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## **Keeping Pace With the Evolving California Case Law: How to Distinguish Between Breach of Fiduciary Duty Claims and Legal Malpractice Claims Against Attorneys**

BY ANJALI KULKARNI AND JASON FELLNER

*Broadway Victoria* is the latest California case to provide guidance on pleading requirements for claims against lawyers for malpractice and breach of fiduciary duty. *Broadway Victoria, LLC v. Norminton, Wiita, & Fuster*, 217 Cal. Rptr. 3d 414, 2017 BL 128260, 10 Cal. App. 5th 1185, Cal. Ct. App., 2d Dist., No. B266060, 4/19/17.

This article examines the key differences between breach of fiduciary duty claims and legal malpractice claims and discusses how practitioners should heed the lessons learned from *Broadway Victoria* when litigating legal malpractice cases.

### **Distinctions Between Breach of Fiduciary Duty Claims and Legal Malpractice Claims in California**

Both plaintiffs and defendants in California must be aware of the remedies in breach of fiduciary duty

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claims and claims arising from legal malpractice. The statutes of limitations for legal malpractice claims and for breach of fiduciary duty claims arising from legal malpractice are the same: one year from the date of actual injury, where an attorney does not commit actual fraud in the performance of professional services under California Code of Civil Procedure Sec. 340.6(a). *Johnson v. Haberman & Kasso*, 201 Cal. App. 3d 1468, 1474 (Cal. App. 2d Dist. 1988).

Different damages are available to plaintiffs in actions for breach of fiduciary duty versus in actions for legal malpractice. Plaintiffs are also required to prove distinct elements for damages in each cause of action.

### **Damages for Legal Malpractice**

To prove damages in a legal malpractice action, a plaintiff must show the probable value of the lawsuit that he or she has lost. The plaintiff must also prove that careful management of his or her claim would have resulted in a favorable judgment and collection of it. *Campbell v. Magana*, 184 Cal. App. 2d 751, 754 (Cal. Dist. App. 2d Dist. 1960). The plaintiff must satisfy each of these elements to collect damages. *DiPalma v. Seldman*, 27 Cal. App. 4th 1499, 1506-7 (Cal. App. 2d Dist. 1994).

The measure of damages in legal malpractice action is the difference between what was recovered and what would have been recovered, but for the attorney's wrongful act or omission. For example, the California Court of Appeal in *Norton v. Superior Court* stated that, where a reasonably competent attorney would have obtained a \$3 million recovery for the client but the negligent attorney obtained only a \$2 million recovery, the client's damage due to the attorney's negligence would be \$1 million—the difference between what a competent attorney would have obtained and what the negligent attorney obtained. *Norton v. Sup. Ct. of Los Angeles*, 24 Cal. App. 4th 1750, 1758 (Cal. App. 2d Dist. 1994).

The plaintiff may not recover attorneys' fees from the negligent attorney in a legal malpractice case unless the plaintiff proves the fees paid to the attorney exceeded the reasonable value of the legal services the attorney rendered. *Orrick Herrington & Sutcliffe LLP v. Sup. Ct. of San Francisco (Malcolm)*, 107 Cal. App. 4th 1052, 1059-60 (Cal. App. 1st Dist. 2003). Likewise, the plain-

tiff may not recover punitive damages allegedly lost in the underlying litigation in which the malpractice occurred. *Ferguson v. Lieff, Cabraser, Heimann & Bernstein LLP*, 30 Cal. 4th 1037, 1046 (Cal. 2003). However, attorneys' fees may be recoverable under the "tort of another" doctrine, in situations where a plaintiff incurs attorneys' fees instituting or defending an action against a third party as a direct result of legal malpractice.

### **Damages for Breach of Fiduciary Duty**

In breach of fiduciary duty actions, the plaintiff may have the option of pursuing either legal remedies for damages, or equitable remedies, like injunctive or equitable relief. *Van de Kamp v. Bank of Am.*, 204 Cal. App. 3d 819, 863 (1988). Recovery of damages in breach of fiduciary duty actions is governed by California Civil Code Sec. 3333, which provides in relevant part "for a breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby . . ." Cal. Civ. Code § 3333.

Punitive damages are recoverable for a breach of fiduciary duty where the plaintiff is able to successfully allege that the defendant's conduct constituted constructive fraud, not merely negligence. *Alfaro v. Cmty Housing Imp. Sys. & Planning Ass'n, Inc.*, 89 Cal. Rptr. 3d 659 (Cal. App. 6th Dist. 2009). Constructive fraud depends on the existence of a fiduciary relationship, and may be found where a fiduciary fails to disclose material facts or puts his own interests before those of his beneficiary.

Attorneys' fees are not recoverable on breach of fiduciary duty claims, unless the attorney fee provision of the agreement between the parties provides for such recovery. *Mark Tanner Constr. Inc. v. HUB Int'l Ins. Servs. Inc.*, 224 Cal. App. 4th 574 (Cal. App. 3d Dist. 2014); *Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th 621 (Cal. App. 6th Dist. 2005).

## **Broadway Victoria: A Landmark California Case**

On April 19, 2017, California litigants received clarification on what gives rise to a breach of fiduciary duty claim in cases involving legal malpractice. In *Broadway Victoria*, the Second District Court of Appeal held that facts giving rise to legal malpractice claims are insufficient to support a breach of fiduciary duty claim. The court found a breach of fiduciary duty claim requires a showing that the attorney breached a duty of confidence or loyalty over and above committing legal malpractice.

*Broadway Victoria, LLC* was a commercial real estate company owned by Anita Lorber and her husband. The Lorbers also owned a textile manufacturing business, Lorber Industries. Lorber Industries leased land on a 20-year lease from Elixir Industries. The terms of Lorber Industries' lease included a right of first refusal and an option to purchase the property at the end of the lease.

Eight years into the lease, Elixir Industries sold the leased land to another owner without giving Lorber Industries notice. Lorber Industries filed for bankruptcy under Chapter 11, and requested the bankruptcy court as debtor in possession to assume and assign the lease

to the highest bidder. *Broadway Victoria LLC* was the highest bidder, and was authorized by the bankruptcy court to assume the lease.

The Lorbers retained defendant Thomas Norminton and his law firm, Norminton, Wiita and Fuster, ("Norminton") to represent them in an action against Elixir Industries for breach of contract for its failure to give Lorber Industries the right of first refusal. Elixir Industries sought summary judgment, raising a lack of standing issue. The trial court granted summary judgment to Elixir, which the court of appeal affirmed.

*Broadway Victoria LLC* then brought legal malpractice and breach of fiduciary duty claims against Norminton on two grounds: 1) the failure to advise *Broadway Victoria LLC* of potential claims it had against its former counsel in the bankruptcy court action; and 2) failure to seek clarification from the bankruptcy court to determine if the right of first refusal was included in the lease, instead litigating the issue in the breach of contract action with Elixir Industries. Both the legal malpractice and breach of fiduciary claims were based on the same facts.

The court of appeal affirmed the trial court's holding for nonsuit of the breach of fiduciary duty claims. In so doing, the court noted that a breach of fiduciary duty requires: 1) the existence of a fiduciary duty; 2) breach of that fiduciary duty; and 3) damage proximately caused by the breach. Whether an attorney has breached a fiduciary duty to a client is "generally a question of fact."

The court found that a "breach of fiduciary duty is a tort claim entirely distinct from a malpractice claim based on professional negligence." The court observed that a cause of action for breach of fiduciary duty must go beyond allegations of professional negligence, and requires "some further violation of the obligation of trust, confidence, and/or loyalty to the client." The court therefore held that breach of fiduciary duty allegations arising from the same facts and seeking the same remedies as allegations of negligence should be dismissed as duplicative.

The court noted that the evidence, taken in light most favorable to *Broadway Victoria LLC*, could support a finding of negligence on the part of Norminton. The court rejected the argument that the evidence showed Norminton breached a duty of loyalty or confidentiality to support a claim for breach of fiduciary duty, dismissing *Broadway Victoria LLC's* contention that Norminton breached a duty by failing to disclose the option to litigate in bankruptcy court based on a "self-interested financial motive" to continue litigating in state court. The court concluded that to allow *Broadway Victoria LLC's* theory of liability to proceed would support the unfair assumption that an attorney was seeking to fleece a client any time an attorney pursued a litigation strategy that was ultimately unsuccessful.

## **Legal Malpractice and Breach of Fiduciary Duty Claims Are Held to be Duplicative in Other Jurisdictions**

*Broadway Victoria* provides specific guidance for both those bringing breach of fiduciary duty claims and those defending against them in the legal malpractice context. Other jurisdictions maintain as a matter of law that a breach of fiduciary claim cannot stand if it is based on duplicative allegations of professional negli-

gence by the attorney. Highlighted below are several published non-California decisions that are helpful and provide guidance to practitioners seeking to distinguish these two often overlapping causes of action.

### **Pippen v. Pederson & Houpt**

In the Illinois case of *Pippen v. Pederson & Houpt*, 39 NE 3d 597 (IL App. 2013), plaintiffs Scottie Pippen and Air Pip, Inc. (“Pippen”) brought negligence and breach of fiduciary duty claims against defendant law firm Pederson & Houpt (“Pederson”), who Pippen alleged inadequately represented Pippen in connection with the purchase of an aircraft. Pippen asserted that Pederson represented Pippen’s financial advisor and structured a complex deal where Pippen was to own a 51 percent interest in the aircraft. Pippen alleged that Pederson had been negligent by failing to: 1) investigate Pippen’s business partners; 2) inform Pippen of the financial advisor’s management fee and allowing the financial advisor to control disbursement of Pippen’s money; 3) ensure Pippen’s money was not distributed until after the agreements for purchase of the aircraft had been executed; 4) ensure Pippen did not execute or deliver documents until the purchase documents had been executed by all parties; and 5) inform Pippen of concerns regarding the purchase.

Pippen’s breach of fiduciary duty claim alleged that Pederson owed Pippen a fiduciary duty and breached it by: 1) representing the financial advisor’s interests while simultaneously representing Pippen’s; 2) failing to disclose the conflict of interest to Pippen; and 3) collecting fees from Pippen while knowing of the conflict of interest.

The Illinois court of appeal came to the same conclusion as the Court of Appeal in *Broadway Victoria*. It found that the claims were duplicative because while the underlying facts showed Pederson’s conflict of interest, they were insufficient to show that those conflicts proximately caused Pippen’s injuries, as is required by a breach of fiduciary duty claim.

### **Cosmetics Grp. Plus Ltd. v. Traub**

In the rather unique New York case of *Cosmetics Grp. Plus Ltd. v. Traub*, 960 N.Y.S. 2d 388 (N.Y. App. Div., 1st Dept. 2013), Cosmetics Group Plus (“Plaintiff”) retained the law firm of Traub, Bonaquist & Fox LLP and certain of its partners (“Defendants”) to represent it in a Chapter 11 bankruptcy proceeding. One month later, two of Plaintiff’s stores were destroyed in the terrorist attack at the World Trade Center on September 11, 2001. The Plaintiff obtained a \$350,000.00 payment from its insurer through the bankruptcy court. The proceeds of the settlement were to be disbursed to Defendants. The proceeds were delivered to Dreier LLP, where Defendants had moved their practice two years earlier.

Unbeknownst to either the Plaintiff or Defendants, Dreier LLP’s sole equity owner was engaged in a Ponzi scheme which involved the sale of fraudulent notes. Upon dismissal of the bankruptcy court action, the Defendants requested Dreier LLP send them a check for the Plaintiff. Dreier’s sole equity owner was coincidentally arrested the next day, and Dreier LLP disbursed the funds to Defendants shortly thereafter. Ultimately, Defendants had to transfer the funds to the Dreier LLP bankruptcy trust account, and were unable to pay Plaintiff its settlement.

Plaintiff brought causes of action for legal malpractice and breach of fiduciary duty against Defendants, alleging that the delay between the approval of the settlement with its insurer and dismissal of the bankruptcy proceeding was inordinately long as a result of the Defendants’ failure to diligently monitor the bankruptcy court. The trial court granted the Defendants’ motion for summary judgment, dismissing the complaint in its entirety. The court of appeal affirmed, finding not only that the Defendants did not commit malpractice, but that the cause of action for breach of fiduciary duty was properly dismissed as duplicative, since it arose out of the same facts as the legal malpractice and did not involve any damages that were separate from the legal malpractice claim.

### **Crist v. Loyacono**

The Mississippi case of *Crist v. Loyacono*, 65 So. 3d 837 (Miss. App. 2011), distinguished breach of fiduciary duty from negligence claims based on the elements a plaintiff is required to successfully allege to prevail on each. In *Crist*, sixteen former clients (“Plaintiffs”) sued two attorneys (“Defendants”) who had represented them in a mass tort litigation. Plaintiffs claimed the attorneys had breached their fiduciary duty by prematurely settling their case in order to maximize attorney’s fees. Responding to Defendants’ motion for summary judgment, Plaintiffs produced as a witness a mass tort lawyer who testified that he had settled numerous similar cases for much more than plaintiffs received. The trial court granted summary judgment for Defendants on the grounds that Plaintiffs were required to, and could not, prove that they would have won their underlying case at trial.

The court of appeal reversed the trial court’s holding, finding that in order to prevail on a breach of fiduciary duty cause of action the Plaintiffs had to establish the same elements recognized by *Broadway Victoria*; (1) the existence of an attorney-client relationship; (2) the acts constituting a violation of the attorney’s fiduciary duty; (3) that the breach proximately caused the injury; and (4) the fact and extent of the injury. The court of appeal recognized that, unlike a negligence based cause of action for legal malpractice, these elements did not require Plaintiffs to establish that but for their attorney’s negligence they would have won their underlying case. The Mississippi court, like the court in *Broadway Victoria*, explicitly recognized that there was a “clear distinction” between legal malpractice and breach of fiduciary duty claims.

### **Illinois Nat’l Ins. Co. v. Wiles, Boyle Burkholder & Bringardner Co.**

In the Ohio case of *Illinois Nat’l Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co.*, L.P.A., 2010-Ohio-5872 (Ohio App. 10th Dist. 2010), plaintiff Illinois National Insurance Company (“Plaintiff”) brought breach of contract, legal malpractice, and breach of fiduciary duty claims against former counsel Wiles, Boyle, Burkholder & Bringardner Co. (“Defendants”), in connection with representation in a products liability action which Plaintiff settled for \$10,000.00. The trial court found the Plaintiff’s claims for breach of contract and breach of fiduciary duty were subsumed within its legal malpractice claim. The court of appeals affirmed the trial court’s finding, noting that the Plaintiff’s breach of contract claim and breach of fiduciary duty

claim regarded only the alleged deficiencies and omissions in the legal representation of Plaintiff. In agreeing with the finding in *Broadway Victoria*, the court of appeals observed that “malpractice by any other name still constitutes malpractice.”

### **Conclusion**

In the wake of *Broadway Victoria*, plaintiffs filing legal malpractice claims in tandem with breach of fiduciary duty claims must exercise diligence in their pleadings to ensure the breach of fiduciary duty claim survives pretrial motions. Plaintiffs must be sure to plead

breach of fiduciary duty claims with a showing that the attorney breached a duty of confidence or loyalty over and above committing legal malpractice. On the other hand, California defendants now have clear grounds to attack insufficiently pled claims for breach of fiduciary duty on the showing that those claims are duplicative of claims for legal malpractice. In sum, keeping pace with the ever evolving California case law in legal malpractice cases is prudent and essential. To that end, practitioners should be familiar with *Broadway Victoria*, which provides guidance to those parties bringing or defending claims for legal malpractice and breach of fiduciary duty.