 44 F.3d 40 (1st Cir. 1995); Bigda v. Fischbach Corp., 898 F. Supp. 1004 (S.D. N.Y. 1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996); *In re* Insulfoams, Inc., 184 B.R. 694 (Bankr. W.D. Pa. 1995), *aff'd sub nom*. Donaldson v. Berstein, 104 F.3d 547 (3d Cir. 1997); Pagonis v. Donnelly, 929 F. Supp. 459 (D. D.C. 1995) (holding fiduciary duties of corporation's officers and directors are determined by law of state of incorporation); Pitman v. Aran, 935 F. Supp. 637 (D. Md. 1996); Regal-Beloit Corp. v. Drecoll, 955 F. Supp. 849, 858 n.3 (N.D. Ill. 1996) (holding corporate laws of state of incorporation are controlling with respect to fiduciary duties of directors as well as other internal corporate affairs); Charles Hansen, et al., *The Role of Disinterested Directors in "Conflict" Transactions: The ALI Corporate Governance Project and Existing Law*, 45 Bus. L. 2083, 2100 (1990).

5. Regal-Beloit Corp. v. Drecoll, 955 F. Supp. 849, 858 n.3 (N.D. Ill. 1996).

6. 318 U.S. 80, 85 (1949).

7. Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp., 925 F. Supp. 429, 447 (S.D.N.Y. 1995), *aff'd*, 101 F.2d 900 (2d Cir. 1996) ("The common law characterizes this obligation as having two prongs, the duty of care and the duty of loyalty."); *In re* Dollar Time Group, Inc., 223 B.R. 237, 245 (Bankr. S.D. Fla. 1998).

8. Model Business Corp. Act § 8.30 (1984) (incorporating changes through October 1999) provides the following:

> Standards of Conduct for Directors
>
> (a) Each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably

believes to be in the best interests of the corporation.

(b) The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

(c) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on the performance by any of the persons specified in subsection (e)(1) or subsection (e)(3) to whom the board may have delegated formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law.

(d) In discharging the board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (e).

(e) A director is entitled to rely, in accordance with subsection (c) or (d), on:

(1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(2) legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters (i) within the particular person's professional or expert competence or (ii) as to which the particular person merits confidence;

(3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

9. *See, e.g.,* Aronson v. Lewis, 473 A.2d 805 (Del. 1984) (holding directors afforded presumption that, in making business decisions, they exercised independent judgment, informed themselves as to the merits of the action, acted in good faith, and honestly believed that the action taken was in the corporation's best interests).

10. Model Business Corp. Act § 8.60 (1984) (incorporating changes through October 1999) provides, in part:

Subchapter Definitions.—In this subchapter:

(1) Conflicting interest with respect to a corporation means the interest a director of the corporation has respecting a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) if

(i) whether or not the transaction is brought before the board of directors of the corporation for action, the director knows at the time of commitment that he or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the director or a related person that the interest would reasonably be expected to exert an influence on the director's judgment if he were called upon to vote on the transaction; or

(ii) the transaction is brought (or is of such character and significance to the corporation that it would in the normal course be brought) before the board of directors of the corporation for action, and the director knows at the time of commitment that any of the following persons is either a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the person that the interest would reasonably be expected to exert an influence on the director's judgment if he were called upon to vote on the transaction: (A) an entity (other than the corporation) of which the director is a director, general partner, agent, or employee; (B) a person that controls one or more of the entities specified in subclause (A) or an entity that is controlled by, or is under common control with, one or more of the entities specified in subclause (A); or (C) an individual who is a general partner, principal, or employer of the director.

(2) "Director's conflicting interest transaction" with respect to a corporation means a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) respecting which a director of the corporation has a conflicting interest. *See, e.g.*, CAL. CORP. CODE § 310 (West 1990); DEL. CODE ANN. tit. 8, § 144 (1991); N.Y. BUS. CORP. LAW § 713 (McKinney 1986 & Supp. 1992).

See also former Model Business Corp. Act § 8.32 entitled "Loans to Directors."

11. *See, e.g.*, CAL. CORP. CODE § 310 (West 1990); DEL. CODE ANN. tit. 8, § 144 (1991); N.Y. BUS. CORP. LAW § 713 (McKinney 1986 & Supp. 1992).

12. *See, e.g.,* Cohen v. Ayers, 596 F.2d 733 (7th Cir. 1979); Trans World Airlines, Inc. Shareholders' Litig., No. 9844, 1988 Del. Ch. LEXIS 139 (Del. Ch. Oct. 21, 1988); Dunbar v. Williams, 554 So. 2d 56 (La. Ct. App. 1988). *Compare* Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 274 (2d Cir. 1986) ("It is not enough that directors merely be disinterested and thus not disposed to self-dealing or other indicia of a breach of the duty of loyalty. Directors are also held to a standard of due care."). *See also* Edelman v. Fruehauf Corp., 798 F.2d 882 (6th Cir. 1986) (holding target corporation's board of directors unreasonably preferred incumbent management in bidding process, acting without objectivity and requisite loyalty to the corporation).

13. *See* A.C. Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d l03, 111-14 (Del. Ch. 1986).

14. *See* Aviall, Inc. v. Ryder System, Inc., 913 F. Supp. 826 (S.D. N.Y. 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997); E. Norman Veasey, *Duty of Loyalty: The Criticality of the Counselor's Role*, 45 BUS. LAW 2065-66 (1990).

15. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). *See also* Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 269 (Del. 1989).

16. *See* Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

17. *See* Kaplan v. Wyatt, 499 A.2d 1184, 1189 (Del. 1985).

18. *See generally* Weinberger v. UOP Inc., 457 A.2d 701 (Del. 1983), *aff'd,* 497 A.2d 792 (Del. 1985).

19. *See* Uniform P'ship Act §§ 1-45, 6 U.L.A. 9-588 (1969 & Supp. 1991) and Uniform Ltd. P'ship Act §§ 1-31, 6 U.L.A. 561-621 (1969 & Supp. 1991), respectively. Only Louisiana did not adopt the UPA and the RULPA of 1976 with 1985 revisions. A new Uniform Partnership Act was enacted in 1994, and in 1996, Article 10, dealing with limited liability partnerships, was added to the UPA (1994). Only a minority of jurisdictions have adopted the new provisions. In 2001, The National Conference of Commissioners

on Uniform State Laws approved a new Uniform Limited Partnership Act (2001), which was approved by the American Bar Association in 2002. The ULPA (2001) is far longer and more complex than its predecessor, and provides rules for Limited Partnership and Limited Liability Partnership without any linkage to the UPA.

20. U.P.A. § 9, 6 U.L.A. 132-33, provides, in part:

> Partner Agent of Partnership as to Partnership Business
>
> (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member, binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

U.P.A. § 13, 6 U.L.A. 163, provides, in part:

> Partnership Bound by Partner's Wrongful Act
>
> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

U.P.A. § 14, 6 U.L.A. 173, provides, in part:

> Partnership Bound by Partner's Breach of Trust
>
> The partnership is bound to make good the loss:
>
> (a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and
>
> (b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

U.P.A. § 20, 6 U.L.A. 256, provides:

> Duty of Partners to Render Information
>
> Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

U.P.A. § 21, 6 U.L.A. 258, provides, in part:

> Partner Accountable as a Fiduciary
>
> (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

21. R.U.L.P.A. § 9, 6 U.L.A. 586-87, provides:

> Rights, Powers and Liability of a General Partner
>
> (1) A general partner shall have all the rights and the powers and be subject

to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to:

(a) Do any act in contravention of the certificate,

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(c) Confess a judgment against the partnership,

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(e) Admit a person as a general partner,

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate,

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

In contrast to the more general R.U.L.P.A., the U.L.P.A. (2001) provides more explicitly for the rights and obligations of both limited and general partners. However, the U.L.P.A. (2001) does contain a general statement as to general partners' conduct:

Section 408. General Standards of General Partner's Conduct.

(a) The only fiduciary duties that a general partner has to the limited partnership and the other partners are the duties of loyalty and care under subsections (b) and (c).

(b) A general partner's duty of loyalty to the limited partnership and the other partners is limited to the following:

(1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity;

(2) to refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership's activities as or on behalf of a party having an interest adverse to the limited partnership; and

(3) to refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's activities.

(c) A general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A general partner shall discharge the duties of the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A general partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the general partner's conduct furthers the general partner's own interest.

In contrast, Limited Partners under the U.L.P.A. (2001) explicitly do not owe fiduciary duties although they do owe a duty of good faith and fair dealing:

Section 305. Limited Duties of Limited Partners.

(a) A limited partner does not have any fiduciary duty to the limited partnership or to any other partner solely by reason of being a limited partner.

(b) A limited partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(c) A limited partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the limited partner's conduct furthers the limited partner's own interest.

22. Opus Corp. v. International Bus. Machs. Corp., 956 F. Supp. 1503 (D. Minn. 1996); Ross v. 1301 Connecticut Ave. Assocs., 99 F.3d 444 (D.C. Cir. 1996); United States v. Miller, 901 F. Supp. 371 (D. D.C. 1995), *aff'd,* 99 F.3d 448; Dymm v. Cahill, 730 F. Supp. 1245 (S.D. N.Y. 1990) (holding general partners owe fiduciary duties to their limited partners); Curley v. Brignoli Curley & Roberts Assocs., 746 F. Supp. 1208 (S.D. N.Y. 1989), *aff'd*, 915 F.2d 81 (2d Cir. 1990), *cert. denied*, 499 U.S. 955 (1991); *In re* Neshaminy Office Bldg. Assocs., 62 B.R. 798 (Bankr. E.D. Pa. 1986) (holding debtor general partner and bankruptcy trustee owed fiduciary duty to debtor limited partnership to act in its best interest, including settlement of interests of limited partners in bankruptcy proceedings); Nashville City Bank & Trust Co. v. Massey, 540 F. Supp. 566 (M.D. Ga. 1982) (holding general partner is fiduciary in whom trust and confidence have been reposed on account of which scrupulous good faith and candor are required); *In re* Harms, 10 B.R. 817 (Bankr. D. Colo. 1981) (holding general partners owe fiduciary duty to limited partners and, therefore, it is important that they have no conflict of interest); Holmes v. Young, 885 P.2d 305 (Colo. Ct. App. 1994).

23. *See, e.g.,* Bane v. Ferguson, 890 F.2d 11 (7th Cir. 1989) (finding withdrawal of partner terminates his partner status and, thus, his fiduciary status); Estate of Ginor v. Landsberg, 960 F. Supp. 661 (S.D. N.Y. 1996).

24. *See generally* Restatement (Third) of Trusts § 2 (2003).

25. *See generally* DuPont v. Southern Nat'l Bank of Houston, Tex., 771 F.2d 874 (5th Cir. 1985) (holding whenever discretion is conferred upon a trustee, trustee must act within bounds of "reasonable judgment" and has duty to deal impartially with beneficiaries of the trust), *cert. denied*, 475 U.S. 1085 (1986); Navajo Tribe of Indians v. United States, 9 Cl. Ct. 227 (1986) (holding trustee's standard of care is determined by the circumstances of time and place that surrounded the trustee when he took or failed to take the action in question), *cert. denied,* 444 U.S. 1072 (1980); Morrissey v. Curran, 650 F.2d 1267 (2d Cir. 1981) (finding trustees are held to strict standard of undivided loyalty that prohibits undisclosed self-dealing; even if beneficiary consents, trustee must nevertheless establish the reasonableness and fairness of the transaction); Himel v. Continental Ill. Bank & Trust Co. of Chicago, 596 F.2d 205 (11th Cir. 1979) (finding under Illinois law, breach of fiduciary duty will result from violations of obligations of a trustee in carrying out the trust according to its terms of care and diligence in protecting and investing trust property and of exercising good faith); Wright v. Nimmons, 641 F. Supp. 1391 (S.D. Tex. 1986) (holding trustee must exercise at least that degree of care that a reasonably prudent person would devote to his own affairs under like circumstances and, accordingly, must treat the

trust as if it were his own property); IAM Stock Ownership Inv. Trust Fund v. Eastern Air Lines, Inc., 639 F. Supp. 1027 (D. Del. 1986) (holding trustee or fund had fiduciary duty to advise participants of the trust fund regarding alternative that would maximize their assets); Busby v. Worthen Bank & Trust Co., N.A., 484 F. Supp. 647 (D. Ark. 1979) (finding trustee subject to probably the highest standard of fiduciary duty known to law; doubts must be resolved against the trustee; trustee has duty to avoid even the appearance of impropriety); Rollins v. May, 473 F. Supp. 358 (D. S.C. 1978) (concluding trustees, in management of trusts, must exercise reasonable care, prudence, and diligence under law of South Carolina and, if they depart from provisions of trust documents, they do so at their own peril; not even good faith nor the exercise of their best judgment will absolve them from liability), *aff'd*, 603 F.2d 487 (5th Cir. 1979).

26. *See generally* Vickery v. Garretson, 527 A.2d 293 (D.C. 1987) (finding whether a trust was, in fact, created is irrelevant to a claim of fiduciary duty; crucial fact is that defendant held herself out as the trustee of a purported trust and took control of the property). *See also* American Metal Forming Corp. v. Pittman, 52 F.3d 504 (4th Cir. 1995); *In re* Telesphere Communications, Inc., 205 B.R. 535 (Bankr. N.D. Ill. 1997) (finding, under Illinois law, agent has fiduciary duty to its principal, of kind which may justify imposition of constructive trust); NPF IV, Inc. v. Transitional Health Servs., 922 F. Supp. 77 (S.D. Ohio 1996) (finding, under Ohio law, constructive trusts may be imposed where there is duty to convey property because it was acquired through fraud, duress, undue influence, mistake, breach of fiduciary obligation, or abuse of confidential relationship); *In re* Jeter, 178 B.R. 787 (Bankr. W.D. Mo. 1995), *aff'd*, 73 F.3d 205 (8th Cir. 1996); *In re* Morken, 182 B.R. 1007 (Bankr. D. Minn. 1995) (holding, under Minnesota law, constructive trust will be imposed in cases of fraud, of taking improper advantage of confidential fiduciary relationship, and of unjust enrichment); Mass Cash Register, Inc. v. Comtrex Sys. Corp., 901 F. Supp. 404 (D. Mass. 1995); First Sec. Bank of Utah, N.A. v. Banberry Cross, 780 P.2d 1253 (Utah 1989) (holding existence of fiduciary duty between trustee and trustor may be implied by the factual situation of a given case).

27. RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

28. *See generally* Federal Pants, Inc. v. Stocking, 762 F.2d 561 (7th Cir. 1985) (holding agents are subject to the directions of the principal and have duty to use reasonable efforts to give to principal information relevant to affairs entrusted to them); Wilcox v. St. Croix Labor Union Mut. Homes, Inc., 567 F. Supp. 924 (D. V.I. 1983) (finding agency is fiduciary relationship and, thus, agent owes a duty to his principal to act in good faith and in accordance with the agency agreement existing between the parties as well as duty to keep and render accounts to the principal of all financial affairs that the agent has handled on behalf of the principal); Levin v. Garfinkle, 492 F. Supp. 781 (E.D. Pa. 1980) (holding, under Pennsylvania law, an agent owes his principal a strict duty of loyalty and must conduct the principal's affairs in the utmost good faith), *aff'd*, 667 F.2d 381 (3d Cir. 1981); Sierra Pacific Indus. v. Carter, 163 Cal. Rptr. 764, 766 (Cal. Ct. App. 1980) (finding once agency relationship is established, fiduciary duties of loyalty and full disclosure flow as a consequence).

29. *See* Aksomitas v. Aksomitas, 529 A.2d 1314 (Conn. 1987) (ruling administratrix had fiduciary relationship with heir by which she owed to him a duty of fair dealing and equity with respect to transactions of mutual concern; thus, administratrix was liable for breach of fiduciary duty for failure to disclose to plaintiff existence of mutual distribution agreement and deeds that would have affected his interest in the estate).

30. *See In the Matter of* Harrison, 335 S.E.2d 564 (Ga. 1985) (finding administrator owed fiduciary obligation to the estate and, therefore, was liable for failing to account for estate funds and converting funds to own use); *In re* Mudge, 654 P.2d 1307, 1310 (Cal. 1982) (Richardson, J., dissenting) (holding attorney, as executor of estate, owed "independent fiduciary obligation to the decedents' estate and to those beneficially interested therein, whether as heirs or creditors"). *See also In the Matter of* George Abdella, 476 N.Y.S.2d 400 (N.Y. App. Div. 1984).

31. *See, e.g.,* Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042 (11th Cir. 1987); Hill v. Bache Halsey Stuart Shields, Inc., 790 F.2d 817 (10th Cir. 1986); T-Bill Option Club v. Brown & Co. Sec. Corp., No. 88C8461, 1990 U.S. Dist. LEXIS 8028 (N.D. Ill. June 29, 1990); Blankenheim v. E.F. Hutton & Co., 266 Cal. Rptr. 593 (Cal. Ct. App. 1990); Duffy v. Cavalier, 264 Cal. Rptr. 740 (Cal. Ct. App. 1989).

32. *See, e.g.,* Transamerica Mtg. Advisors, Inc. v. Lewis, 444 U.S. 11, 16 (1979). The federal act applies only to investment advisers that have at least $25 million of assets under management or advise a registered investment company. The act allows individual states to regulate other investment advisers. 15 U.S.C. § 80b-3a.

33. *See, e.g.,* Laird v. Integrated Resources Inc., 897 F.2d 826 (5th Cir. 1989) (holding consideration of fiduciary status of investment advisers is required in assessing liability under Rule 10b-5). *Compare* Forkin v. Rooney Pace Inc., 804 F.2d 1047, 1050 (8th Cir. 1986) ("section 10(b) and Rule 10b-5 were not intended to bring within their ambit simple corporate mismanagement or every imaginable breach of fiduciary duty in connection with a securities transaction") (quoting St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 562 F.2d 1040, 1048 (8th Cir. 1997)); Shamsi v. Dean Witter Reynolds Inc., 743 F. Supp. 87 (D. Mass. 1989) (finding unsuitable and unauthorized trading is not necessarily violative of section 10(b) or Rule l0b-5).

34. Flickinger v. Harold C. Brown & Co., Inc., 947 F.2d 595 (2d Cir. 1991).

35. New York Stock Exchange Rule 405(l) (the "Know Thy Customer" rule) provides:

> Diligence as to Accounts
>
> Every member organization is required through a general partner, a principal executive officer or a person or persons designated under the provisions of Rule 342(b)(1) [¶ 2342] to
>
> (1) use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization.

See also the National Association of Securities Dealers Conduct Rule 2310, which provides:

> 2310. Recommendations to Customers (Suitability)
>
> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

36. *See, e.g.,* Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 906 F.2d 1206,

1212 (8th Cir. 1990) ("A stockbroker has a duty to its customers under the rules of the New York Stock Exchange and the rules of the National Association of Securities Dealers to make trades only after receiving prior authorization from the customer, and to not churn the customer's account."); Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981), *reh'g denied*, 642 F.2d 1210 (5th Cir. 1981) (holding broker's wrongful collection of commissions generated by intentional, excessive trading to be violation of federal securities law and common law fiduciary duty when measured against standards of industry); Mihara v. Dean Witter & Co., 619 F.2d 814 (9th Cir. 1980) (recognizing stock exchange rules as standard to which all brokers are held, the violation of which is tantamount to fraud).

37. For example, on Jan. 14, 2004, the Securities and Exchange Commission voted to approve three regulatory initiatives, which include provisions on Investment Company Governance, a Code of Ethics for Investment Advisors, and New Confirmation and Point of Sale Disclosure requirements.

38. *See, e.g.,* Edmonds v. Augustyn, 238 Cal. Rptr. 704 (Cal. Ct. App. 1987) (finding real estate licensee is fiduciary and therefore must exercise highest standards of good faith). *See also* A.E. Korpela & J. Kraut, Annotation, *Liability of Real Estate Broker or Agent for Concealing or Failing to Disclose Offer*, 7 A.L.R.3d 693, 695-96 (1966).

39. *See* Richard T. Kiko Agency, Inc. v. Ohio Dep't of Commerce, Div. of Real Estate, 549 N.E.2d 509 (Ohio 1990) (finding real estate broker should keep in a special bank account, separated from his own funds, monies coming into his hands in trust for other persons due to his fiduciary relationship with all parties and the canons of ethics for the real estate industry), *reh'g granted in part*, 551 N.E.2d 1305 (Ohio 1990); Guilderland Reins Co. v. Gold, 642 N.Y.S.2d 99, 100 (N.Y. Ct. App. 1996) ("A licensed real estate broker is a fiduciary for his client, and must exercise the utmost good faith and loyalty in his performance.") (quoting Weissman v. Mertz, 128 A.D.2d 609, 610 (1987)); Kahler, Inc. v. Weiss, 539 N.W.2d 86, 92 (S.D. 1995) ("A real estate agent owes the principal a fiduciary duty to use reasonable care, skill and diligence . . . "); Licari v. Blackwelder, 539 A.2d 609, 613 (Conn. Ct. App. 1988) (finding real estate broker "cannot put himself in a position antagonistic to his principal's interest") (quoting Ritch v. Robertson, 106 A. 509 (1919)), *cert. denied*, 545 A.2d 1100 (Conn. 1988); T-A-L-L, Inc. v. Moore & Co., 765 P.2d 1039 (Colo. Ct. App. 1988) (finding real estate broker has fiduciary duty to act with the utmost faith and loyalty in behalf of, and to act solely for the benefit of, his principal), *rev'd in part on other grounds*, 792 F.2d 794 (Colo. 1990).

40. *See* Roger v. Division of Real Estate of Dep't of Bus. Reg. of the State of Utah, 790 P.2d 102, 107 (Utah Ct. App. 1990) ("Though not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor [or a purchaser] is expected to be honest, ethical, and competent and is answerable at law for breaches of his or her statutory duty to the public.") (quoting Dugan v. Jones, 615 P.2d 1239, 1248 (Utah 1980) (alteration in original)).

41. Puchett v. Blue Cross and Blue Shield of Alabama, 75. F. Supp. 2d 1310, 1313 (M.D. Ala. 1999).

42. *See* 29 U.S.C. § 1002(21)(A)(1988).

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 U.S.C. § 1105(c)(1)(B)].

See also Pegram v. Herdrich, 120 S. Ct. 2143 (2000) (holding mixed eligibility and treatment decisions made by HMO through its physicians were not fiduciary acts within the meaning of ERISA); Lockheed Corp. v. Spink, 517 U.S. 882 (1996) (finding when employers adopt, modify or terminate welfare benefit or pension plans, they do not act as "fiduciaries" under ERISA); Varity Corp. v. Howe, 516 U.S. 489 (1996) (finding employer acted as "fiduciary" in misrepresenting to employees that their benefits would remain secure if they voluntarily transferred to a separately incorporated subsidiary); IT Corp. v. General Am. Life Ins. Co., 107 F.3d 1415 (9th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998) (holding right to write checks on ERISA plan funds is "authority or control respecting management or disposition of its assets" so as to render person doing so an ERISA fiduciary); Steen v. John Hancock Mut. Life Ins. Co., 106 F.3d 904 (9th Cir. 1997) (determining that a party is or is not an ERISA fiduciary is a factual conclusion subject to a clearly erroneous standard of review); *C*ottrill v. Sparrow, Johnson & Ursillo, Inc., 74 F.3d 20 (1st Cir. 1996) (ruling existence of discretion is the "sine qua non" of fiduciary duty under ERISA); Coyne & Delany Co. v. Selman, 98 F.3d 1457 (4th Cir. 1996) (finding employer was ERISA fiduciary to the extent it exercised its discretionary responsibility "to monitor appropriately" and remove plan administrator and supervisor); HealthSouth Rehab. Hosp. v. American Nat'l Red Cross, 101 F.3d 1005 (4th Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997) (holding company providing administrative and ministerial services to plan was not ERISA fiduciary); Wolin v. Smith Barney Inc., 83 F.3d 847 (7th Cir. 1996) (concluding that to be deemed an ERISA fiduciary, an investment adviser must be rendering advice pursuant to agreement, be paid for the advice, and have influence approaching control of one plan's investment decisions); Akers v. Palmer, 71 F.3d 226 (6th Cir. 1995), *cert. denied*, 518 U.S. 1004 (1996) (holding founding board member and former member of Employee Stock Ownership Plan (ESOP) committee was not ERISA fiduciary based on fact that he was a founding member of the company and voted to create ESOP); Concha v. London, 62 F.3d 1493 (9th Cir. 1995), *writ of cert. dismissed,* 517 U.S. 1183 (1996) (finding fiduciaries of ERISA plan adequately pled their own fiduciary status under 29 U.S.C. § 1002 as well as that of co-fiduciary defendants); Kayes v. Pacific Lumber Co., 51 F.3d 1449 (9th Cir. 1995), *cert. denied*, 516 U.S. 914 (1995) (holding corporate officers liable as fiduciaries on the basis of their conduct and authority with respect to ERISA plan even if corporation was named fiduciary and officers were not so named); Landwehr v. DuPree, 72 F.3d 726 (9th Cir. 1995) (finding ERISA defines fiduciary in functional terms); Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), *reh'g and suggestion for reh'g denied, cert. denied*, 516 U.S. 1115 (1996) (holding fiduciary status is not an "all or nothing" concept and the court must ask whether party is a fiduciary with respect to the particular activity in question); Parker v. Bain, 68 F.3d 1131 (9th Cir. 1995) ("ERISA's definition of 'fiduciary' is functional rather than formal"); Reich v. Lancaster, 55 F.3d 1034 (5th Cir. 1995) (holding, in some situations, an adviser's influence may become so great that it confers effective discretionary authority for the purposes of making the adviser an ERISA fiduciary); Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (2d Cir. 1995) (holding trustees of single-employer pension plan may conduct business on behalf of their employer, and, to the extent that such business is not regulated by ERISA, may act without invoking their fiduciary duties to beneficiaries); Petrilli v. Gow, 957 F. Supp. 366 (D. Conn. 1997) (determining whether an individual is ERISA fiduciary by focusing on function performed, rather than on title held); Black v. Bresee's Oneonta Dept. Store, Inc. Sec. Plan, 919 F. Supp. 597 (N.D. N.Y. 1996) (holding insurance agent who proposed pension plan and sold policies to fund it was held to be a fiduciary where agent did not provide investment advice or take any discretionary action in reference to the plan); Grohowski v. U.E. Systems, Inc., 917 F. Supp. 258 (S.D. N.Y. 1996) (recommendation to purchase life insurance does not constitute "investment advice" for purposes of determining ERISA fiduciary status); Hartford Fire Ins. Co. v. E.A. Sween Co., 920 F. Supp. 1021 (D. Minn. 1996) (holding third-party administrator had no fiduciary duty to ensure that hospital in its preferred-provider network submitted claims in timely manner); Variety Children's Hosp., Inc. v. Blue Cross/Blue Shield of Florida, 942 F. Supp. 562 (S.D. Fla. 1996) (holding third-party administrator group health insurance plan would be fiduciary if administrator had discretionary authority or control over management of plan); Walling v. Brady, 917 F. Supp. 313 (D. Del. 1996), *rev'd on other grounds*, 125 F.3d 114 (3d Cir. 1997) (finding fiduciary status is not an all-or-nothing concept and the court must determine whether one acts as a fiduciary with respect to the particular activity in question); Welsh v. Quabbin Timber Inc., 943 F. Supp. 98 (D. Mass. 1996) (holding company president who chose health insurance policy and the specific benefits to be provided within plan held to be fiduciary); Conner v. Mid South Ins. Agency, 943 F. Supp. 647 (W.D. La. 1995) (holding vice president of employer who initiated and negotiated a seller-financed disposition of company's stock to group which included himself, pension plan, and other investors to be fiduciary); Guardian Life Ins. Co. of Am. v. Roma, 895 F. Supp. 442 (N.D. N.Y. 1995), *aff'd*, 101 F.3d 682 (2d Cir. 1996) (finding employer that participated in regulated group insurance policy was fiduciary where the employer exercised discretionary control and authority over the policy's management, administration or assets); McDermott Food Brokers, Inc. v. Kessler, 899 F. Supp. 928 (N.D. N.Y. 1995) (holding employer lacked fiduciary status to bring claims for negligence and breach of contract against general agents of insurance company retained by employer to act as third-party administrator); McMorgan & Co. v. First California Mtg. Co., 916 F. Supp. 966 (N.D. Cal. 1995) (holding that under ERISA, status as a fiduciary is determined by function, not by label); Redall Indus., Inc. v. Wiegand, 878 F. Supp. 1026 (E.D. Mich. 1995) (holding financial services company not to be fiduciary where it did not exercise discretionary control over distribution of benefits, did not give investment advice, and did not create plan); Samuels v. PCM Liquidating, Inc., 898 F. Supp. 711 (C.D. Cal. 1995) (finding company that processed claims performed merely ministerial duties and was not fiduciary).

43. *See* 29 U.S.C. § 1104(a)(1) (1988), which provides in part that:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with

> such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or subtitle IV.

44. 29 U.S.C. § 1109(a) provides in part that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary . . . .

45. *See* 29 C.F.R. § 2510.3-21(d)(1), which provides that

> A person who is a broker or dealer . . . shall not be deemed to be a fiduciary, within the meaning of § 3(21)(A) of the Act, with respect to an employee benefit plan solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in the ordinary course of its business as a broker [or] dealer, . . . pursuant to instructions of a fiduciary with respect to such plan, if:
>
> (i) Neither the fiduciary nor any affiliate of such fiduciary is such broker [or] dealer, . . . and
>
> (ii) The instructions specify (A) the security to be purchased or sold, (B) a price range within which such security is to be purchased or sold . . . (C) a time span during which such security may be purchased or sold (not to exceed five business days), and (D) the minimum or maximum quantity of such security which may be purchased or sold.

See also Farm King Supply Integrated Profit-Sharing Plan v. Edward D. Jones & Co., 884 F.2d 288 (7th Cir. 1989).

46. Lockheed Corp. v. Spink, 517 U.S. 882 (1996); Coyne & Delany Co. v. Selman, 98 F.3d 1457 (4th Cir. 1996); Equitable Life Assur. Soc. of U.S. v. Crysler, 66 F.3d 944 (8th Cir. 1995); Holsey v. UNUM Life Ins. Co. of Am., 954 F. Supp. 144 (E.D. Mich. 1997); Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869 (S.D. N.Y. 1997); Morales v. Health Plus, Inc., 954 F. Supp. 464 (D. P.R. 1997); Healthcare America Plans, Inc. v. Bossemeyer, 953 F. Supp. 1176 (D. Kan. 1996), *aff'd*, 166 F.3d 347 (10th Cir. 1998); Santana v. Deluxe Corp., 920 F. Supp. 249 (D. Mass. 1996); Tool v. National Employee Ben. Serv., Inc., 957 F. Supp. 1114 (N.D. Cal. 1996), *aff'd*, 166 F.3d 347 (10th Cir. 1998); Moffitt v. Whittle Communications, L.P., 895 F. Supp. 961 (E.D. Tenn. 1995).

47. *See, e.g., In re* Lauer, 98 F.3d 378 (8th Cir. 1996), *reh'g denied,* 1996 U.S. App. LEXIS 33547 (8th Cir. Dec. 20, 1996); Ledbetter v. First State Bank & Trust Co., 85 F.3d 1537 (11th Cir. 1996); *In re* W. T. Grant Co., 699 F.2d 599, 609-10 (2d Cir. 1983), *cert.*

denied, 464 U.S. 822 (1983); Ingram v. Lehr, 41 F.2d 169, 170 (9th Cir. 1930); Stern v. Great Western Bank, 959 F. Supp. 478, 487 (N.D. Ill. 1997); NPF IV, Inc. v. Transitional Health Serv., 922 F. Supp. 77, 83 (S.D. Ohio 1996); Overseas Private Inv. Corp. v. Industria de Pesca, N.A., Inc., 920 F. Supp. 207, 209 (D. D.C. 1996); GE Capital Mtg. Serv., Inc. v. Pinnacle Mtg. Inv. Corp., 897 F. Supp. 854, 863 (E.D. Pa. 1995); Oliver v. Resolution Trust Corp., 747 F. Supp. 1351, 1356 (E.D. Mo. 1990); Ramanathan v. Chemical Bank, No. 88 CIV. 8637, 1990 U.S. Dist. LEXIS 12615, *3 n.2 (S.D. N.Y. Sept. 21, 1990); *In re* Ludwig Honold Mfg. Co., 46 B.R. 125, 128 (Bankr. E.D. Pa. 1985); *In re* Teltronics Servs., Inc., 29 B.R. 139, 169 (Bankr. E.D. N.Y. 1983).

48. *See, e.g.,* Hackney v. First Ala. Bank, 555 So. 2d 97, 100 (Ala. 1989); Simmons v. Jenkins, 750 P.2d 1067, 1070 (Mont. 1988) (finding no fiduciary duty in the absence of evidence of an advisory relationship between bank and customer); Stewart v. Phoenix Nat'l Bank, 64 P.2d 101, 106 (Ariz. 1937); Irons v. Community State Bank, 461 N.W.2d 849, 852 (Iowa Ct. App. 1990) (noting that a fiduciary duty generally did not arise solely from a bank-depositor relationship, and that the borrowers actually benefited from the FMHA loan); Production Credit Ass'n of Lancaster v. Croft, 423 N.W.2d 544, 546-48 (Wis. Ct. App. 1988); Hutson v. Wenatchee Fed. Sav. & Loan Assn., 588 P.2d 1192 (Wash. Ct. App. 1978) (finding savings and loan that possessed superior knowledge and experience compared to its customers owed a quasi-fiduciary duty to its customers).

49. Credit Managers Assn. of S. Cal. v. Super. Ct., 124 Cal. Rptr. 242 (Cal. Ct. App. 1975).

50. *In re* Letterman Bros. Energy Sec. Litig., 799 F.2d 967, 975 (5th Cir. 1986) (quoting Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962)), *reh'g denied*, 802 F.2d 455 (5th Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

51. Atlantic Nat'l Bank of Fla. v. Vest, 480 So. 2d l328 (Fla. Ct. App. 1985).

52. Scheiffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907, 912 (Neb. 1993) (citations omitted).

53. Winkler v. Rocky Mountain Conference of the United Methodist Church, 923 P.2d 152 (Colo. Ct. App. 1996), *cert. denied*, 519 U.S. 1093 (1997).

54. Cherepski v. Walker, 913 S.W.2d 761 (Ark. 1996); DeBose v. Bear Valley Church of Christ, 890 P.2d 214, *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1996), *cert. denied*, 520 U.S. 1241 (1997); Moses v. Diocese of Colo., 863 P.2d 310 (Colo. 1993), *cert. denied*, 511 U.S. 1137 (1994); *but see* Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907 (Neb. 1993) (holding parishioner's breach of fiduciary duty claim against priest not actionable as it was "merely another way of alleging that the defendant grossly abused his pastoral role, that is, he engaged in malpractice").

55. Fleet Nat'l Bank v. H & D Entertainment, Inc., 926 F. Supp. 226 (D. Mass. 1996), *aff'd*, 96 F.3d 532 (1st. Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

56. A very controversial case involving a physician's fiduciary duty was presented to the court in *Moore v. Regents of the Univ. of Cal.*, 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (Cal. 1990) in which the California Supreme Court held that a patient stated a cause of action for breach of fiduciary duty when the physician concealed his own economic interest in removing cells from a patient's body.

57. Church of Scientology Int'l v. Eli Lilly & Co., 848 F. Supp. 1018 (D. D.C. 1994), *recons. denied*, No. 92-1892, 1994 WL 193910 (D. D.C. June 8, 1994).

58. Crabtree v. Tristar Automotive Group, Inc., 776 F. Supp. 155 (S.D. N.Y. 1991).

59. Red Cardinal Fifteen, Inc. v. Chang, 954 F. Supp. 1111 (D. S.C. 1995), *aff'd in part, vacated in part*, 106 F.3d 391 (4th Cir. 1997) (reversal on remittitur).

60. McGuirk Oil Co. v. Amoco Oil Co., 889 F.2d 734 (6th Cir. 1989); O'Neal v. Burger Chef Sys., Inc., 860 F.2d 1341 (6th Cir. 1988); Oil Express Nat'l, Inc. v. Burgstone, 958 F. Supp. 366 (N.D. Ill. 1997); Oil Express Nat'l, Inc. v. Latos, 966 F. Supp. 650 (N.D. Ill. 1997); St. Martin v. KFC Corp., 935 F. Supp. 898 (W.D. Ky. 1996) (holding generally franchise agreements do not impose fiduciary duties); Wayman v. Amoco Oil Co., 923 F. Supp. 1322 (D. Kan. 1996).

61. Tanksley & Assocs. v. Willard Indus., Inc., 961 F. Supp. 203 (S.D. Ohio 1997).

62. McDonnell-Douglas Corp. v. SCI Tech., Inc., 933 F. Supp. 822 (E.D. Mo. 1996).

63. Norand Corp. v. Parkin, 785 F. Supp. 1353 (N.D. Iowa 1990).

64. Morris v. Consol. Coal Co., 446 S.E.2d 648 (W. Va. 1994).

65. Petre v. Living Centers-East, Inc., 935 F. Supp. 808 (E.D. La. 1996); Schenck v. Living Centers-East, Inc., 917 F. Supp. 432 (E.D. La. 1996).

66. United Teachers Ass'n Ins. Co. v. MacKeen & Bailey, Inc., 99 F.3d 645 (5th Cir. 1996).

67. PulseCard, Inc. v. Discover Card Servs., Inc., 917 F. Supp. 1478 (D. Kan. 1996).

68. Liebowitz v. Elsevier Science Ltd., 927 F. Supp. 688 (S.D. N.Y. 1996).

69. Trumpet Vine Inv., N.V. v. Union Capital Partners I, Inc., 92 F.3d 1110 (11th Cir. 1996).

70. Floors Unltd., Inc. v. Fieldcrest Cannon, Inc., 55 F.3d 181 (5th Cir. 1995).

71. Noah v. Enesco Corp., 911 F. Supp. 299 (N.D. Ill. 1995).

72. Anchor v. O'Toole, 94 F.3d 1014 (6th Cir. 1996), *reh'g denied*; Thanksgiving Tower Partners v. Anros Thanksgiving Partners, 64 F.2d 227 (5th Cir. 1995).

73. United States v. Brennan, 938 F. Supp. 1111 (E.D. N.Y. 1996), *conviction rev'd on other grounds,* 183 F.3d 139 (2d Cir. 1999); Anchor v. O'Toole, 94 F.3d 1014 (6th Cir. 1996); Compagnie de Reassurance d'Ile de France v. New England Reins. Corp., 944 F. Supp. 986 (D. Mass. 1996); Fleet Nat. Bank v. H & D Entertainment, Inc., 926 F. Supp. 226 (D. Mass. 1996), *aff'd*, 96 F. 3d 532 (1st. Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); Heden v. Hill, 937 F. Supp. 1230 (S.D. Tex. 1996).

74. S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 848-49, 851 (2d Cir. 1979); Estate of Ginor v. Landsberg, 960 F. Supp. 661 (S.D. N.Y. 1996), *aff'd*, 159 F.3d 1346 (2d Cir. 1998); Rowen v. Le Mars Mutual Ins. Co. of Iowa, 282 N.W.2d 639 (Iowa 1979); RESTATEMENT (SECOND) OF TRUSTS §§ 280-326 (1959).

75. MHC Investment Co. v. Racom Corp., 254 F. Supp. 2d 1090 (S.D. Iowa 2002); *In re* TEU Holdings, 287 B.R. 26 (Bankr. D. Del. 2002).

76. 432 A.2d at 821-22 (quoting Campbell v. Watson, 50 A.120 (N.J. Ch. 1901)). *See also* McDonnell v. American Leduc Petroleums Ltd., 491 F.2d 380 (2d Cir. 1974) (holding officer/director who had limited business experience and played a passive role was liable to the extent of damage to the corporation by conduct of third parties about which she knew or should have known by examining corporate records); Gamble v. Brown, 29 F.2d 366 (4th Cir. 1928) (holding elderly and infirm director liable), *cert. denied,* 279 U.S. 839 (1929). *Compare* Harman v. Wilibem, 374 F. Supp. 1149 (D. Kan. 1974) (holding director who, after selling his shares, remained on corporate board in name only and who relied on officers of the corporation while assets of the corporation were being depleted not liable), *aff'd,* 520 F.2d 1333 (10th Cir. 1975).

77. 535 F.2d 761 (3d Cir. 1976).

78. *Id.* at 777. *See also* Barnes v. Andrews, 298 F. 614 (S.D. N.Y. 1924) (ruling an inactive director must keep abreast of the activities of the corporation with some degree of particularity). *Compare* Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963) ("[A]bsent cause for suspicion, there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to expect exists.").

79. *See, e.g.,* Robinson v. Pittsburgh Oil Ref. Corp., 126 A. 46, 48 (Del. Ch. 1924). *See also* Stepak v. Schey, 553 N.E.2d 1072, 1076-78 (Ohio 1990) (Holmes, J., concurring); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987); Frances T. v. Village Green Owners Assn., 723 P.2d 573 (Cal. 1986); Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987); Interlake Porsche + Audi, Inc. v. Blackburn, 728 P.2d 597 (Wash. Ct. App. 1986).

80. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). *See also* Ward v. Succession of Freeman, 854 F.2d 780 (5th Cir. 1988), *reh'g denied*, 863 F.2d 882 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989); Miller v. American Tel. & Tel. Co., 507 F.2d 759 (3d Cir. 1974); Gimbel v. Signal Cos., 316 A.2d 599 (Del. Ch. 1974), *aff'd*, 316 A.2d 619 (Del. 1974); Casey v. Woodruff, 49 N.Y.S.2d 625, 643 (N.Y. App. Div. 1944).

81. *See* Int'l lns. Co. v. Johns, 874 F.2d l447 (11th Cir. 1989); Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2d Cir. 1980).

82. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

83. Abbey v. Control Data Corp., 603 F.2d 724 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980); Lewis v. Anderson, 615 F.2d 778 (9th Cir. 1979), *cert. denied*, 449 U.S. 869 (1980); Powell v. Western Ill. Elec. Coop., 536 N.E.2d 231 (Ill. Ct. App. 1989), *appeal denied,* 545 N.E.2d 129 (Ill. 1989), *cert. denied*, 493 U.S. 1079 (1990).

84. Robinson v. R & R Pub. Inc., 943 F. Supp. 18 (D. D.C. 1996).

85. *See, e.g.,* Dixmoor Golf Club Inc. v. Evans, 156 N.E. 785, 787 (Ill. l927) (ruling that since board of directors was dominated by one member, and board had purchased land from him for the corporation at a price 2½ times more than required, transaction would be set aside, even though corporation had use for the land and received benefit from transaction. "It is a breach of duty for the directors to place themselves in a position where their personal interests would prevent them from acting for the best interests of those they represent.").

86. *See generally* Gaillard v. Natomas Co., 256 Cal. Rptr. 702 (Cal. Ct. App. 1989). C*ompare* Remillard Brick Co. v. Remillard Dandini Co., 241 P.2d 66, 73-77 (Cal. Ct. App. 1952) (holding statute prohibiting automatic invalidation of contracts between corporations having a common directorate does not validate such contracts "simply because there has been a disclosure and approval by the majority of the stockholders").

87. American Law Institute, Principles of Corporate Governance: Analysis and Recommendations pt. 5, § 5.02 (1994).

88. *See* American Bar Association, *Changes in the Model Business Corporation Act—Amendments Pertaining to Directors' Conflicting Interest Transactions*, 44 Bus. Law 1307 (1989).

89. 250 U.S. 483, 487-88 (1919). *See also* Pepper v. Litton, 308 U.S. 295, 306 (1939) (holding a dominant or controlling stockholder or group of stockholders is a fiduciary. "Their powers are powers in trust. . . . Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged, the burden is on the director or stockholder to not only prove the good faith of

the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein."); Banks v. Bryant, 497 So. 2d 460 (Ala. 1986) (finding many stockholders impermissibly acted in their individual capacities in contracting for construction and operation of dog-racing track); Albert v. 28 Williams St. Corp., 473 N.E.2d 19 (N.Y. 1984) (asserting claim against majority shareholders for breach of fiduciary duty in approving and executing merger agreement without showing strong and compelling legitimate business purpose), *reh'g denied,* 64 N.Y.2d 1041 (N.Y. 1985); Harman v. Masoneilan Int'l, Inc., 442 A.2d 487 (Del. 1982) (asserting a claim in equity for breach of fiduciary duty of a majority shareholder to the minority shareholders); Jones v. H.F. Ahmanson & Co., 460 P.2d 464, 471 (Cal. 1969) ("The Courts of Appeal have often recognized that majority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities in order to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business."); Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 109-10 (Del. 1952) (ruling dominant corporation, as majority stockholder with interests on both sides of a merger transaction, has burden of establishing its "entire fairness" to minority stockholders); TransWorld Airlines Inc. v. Summa Corp., 374 A.2d 5, 10 (Del. Ch. 1977) ("[I]t is clear on the present record that the minority shareholders of TWA received nothing in exchange for the strictures imposed by defendants on [TWA's] operations and that such stockholders may have suffered injury as a result of the loss of TWA's freedom to compete."); Childes v. Robertson, 767 P.2d 903 (Or. Ct. App. 1989).

90. *See, e.g.,* Morton v. Rank America, Inc., 812 F. Supp. 1062 (C.D. Cal. 1993); Hagshenas v. Gaylord, 557 N.E.2d 316 (Ill. Ct. App. 1990), *appeal denied*, 561 N.E.2d 691 (Ill. 1990).

91. *See* Judson A. Crane & Alan R. Bromberg, Law of Partnership 389 (1968):

> [E]ach partner is, roughly speaking, both a principal and an agent, both a trustee and a beneficiary, for he has the property, authority and confidence of his co-partners, as they do of him. He shares their profits and losses, and is bound by their actions. Without the protection of fiduciary duties, each is at the others' mercy.

92. *See, e.g.,* Del. Code Ann. tit. 6, § 17-403 (1994) (conferring same rights and restrictions on general partner as on any partner in a partnership without limited partners); N.Y. Partnership Law § 98 (McKinney 1988) (same); Wash. Rev. Code Ann. § 25.10.240 (1994) (same); Gagan v. American Cablevision, Inc., 77 F.3d 951 (7th Cir. 1996), *reh'g denied,* 1996 U.S. App. LEXIS 6292 (7th Cir. Apr. 1, 1996); *In re* Monetary Group, 2 F.3d 1098 (11th Cir. 1993); Ebest v. Bruce, 734 S.W.2d 915 (Mo. Ct. App. 1987) (ruling where general partner of limited partnership acts with complete control, he stands in same position to the limited partners as a trustee stands to the beneficiary of a trust); People of the State of N.Y. v. Zinke, 76 N.Y.2d 8, 15 (N.Y. 1990); F & S Enters., Inc. v. Cure, 690 So. 2d 263 (La. Ct. App. 1997).

93. *See* Phillips v. Kula Zoo, 629 F.2d 119 (Haw. Ct. App. 1981) (holding approval by 75.69 percent of the limited partnership interests cannot cause the limited partnership to

ratify, forgive, or waive a claim for a breach of fiduciary duty owed it by one of its general partners).

94. *See, e.g.,* Lenz v. Associated Inns & Restaurants Co. of America, 833 F. Supp. 362 (S.D. N.Y. 1993); Phillips v. Kula Zoo, 629 P.2d 119 (Haw. Ct. App. 1981) (holding limited partner could maintain action against general partners on behalf of limited partnership for breach of fiduciary duty where limited partnership refuses to do so).

95. Wash. Rev. Code Ann. §§ 25.15.155 to 25.15.160 (1994); N.Y. Ltd. Liab. Co. Law §§ 409, 420 (McKinney 1994); N.Y. Ltd. Liab. Co. Law § 417 (McKinney 1996).

96. U.L.L.C.A. § 409.

97. *See, e.g.,* Shepard v. K.B. Fruit & Vegetable, Inc., 868 F. Supp. 703 (E.D. Pa. 1994); Shriners Hosp. for Crippled Children v. Gardiner, 733 P.2d 1110 (Ariz. 1987) (finding trustee breached fiduciary duty when she transferred investment power).

98. *See, e.g.,* Stegemeier v. Magness, 728 A.2d 557 (Del. 1999) (holding co-administrator of estate and trustee breached fiduciary duty by conveying real estate that was to be part of the corpus of the trust to a corporation owned by them and this breach was not "cured" when a disinterested co-administrator executed the deed); Jones v. Ellis, 551 So. 2d 396 (Ala. 1989) (finding trustee breached fiduciary duty by failing to properly manage trust and maintain its value in directly causing decline in value of corporate stock owned by trust and using position as director of corporation to rob the trust he guarded of any value it might have); Riley v. Rockwell, 747 P.2d 903 (Nev. 1987) (ruling it is a breach of a trustee's fiduciary obligation to become a co-owner of property with the trust because there is a greater tendency for self-dealing).

99. *See, e.g., In re* Stat-Tech Intern. Corp., 47 F.3d 1054 (10th Cir. 1995); Holladay v. Fidelity Nat'l Bank of Baton Rouge, 312 So. 2d 883 (La. Ct. App. 1975) (holding trustees were not liable for breach of fiduciary duty under prudent man standard in suit by settlor and income beneficiary alleging, inter alia, failure to maintain confidentiality, failure to record trust instruments as required by law, nondisclosure, and improper delegation of trustee duties).

100. *See generally* Kimbrough v. Union Planters Nat'l Bank, 764 S.W.2d 203 (Tenn. 1989).

101. *See* Delano v. Kitch, 663 F.2d 990 (10th Cir. 1981) (holding jury could find that agent acted for his own pecuniary interest by procuring a secret commission from a third party), *cert. denied*, 456 U.S. 946 (1982); Frey v. Fraser Yachts, 29 F.3d 1153 (7th Cir. 1994); Johnson v. Pacific Lighting Land Co., 817 F.2d 601 (9th Cir. 1987) (finding if an agent makes a secret and unlawful profit, then he is required to pay that amount to his principal), *cert. denied*, 484 U.S. 1062 (1988); FDIC v. Caplan, 874 F. Supp. 741 (W.D. La. 1995).

102. *See* Gelfand v. Horizon Corp., 675 F.2d 1108 (10th Cir. 1982) (finding agent breached fiduciary duty in failing to disclose relevant facts to his employer regarding sale of property to corporation in which his wife had a one-third interest).

103. *See, e.g.,* Clinkenbeard v. Central Southwest Oil Corp., 526 F.2d 649 (5th Cir. 1976) (holding termination of agency relationship also terminated the fiduciary duties that flowed from it); Mercer Mgmt. Consulting, Inc. v. Wilde, 920 F. Supp. 219 (D. D.C. 1996); Western Med. Consultants, Inc. v. Johnson, 835 F. Supp. 554 (D. Or. 1993), *aff'd*, 80 F.3d 1331 (9th Cir. 1996).

104. *See* Restatement (Second) of Agency §§ 386, 396 (1958); Apollo Techs. Corp. v. Centrosphere Indus. Corp., 805 F. Supp. 1157 (D. N.J. 1992).

105. *See* Succession of Danese, 459 So. 2d 725 (La. Ct. App. 1984) (finding testamentary executor liable for breach of fiduciary duty for failing to either lease or sell property of the estate for 2½ years and filing inaccurate descriptive list of property of the estate). *Compare* Hamilton v. Nielson, 678 F.2d 709 (7th Cir. 1982) (holding executors were not negligent in failing to sell stock of the estate prior to decline in value of stock).

106. *See, e.g.,* Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982) (denying summary judgment motion filed by defendant widow/executrix, in part, due to question of fact regarding defendant's application for one year's support as widow of decedent despite inherent conflict arising from her role as executrix); Williamson v. Williamson, 407 F. Supp. 370 (E.D. Va. 1976) (holding executrix overcame presumption of fraud resulting from self-dealing by clear and satisfactory evidence; mere preponderance of the evidence would not have sufficed). *See also In re* Estate of George Halas, Jr., 512 N.E.2d 1276 (Ill. Ct. App. 1987) (finding attorney of personal representative breached fiduciary duty to estate beneficiaries).

107. *See, e.g.,* Moser v. Van Winkle, 797 P.2d 1063 (Or. Ct. App. 1990) (affirming order surcharging estate representative for attorney's fees and costs in favor of widow and heirs of estate, since representative made remarks that resulted in depletion of estate assets); Alcabasa v. Korean Air Lines Co., Ltd., 62 F.3d 404 (D.C. Cir. 1995).

108. *See generally* L.S. Tellier, Annotation, *Coexecutor's, Coadministrator's, or Cotrustee's Liability for Defaults or Wrongful Acts of Fiduciary in Handling Estate*, 65 A.L.R.2d 1019 (1959).

109. *See, e.g.,* Duffy v. Cavalier, 264 Cal. Rptr. 740, 749 (Cal. Ct. App. 1989) (citing Twomey v. Mitchum, Jones & Templeton Inc., 69 Cal. Rptr. 222 (Cal. Ct. App. 1968)):

> "The relationship between broker and principal is fiduciary in nature and imposes on the broker the duty of acting in the highest good faith toward the principal." With respect to stockbrokers it is recognized "the duties of the broker, being fiduciary in nature, must be exercised with the utmost good faith and integrity." (citations omitted)
>
> *See also* Ohio Co. v. Nemecek, 886 F. Supp. 1342 (E.D. Mich. 1995), *rev'd on other grounds*, 98 F.3d 234 (6th Cir. 1996); First of Michigan Corp. v. Swick, 894 F. Supp. 298 (E.D. Mich. 1995); *In re* Merrill Lynch Secs. Litig., 911 F. Supp. 754 (D. N.J. 1995), *rev'd on other grounds*, 135 F.3d 266 (3d Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); Farmland Indus. v. Frazier-Parrott Commodities, Inc., 871 F.2d 1402 (9th Cir. 1989); Schwartz v. Oberweis, 826 F. Supp. 280 (N.D. Ind. 1993); Jenny v. Shearson, Hammill & Co., Inc., Fed. Sec. L. Rep. (CCH) ¶ 97,911 (S.D. N.Y. Mar. 20, 1981);

110. *See, e.g.,* Miley v. Oppenheimer & Co., 637 F.2d 318, 333 (5th Cir. 1981) ("NYSE and NASD rules are excellent tools against which to assess in part the reasonableness or excessiveness of a broker's handling of an investor's account."). *See also* Mihara v. Dean Witter & Co., 619 F.2d 814, 824 (9th Cir. 1980) ("Appellants contend that the admission of testimony regarding the New York Stock Exchange and NASD rules served to 'dignify those rules and regulations to some sort of standard.' The admission of testimony relating to those rules was proper precisely because the rules reflect the standard to which all brokers are held."). *Compare* Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 182 (2d Cir. 1966) (holding no cause of action exists for violation of stock exchange rules),

cert. denied, 385 U.S. 817. *See also* Morris v. Commodity Futures Trading Comm'n, 980 F.2d 1289 (9th Cir. 1992); Sheldon Co. Profit Sharing Plan & Trust v. Smith, 828 F. Supp. 1262 (W.D. Mich. 1993).

111. 337 F. Supp. 107, 111 (N.D. Ala. 1971), *aff'd,* 453 F.2d 417 (5th Cir. 1972). Specifically, the court noted:

> The relationship of agent and principal only existed between plaintiff and defendant when an order to buy or sell was placed, and terminated when the transaction was complete. That is, defendant was a broker and nothing more. It then becomes clear that defendant's duty, in the language of § 381 of the Restatement of Agency 2d quoted above, is a duty to "use reasonable efforts" to give the principal information relevant to the affairs entrusted to it. The affair entrusted to a broker who is to buy or sell through an exchange is to execute the order, not to discuss its wisdom. The result is that at the time of the acts complained of in the present case, there was no "fiduciary relationship" between the parties and there was, accordingly, no breach of duty arising from such relationship.

112. 790 F.2d 817, 824-25 (10th Cir. 1986) ("Regarding trading advice, brokers cannot be liable for honest opinions that turn out to be wrong. Otherwise, brokers would refuse to take discretionary accounts and would refuse to advise on non-discretionary accounts. We are unwilling to cripple the markets in the name of absolute protection for speculators." (citation omitted)).

113. *See* Duffy v. Cavalier, 264 Cal. Rptr. 740, 740 (Cal. Ct. App. 1989) (holding broker on notice that retirement plan trustees who desired to speculate in options with retirement plan funds had obligation to investigate nature and amount of funds sought to be invested before soliciting or recommending any speculative trades, and to refrain completely from soliciting speculative trades if it became apparent that such trades would be inappropriate), *reh'g denied,* 1989 Cal. App. LEXIS 1333 (Cal. Ct. App. Dec. 27, 1989). *See also* Flickinger v. Harold C. Brown & Co., Inc., 947 F.2d 595, 599 (2d Cir. 1991); Fry v. UAL Corp., 895 F. Supp. 1018 (N.D. Ill. 1995), *aff'd*, 84 F.3d 936 (7th Cir. 1996), *cert. denied*, 519 U.S. 987 (1996); Levitin v. PaineWebber, Inc., 159 F.3d 698 (2d Cir. 1998), *cert denied*, 525 U.S. 1144, 119 S. Ct. 1039, 143 L. Ed. 2d 47 (1999).

114. *See, e.g.,* Black v. Dahl, 625 P.2d 876 (Alaska 1981).

115. *See, e.g.,* Roberts v. Rivera, 458 So. 2d 786 (Fla. Ct. App. 1984).

116. *See, e.g.,* Morley v. Pagel Realty & Co., 550 P.2d 1104 (Ariz. Ct. App. 1976).

117. *See, e.g.,* Haldiman v. Gosnell Dev. Corp., 748 P.2d 1209 (Ariz. Ct. App. 1987).

118. *See, e.g.,* Sommers Drugstores Co. Employee Profit-Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456 (5th Cir. 1986), *reh'g denied*, 797 F.2d 977 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987).

119. *See, e.g.,* Hockett v. Sun Co., Inc. (R&M), 109 F.3d 1515 (10th Cir. 1997); IT Corp. v. General Am. Life Ins. Co., 107 F.3d 1415 (9th Cir. 1997), *cert. denied,* 522 U.S. 1068 (1998); Rosen v. Hotel & Restaurant Employees & Bartenders Union of Philadelphia, 637 F.2d 592 (3d Cir. 1981), *cert. denied*, 454 U.S. 898 (1981); Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869 (S.D. N.Y. 1997).

120. *See, e.g.,* Pegram v. Herdrich, 530 U.S. 211 (2000); Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983) (holding ERISA fiduciary has duty of loyalty and of care), *cert. denied*, 467 U.S. 1251 (1984); Peoria Union Stockyards Co. Retirement Plan v. Penn

Mutual Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983) ("Lying is inconsistent with duty of loyalty owed by all fiduciaries and codified in section 404(a) (1) of ERISA, 29 U.S.C. § 1104(a) (1).").

121. *See, e.g.,* Whitfield v. Lindemann, 853 F.2d 1298 (5th Cir. 1988) (holding attorney who was not a statutory fiduciary but who knowingly participated in a breach of trust was jointly liable with a statutory fiduciary), *cert. denied*, 490 U.S. 1089 (1989); Marris Trust & Savings Bank v. Solomon, Smith Barney, Inc., 530 U.S. 238 (2000) (finding non-fiduciary broker subject to restitution action as "appropriate equitable relief" under 29 U.S.C. section 1132(a)(3) for engaging in prohibited transactions).

122. 473 U.S. 134 (1985).

123. 29 U.S.C. § 1132(a) (1988) denominates those persons specifically empowered to bring a civil action for violations of the ERISA statute:

> (a) Persons empowered to bring a civil action. A civil action may be brought—
> (1) by a participant or beneficiary—
> (A) for the relief provided for in subsection (c) of this section, or
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];
> (3) by a participant, beneficiary, or fiduciary
> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or
> (B) to obtain other appropriate equitable relief
> (i) to redress such violations or
> (ii) to enforce any provisions of this title or the terms of the plan; . . . .

124. For the fiduciary liability provisions of ERISA, *see* 29 U.S.C. § 1109(a) (1988).

125. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985) (emphasis in original):

> [W]hen the entire section [*i.e.*, 29 U.S.C. § 1109(a)] is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent. Thus, not only is the relevant fiduciary relationship characterized at the outset as one "with respect to a plan," but the potential personal liability of the fiduciary is "to make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan*. . . ."

126. *Compare* Kuntz v. Reese, 760 F.2d 926 (9th Cir. 1985) (reversing district court's dismissal of claims for pension benefits in action against plan administrator for breach of fiduciary duty on the grounds that defendants lied about the amount of benefits that plaintiffs would receive under ERISA plan and failed to comply with ERISA requirements for disclosing pension plan documents), *vacated on other grounds*, 760 F.2d 926 (9th Cir. 1985), *cert. denied*, 479 U.S. 916 (1986).

127. *See, e.g.,* Paradise Hotel Corp. v. Bank of Nova Scotia, 842 F.2d 47 (3d Cir. 1988); Weinberger v. Hendrick, 698 F.2d 61, 78-79 (2d Cir. 1982); Kruse v. Bank of Am., 202

Cal. App. 3d 38 (Cal. Ct. App. 1988); Busby v. Parish Nat'l Bank, 464 So. 2d 374, 379 (La. Ct. App. 1985), *writ denied*, 467 So. 2d 1132 (La. 1985).

128. *See* Rader v. Boyd, 252 F.2d 585, 587 (10th Cir. 1957); Scott v. Dime Sav. Bank of New York, FSB, 886 F. Supp. 1073, 1078 (S.D. N.Y. 1995), *aff'd*, 101 F.3d 107 (2d Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997) (jury verdict upholding breach of fiduciary duty claim against bank based on confidence placed in the bank that gives bank advantage).

129. Scott v. Dime Sav. Bank of New York, FSB, *supra* note 128.

130. *See, e.g.,* Barnett Bank of West Florida v. Hooper, 498 So. 2d 923 (Fla. 1986).

131. Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir. 1973), *reh'g denied*, 490 F.2d 916 (5th Cir. 1974).

132. *See, e.g., In re* W.T. Grant Co., 699 F.2d 599, 610 (2d Cir. 1983), *cert. denied*, 464 U.S. 822 (1983).

133. Official Comm. of Unsecured Creditors v. R.L. Lafferty & Co., Inc., 267 F.3d 340, 350 (3d Cir. 2001).

134. Hannover Corp. of America v. Beckner, 211 B.R. 849 (Bankr. M.D. La. 1997).

135. Florida Dep't of Ins. v. Chase Bank of Texas National Ass'n, 274 F.3d 924 (5th Cir. 2001), *cert. denied*, 535 U.S. 1097 (2002).

136. *In re* Exide Techs., Inc., 299 B.R. 732 (Bankr. Del. 2003) (addressing suit by unsecured creditors against lenders for aiding and abetting breach of fiduciary duty).

137. Schact v. Brown, 711 F.2d 1343 (7th Cir. 1983), *cert. denied,* 464 U.S. 1002 (1983).

138. Allard v. Arthur Andersen & Co. (USA), 924 F. Supp. 488 (S.D. N.Y. 1996).

139. *In re* Flagship Healthcare, Inc., 269 B.R. 721 (Bankr. S.D. Fla. 2001).

140. *Official Comm. of Unsecured Creditors*, 267 F.3d at 347-48.

141. "The doctrine of in pari delicto provides that a plaintiff may not assert a claim against a defendant if the plaintiff bears fault for the claim." *Official Comm. of Unsecured Creditors,* 267 F.3d at 354 (citations omitted). In that case, the court held that a creditors' committee having the status of the debtor corporation was in pari delicto with the sole shareholders so as to bar the claim.

142. *Florida Dep't of Ins.,* 274 F.3d 924 (holding liquidator of insolvent insurer had standing to bring claims on behalf of insurer, but not on behalf of policy holders); *Hannover Corp. of America, supra* note 134 (holding debtors sufficiently established distinct injury for standing purposes).

143. *In re* Exide Techs., Inc., 299 B.R. at 751-52.

144. *In re* Flagship Healthcare, Inc., 269 B.R. at 728; Bookland of Maine v. Baker, Newman & Noyes, LLC, 271 F. Supp. 2d 324, 326 (D. Maine 2003) (addressing accounting malpractice); *Schact*, 711 F.2d 1343 (addressing civil RICO suit).

145. Collie v. Becknell, 762 P.2d 727 (Colo. Ct. App. 1988); Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939). *But see* Committee of Unsecured Creditors of Specialty Plastic v. Doemling, 127 B.R. 945 (Bankr. W.D. Pa. 1991); Chemical Dynamics, Inc. v. Newfeld, 728 S.W.2d 590 (Mo. Ct. App. 1987); Suburban Motor of Grafton Inc. v. Forester, 396 N.W.2d 351 (Wis. Ct. App. 1986).

146. Steelman v. Mallory, 716 P.2d 1282 (Idaho 1986); Stangenberg v. Allied Distribution & Bldg. Servs. Co., Inc., No. 86-12-II, 1986 Tenn. App. LEXIS 3118 (Tenn. Ct. App. July 9, 1986).

147. *In re* Securities Groups, 89 B.R. 204 (Bankr. M.D. Fla. 1988), *aff'd*, 159 B.R. 964 (M.D. Fla. 1990), *aff'd in part, rev'd in part on other grounds*, 2 F.3d 1098 (11th Cir. 1993).

148. *In re* Club Dev. & Mgmt. Corp., Mark IV Props. Inc. v. Leonard, 930 F.2d 26 (9th Cir. 1991) (table case); Kirby v. Cruce, 688 S.W.2d 161, 165 (Tex. Ct. App. 1985).

149. Raines v. Toney, 313 S.W.2d 802, 809-10 (Ark. 1958). *But see* Lance Roof Inspection Serv., Inc. v. Hardin, 653 F. Supp. 1097 (S.D. Tex. 1986).

150. Tri-Growth Centre City, Ltd. v. Silldorf, Burdman Duigan & Eisenberg, 265 Cal. Rptr. 330 (Cal. Ct. App. 1989), *reh'g denied*, 1990 Cal. App. LEXIS 29 (Cal. Ct. App. 1990); David Welch v. Erskine & Tulley, 250 Cal. Rptr. 339, 341-43 (Cal. Ct. App. 1988).

151. Grynberg v. Watt, 717 F.2d 1316 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984).

152. Algernon Blair Group, Inc. v. Corneal, No. 86-4465, 1988 U.S. Dist. LEXIS 1497 (E.D. Pa. Feb. 18, 1988), *aff'd*, 862 F.2d 306 (3d Cir. 1988).

153. Equity Corp. v. Milton, 221 A.2d 494 (Del. 1966).

154. T. P. Group, Inc. v. Wilson, No. 89-CIV. 2227, 1990 U.S. Dist. LEXIS 4367 (S.D. N.Y. Apr. 17, 1990); Sauer v. Moffitt, 363 N.W.2d 269 (Iowa Ct. App. 1984).

155. *In re* Century Glove Inc., 73 B.R. 528 (Bankr. D. Del. 1987); Warren v. Century Bankcorp, 741 P.2d 846 (Okla. 1987); Solimine v. Hollander, 16 A.2d 203, 215 (N.J. 1940).

156. *In* Francis v. United Jersey Bank, 432 A.2d 814, 826 (N.J. 1981) (discussing cause in fact).

> Analysis of proximate cause requires an initial determination of cause-in-fact. Causation-in-fact calls for a finding that the defendant's act or omission was a necessary antecedent of the loss, *i.e.*, that if the defendant had observed his or her duty of care, the loss would not have occurred. Further, the plaintiff has the burden of establishing the amount of the loss or the damages caused by the negligence of the defendant. (citation omitted)

In Barnes v. Andrews, 298 F. 614, 616 (S.D. N.Y. 1924) (specifically addressing proximate cause in the context of omissions).

> The plaintiff must, however, go further than to show that [the director] should have been more active in his duties. This cause of action rests upon a tort, as much though it be a tort of omission as though it had rested upon a positive act. The plaintiff must accept the burden of showing that the performance of the defendant's duties would have avoided loss, and what loss it would have avoided.

157. *E.g., Francis*, 432 A.2d at 829, in which the court addressed "substantial factor," in terms of "inferred causation":

> [W]here it is reasonable to conclude that the failure to act would produce a particular result and that result has followed, causation may be inferred. We conclude that even if [the defendant's] mere objection had not stopped the depredations of her sons, her consultation with an attorney and the threat of suit would have deterred them. That conclusion flows as a matter of common sense and logic from the record. Whether in other situations a director has a duty to do more than protest and resign is best left to case-by-case determinations. In this case, we are satisfied that there was a duty to do more than object and resign. Consequently, we find that [the defendant's] negligence was a proximate cause of the misappropriations. (citation omitted)

158. *See generally* American Institute, Principles of Corporate Governance: Analysis and Recommendations pt. 7, § 7.18.

159. *See, e.g.,* Kaplan v. Wyatt, 499 A.2d 1184, 1189 (Del. 1985); Aronson v. Lewis, 473 A.2d 805, 815-16 (Del. 1984), *overruled on other grounds*; Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

160. *See, e.g.,* Andresen v. Bucalo, No. 6372, 1984 WL 8205 (Del. Ch. Mar. 14, 1984) (holding where directors who approved agreements that benefited defendant were controlled by defendant, the agreements under attack are not protected by presumption of propriety).

161. *See, e.g.,* Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983), *aff'd,* 497 A.2d 792 (Del. 1985).

162. Steinberg v. Amplica, Inc., 729 P.2d 683 (Cal. 1986).

163. *See, e.g., In re* W.T. Grant Co., 699 F.2d 599, 609-10 (2d Cir. 1983), *cert. denied*, 464 U.S. 822 (1983).

164. *See, e.g.,* Atlantic Nat'l Bank of Fla. v. Vest, 480 So. 2d 1328 (Fla. Ct. App. 1985) (finding while fiduciary relationship had arisen when plaintiff requested insurance information from loan officer, any fiduciary relationship that arose was discharged when loan officer conveyed responsive information from the insurance agent to plaintiff); Busby v. Parish Nat'l Bank, 464 So. 2d 374 (La. Ct. App. 1985) ("[T]he relationship between the parties does not fall into any of those situations in which a fiduciary duty is imposed by law. Further, the fact plaintiffs were accompanied by counsel at meetings with bank officials indicates an awareness the bank was not acting in a fiduciary capacity."), *writ denied*, 467 So. 2d 1132 (La. 1985); Fridenmaker v. Valley Nat'l Bank of Ariz., 534 P.2d 1064 (Ariz. Ct. App. 1975) (holding while confidential relationship originally existed, "presence and participation" of plaintiffs' counsel left "any confidential relationship that existed of nugatory legal effect").

165. *See* Fed. R. Civ. P. 9, which provides, in part: "(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally."

166. *See, e.g.,* Dale v. Prudential-Bache Secs., Inc., 719 F. Supp. 1164 (E.D. N.Y. 1989) (finding brokerage customer's claims of misrepresentation, churning, and unsuitable and unauthorized trading of recommended securities were not pleaded with sufficient particularity. Customer failed to specify the exact statements made as well as the time and place that alleged misrepresentations were made. She failed to identify the securities involved in the churning claim and did not give sufficient facts to permit a rough calculation of either the turnover ratio or the percentage of the account value paid in commissions. Finally, she failed to specify the securities that allegedly were unsuitable for the trades that allegedly were unauthorized.). *Compare* Gopez v. Shin, 736 F. Supp. 51 (D. Del. 1990) (holding plaintiff on churning claim is not required to assert turnover ratios in complaint as long as sufficient facts are pleaded that enable the defendant to calculate turnover ratios or commission percentages).

167. 29 U.S.C. section 1144 provides, in part:

> (a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State

> laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

See also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) ("[I]nclusion of certain remedies and the exclusion of others under the federal scheme would be undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA . . . ").

168. Shaw v. Delta Airlines, 463 U.S. 85, 100 n.21 (1983). *See also* Mackey v. Lanier Collections Agency & Servs. Inc., 486 U.S. 825 (1988) (holding state law owing garnishment of ERISA plan benefits to satisfy a claim against a plan participant was preempted).

169. In *Kentucky Association of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471 (2003), the court held that Kentucky's "Any Willing Provider" statute, which prohibited discrimination against providers, was within this saving provision. In this case, the court made a clean break from its prior decisions relying upon earlier cases interpreting the McCarron-Ferguson Act (15 U.S.C. § 1012) to construe the saving clause. Under the *Kentucky Association of Health Plans* analysis, in order to fall within the savings provision, a state law must "be specifically directed towards entities engaged in insurance," and "substantially affect the risk pooling arrangement between the insurer and the insured." *Kentucky Association of Health Plans*, 123 S. Ct. 15 1479. Previously, the court had held that an Illinois statute requiring HMOs to provide and abide by the medical necessity evaluation of an independent reviewer fell within the saving clause. Rush v. Prudential HMO, Inc., 563 U.S. 355 (2002). Likewise, California's "notice-prejudice" rule requiring an insurer to show proof of prejudice from an untimely proof of claim was also held to fall within the saving clause. *UNUM Life Ins. Co. of America*, 526 U.S. 358 (1999).

170. A constructive trust is a device employed in equity to avoid unjust enrichment of one party at the expense of the other where legal title to property is obtained by fraud or in violation of a fiduciary relation. Barry v. Covich, 124 N.E.2d 921 (Mass. 1955).

171. *See, e.g.,* Republic of Haiti v. Crown Charters, Inc., 667 F. Supp. 839 (S.D. Fla. 1987); Pioneer Annuity Life Ins. Co. v. National Equity Life Ins. Co., 765 P.2d 550 (Ariz. Ct. App. 1988).

172. *See* Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406 (9th Cir. 1988); Old Security Life Ins. Co. v. Continental Ill. Nat'l Bank & Trust Co. of Chicago, 740 F.2d 1384 (7th Cir. 1984); United States v. Goodrich, 687 F. Supp. 567 (M.D. Fla. 1988), *aff'd*, 871 F.2d 1011 (11th Cir. 1989).

173. *See* McMerty v. Herzog, 702 F.2d 127 (8th Cir. 1983), *reh'g denied*, 710 F.2d 429 (8th Cir. 1983); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 (6th Cir. 1982).

174. *See, e.g.,* David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339 (Cal. Ct. App. 1988).

175. *See, e.g.,* Okun v. Morton, 250 Cal. Rptr. 220 (Cal. Ct. App. 1988).

176. *See, e.g.,* Hooper v. Yoder, 737 P.2d 852 (Colo. 1987).

177. *See, e.g.,* Beckman v. Farmer, 579 A.2d 618 (D.C. 1990).

178. *See, e.g.*, RESTATEMENT OF RESTITUTION § 138 (1937):

> Violation of Fiduciary Duty
>
> (1) A fiduciary who has acquired a benefit by a breach of his duty as fiduciary is under a duty of restitution to the beneficiary.
>
> . . .

> Comment: (a) A fiduciary who commits a breach of his duty as fiduciary is guilty of tortious conduct and the beneficiary can obtain redress either at law or in equity for the harm done. As an alternative, the beneficiary is entitled to obtain the benefits derived by the fiduciary through the breach of duty . . . .

179. *See, e.g.,* Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099 (Del. 1985); Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1186 (Del. 1988).

180. *See, e.g.,* Steinberg v. Amplica, Inc., 729 P.2d 683 (Cal. 1986) (holding that, at least when plaintiff is aware of all facts establishing a cause of action prior to merger, plaintiff's suit for damages rather than appraisal will be barred).

181. *See, e.g.,* Stortroen v. Beneficial Fin. Co. of Colo., 736 P.2d 391 (Colo. 1987).

182. *See* Jensen v. Peterson, 264 N.W.2d 139 (Minn. 1978).

183. *See In the Matter of* the Estate of Mark Rothko, 379 N.Y.S.2d 923 (N.Y. Sup. Ct. 1975), *modified*, 392 N.Y.S.2d 870 (N.Y. App. Div. 1977), *aff'd*, 401 N.Y.S.2d 449 (N.Y. 1977).

184. *See* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985).

185. Dairy Farmers of America, Inc. v. Travelers Ins. Co., 292 F.3d 567, 572 (8th Cir. 2002).