Loyalty and Care

Separate but Equal Duties

By Kate Whitlock

The obligations of the duty, the proof of breach, and the damages available are different for each.

Fiduciaries, by the nature of their relationships with their principals, owe the principal special obligations. Courts and commentators have confused and conflated two quite separate, but equally important, special duties of a fiduciary to his or her principal: the duty of care and the duty of loyalty. The courts have made reference to "additional" fiduciary duties of disclosure and candor, but these are really just different iterations of the core duty of loyalty. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. 2005); *Malone v. Brincat*, 722 A.2d 5, 11 (Del. 1998).

> The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies, and so forth… That a lawyer can commit a breach of the special duty [of a fiduciary]… by [for example] entering into a contract with a client without full disclosure and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words.

Mothew v. Bristol & West Building Society, [1996] EWCA (Civ) 533, [1998] Ch. 1, [1997] 2 WLR 436, [1996] 4 All ER 698 (Eng. C.A.) (quoting *Southin, J. in Girardet v. Crease & Co.*, (1987) 11 B.C. L.R. (2d) 361, 362. 1998 Ch.1 (Eng. C.A.), at 16. It is a perversion because while the duties co-exist, they are separate and distinct.

The Difference Between the Duty of Care and the Duty of Loyalty

A lawyer case from Georgia illustrates the difference. In *Tante v. Herring*, 264 Ga. 694, 453 S.E.2d 686 (Ga. 1994), the lawyer was retained by husband and wife to seek Social Security benefits for the wife. During the representation, the wife and the lawyer had an affair. The lawyer successfully obtained Social Security benefits, but the clients still sued, claiming that the lawyer took advantage of confidential information regarding the wife's emotional and mental condition to convince her to have an affair with him. The Georgia Supreme Court held that in these circumstances, the clients did not have a legal malpractice case, but they did articulate a breach of fiduciary duty claim. That is, the lawyer could not be found to have violated the standard of care, since he was successful in achieving the very result for which he was retained. However, the

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lawyer was a fiduciary with regard to the confidential information given to him by his clients, and if he used that information to his own advantage, he would be guilty of violating his duty of loyalty, regardless of the outcome of the legal matter for which he was retained. So while both duties arise out of the fiduciary relationship, they require different conduct on the part of the fiduciary.

The duty of care requires a person who coincidentally is a fiduciary to act as a reasonably prudent person under like and similar circumstances, *i.e.*, to fulfill the terms of his or her contract. *See generally*, *Jones v. Am. Envirecycle*, 217 Ga. App. 80, 456 S.E.2d 264 (Ga. Ct. App. 1995). The duty of loyalty requires the fiduciary to place the principal's interests over his or her own and over those of others and arises out of the special undertaking the fiduciary has made. *Zastrow v. Journal Communs., Inc.*, 291 Wis. 2d 426, 718 N.W.2d 51 (Wis. 2006). It is because the fiduciary has agreed to accept this duty of loyalty that he or she is, in fact, a fiduciary. *Mothew*, 1998 Ch.1 (Eng. C.A.) at 18; *Noel v. Hall*, 2012 U.S. Dist. Lexis 110575, *48, 2012 WL 3241858 (D. Or. Apr. 27, 2012) (duty of loyalty requires a partner to account to and act for benefit of partnership while duty of care calls for partners to refrain from negligent or intentional misconduct).

Legal Mischief and Litigating "Duplicative"

The failure to distinguish between the two different duties has caused much mischief in the law, most notably permitting plaintiffs to get "two bites at the apple." Georgia, similar to other states, does not permit a malpractice plaintiff to recover from the defendant under a breach of fiduciary duty theory when it is duplicative of the professional malpractice, or breach of duty of care, claim. *Oehlerich v. Llewellyn*, 285 Ga. App. 738, 741, 647 S.E.2d 399 (Ga. Ct. App. 2007). What constitutes "duplicative" has thus become grist for the litigation mill. For example, a 2007 decision by the Georgia Court of Appeals implied that intentional misconduct by an attorney toward a client will support a separate claim in addition to a professional negligence claim. *Oehlerich*, 258 Ga. App. at 741. In the same vein, the Supreme Court of Wisconsin found that breach of fiduciary duty of loyalty was an intentional tort. *Zastrow*, 291 Wis. 2d at 426, 718 N.W.2d at 51. While that may be an intellectually appealing distinction, it is one that must be treated with care. An intentional conduct exception encourages malpractice plaintiffs simply to "masquerade what essentially constitute legal malpractice claims as intentional torts." *Donalson v. Martin*, 2003 WL 22145667, at *2, 2003 Tex. App. Lexis 8070 (Tex. Ct. App. Sept. 18, 2003). Missing a deadline becomes "intentionally concealing" the applicable deadline, omitting a term in a contract becomes intentional omission, and so on. Courts need to be vigilant and weed out the "intentional" conduct that is, indeed, no more than the failure to exercise the requisite degree of care.

A more satisfactory approach that courts have taken to determine whether the claims are duplicative, or whether they really state separately a claim for breach the duty of loyalty and a claim for breach the duty of care, is to ask if "the duties arose from the same source…, were allegedly breached by the same conduct, and allegedly caused the same damages." *Anderson v. Jones*, 323 Ga. App. 311, 318, 745 S.E.2d 787 (Ga. Ct. App. 2013). If so, a breach of fiduciary duty claim duplicates the legal malpractice claim and cannot be sustained.

This is the sort of reasoning favored by a leading commentator on legal malpractice law. *See* Mallen & Smith, Legal Malpractice §14:2 (2007 ed.) ("[A] claim for fiduciary breach, which is based on the same facts and seeks the same relief as the negligence claim, is redundant and should be dismissed."). The alleged misconduct—in the *Anderson* case, failure to disclose—is, at bottom, a failure to exercise reasonable care, not a failure to remain loyal to the principal.

This approach is far superior to the intentional versus negligent distinction inasmuch as it permits more accurate pleading. For example, one could plead that a director negligently permitted funds to be wasted (breach of duty of care), but then intentionally covered up the shortages on reports to shareholders (breach of duty of loyalty). Thus, while the loss of the money was the contended harm, the different acts would support legitimate claims for both breach of duty of care and breach of duty of loyalty. But the failure to stop the wasting was not a breach of the duty of loyalty. Thus, "the principal inquiry… is whether the fiduciary duty in the complaint arises from general fiduciary principles or from specific contractual obligations agreed upon by the parties." *Halperin v. Moreno (In re Green Field Energy Servs.)*, 2015 Bankr. Lexis 2914, *37–*38, 2015 WL 5146161 (D. Del. Aug. 31, 2015). If it is the latter, it is more accurately a breach of contract or a breach of duty of care claim and not a breach of fiduciary duty claim.

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The failure of courts, and consequently, litigants, to distinguish between the claims has resulted in numerous filings that cannot legitimately be said to be separate. This is unfortunate, because "[n]othing is to be gained by fracturing a cause of action arising out of bad legal advice or improper representation into claims for negligence, breach of contract, fraud or some other name.…" *Sledge v. Alsup*, 759 S.W.2d 1, 2 (Tex. Ct. App. 1988). And claims that are nothing more than a fracturing of a cause of action are "redundant and should be dismissed." *Flycell, Inc. v. Schlossberg LLC*, 2011 WL 5130159, at *8, 2011 U.S. Dist. Lexis 126024 (S.D.N.Y. Oct. 28, 2011). *See also Nordwind v. Rowland*, 584 F.3d 420, 433–34 (2nd Cir. 2009); *England v. Feldman*, 2011 WL 1239775, at *5, 2011 U.S. Dist. Lexis 36382 (S.D.N.Y. Mar. 28, 2011); *Decker v. Nagel Rice LLC,* 2010 WL 2346608, at *4, 2010 U.S. Dist. Lexis 62042 (S.D.N.Y. May 28, 2010); *Waggoner v. Caruso*, 886 N.Y.S.2d 368, 371 (N.Y. App. Div. 2009); *Ad-*

amson v. Bachner, 2002 WL 31453096, at *3, 2002 U.S. Dist. Lexis 21102 (S.D.N.Y. Oct. 31, 2002). The reasoning in all these cases is that a breach of fiduciary duty claim will not lie against a fiduciary when the duties arise from the fiduciary relationship, the complained of conduct is the same, and the alleged fiduciary breach caused the same damages as the malpractice.

When you are faced with the question of whether the verdict form should include both "breach of fiduciary duty" and "malpractice," force the plaintiff's attorney to articulate the different conduct that constitutes the breach of duty of loyalty, or which different damages were sustained, or out of which relationship the duty arose.

Georgia has followed this rule in many instances.

- *Mosera v. Davis,* 306 Ga. App. 226, 701 S.E.2d 864 (Ga. Ct. App. 2010) (breach of fiduciary duty claim was "mere duplication" of legal-malpractice claim).
- *Stafford-Fox v. Jenkins*, 282 Ga. App. 667, 639 S.E.2d 610 (Ga. Ct. App. 2006) (the claim that the doctor breached a fiduciary duty by failing to inform the patient of relevant matters was a medical malpractice claim).
- *Griffin v. Fowler*, 260 Ga. App. 443, 446, 579 S.E.2d 848 (Ga. Ct. App. 2003)(breach of fiduciary duty claim was "mere duplication[] of the legal-malpractice claim which itself is based on the establishment of a fiduciary, attorney-client relationship that is breached").
- *McMann v. Mockler*, 233 Ga. App. 279, 503 S.E.2d 894 (Ga. Ct. App. 1998) (claims of breach of contract, breach of implied duty of good faith and fair dealing, and breach of fiduciary duty were merely duplications of malpractice complaint).
- *Hays v. Page Perry, LLC*, 627 Fed. App'x 892, 897 (11th Cir.2015) (breach of fiduciary duty claims was duplicative of complaint about professional malpractice).
- *Waithe v. Arrowhead Clinic, Inc.*, 2012 WL 776916, *11 n. 13, 2012 U.S. Dist. Lexis 30595 (S.D. Ga. Mar. 7, 2012) (alternative claims which are mere duplications of a plaintiff's professional negligence claim are typically subject to summary judgment in the defendant's favor).

New York has as well.

- *Abramo v. Teal, Becker & Chiaramonte, CPA's, P.C.*, 713 F. Supp. 2d 96, 108 (N.D.N.Y. 2010) (fraud claim asserted alongside legal malpractice claim is sustainable only to the extent the fraud caused additional damages, separate and distinct from those generated by the alleged malpractice).
- *Sayeh v. 66 Madison Ave. Apt. Corp.*, 901 N.Y.S.2d 26, 29 (N.Y. App. Div. 2010) (claim for intentional tort was properly dismissed as it was based on same facts that gave rise to legal malpractice claim).
- *Thies v. Bryan Cave LLP*, 2006 WL 2883815, at *4 (N.Y. Sup. Ct. Mar. 14, 2006) (alleging that defendant placed its own financial and other interests before the plaintiffs' interests duplicates legal malpractice claim).

And numerous other states, have, too. *See, e.g., Hales v. Pittman*, 118 Ariz. 305, 309, 576 P.2d 493, 497 (Ariz. 1978) (physician's fiduciary duty to patient does not create cause of action for breach of trust independent from medical malpractice and battery); *Kracht v. Perrin, Gartland & Doyle,* 219 Cal. App. 3d 1019, 268 Cal. Rptr. 637(Cal. Ct. App. 1990) (where the injury is suffered because of a lawyer's professional negligence, the gravamen of the claim is legal malpractice); *Aller v. Law Office of Carole C. Schriefer, P.C.,* 140 P.3d 23 (Colo. App. 2005) (legal malpractice claim and breach of fiduciary duty claim are duplicative if they arise from the same material facts); *Awai v. Kotin*, 872 P.2d 1332, 1337 (Colo. App. 1993) (in claim against therapist, factual allegations in support of breach of fiduciary duty were the same as those in support of the claim of negligence and present the same issue for the jury, so summary judgment on breach of fiduciary duty was appropriate); *Cochrane v. Azman*, 2011 Haw. App. Lexis 149, at *11 (Haw. Ct. App. Feb. 22, 2011) (Hawaii law has not recognized a separate cause of action for breach of fiduciary duty asserted in the context of alleged medical negligence or malpractice); *Neade v. Portes*, 193 Ill. 2d 433 (Ill. 2000) (no cause of action for breach of fiduciary duty exists for doctor's failure to disclose personal financial incentives for recommended medical care); *Majumdar v. Lurie*, 653 N.E.2d 915, 920–21 (Ill. Ct. App. 1995) (when same operative facts support actions for legal malpractice and breach of fiduciary duty resulting in same injury to client, fiduciary breach claims are duplicative); *Moriarty v. O'Connell*, 2005 Mass. Super. Lexis 299, 2005 WL 1812513 (Mass. Super. June 30, 2005) (legal malpractice claim and breach of fiduciary duty claim are duplicative where the facts underlying the two claims are identical); *McKenzie v. Berggren*, 99 Fed. Appx. 616 (6th Cir. 2004) (breach of contract and fiduciary duty claims were duplicative of legal malpractice claim) (applying Michigan law); *D.A.B. v. Brown*, 570 N.W.2d 168 (Minn. Ct. App. 1997) (alleged kickback scheme was in essence a medical malpractice case and could not be converted into a class action breach of fiduciary duty case); *Garcia v. Coffman*, 124 N.M. 12, 19, 946 P.2d 216, 223 (N.M. Ct. App. 1997) (cause of action for breach of fiduciary duty by providers was not distinct from fraudulent misrepresentation, so it provided no independent basis for imposition of liability); *B & B Contrs. & Developers, Inc. v. Olsavsky Jaminet*, 984 N.E.2d 419 (Ohio Ct. App. 2012) (action against attorney for damages resulting from legal representation is an action for malpractice and other duplicative claims are subsumed in the malpractice claim); *RFT Mgt. Co., LLC v. Tinsley & Adams LLP*, 732 S.E.2d 166, 173–74 (S.C. 2012) (breach of fiduciary duty claim was duplicative of claim for legal malpractice, where there was no separate duty out-

side attorney-client relationship alleged to have been breached and no different material fact supporting the fiduciary duty claim); *Kimleco Petroleum, Inc. v Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. Ct. App. 2002) ("Regardless of the theory a plaintiff pleads, as long as the crux of the complaint is that the plaintiff's attorney did not provide adequate legal representation, the claim is one for legal malpractice.").

Maintaining the Distinction

Besides insuring intellectual integrity, it is important to the defense bar to maintain the distinction between breach of duty of care and breach of loyalty so as to avoid, as noted above, giving a jury two opportunities to find against a fiduciary based of the same conduct. One can think of the distinction in terms of malice murder and felony murder. While both arise out of the death of a person, to find malice murder there must be intent, and with felony murder, there must be a separate felony. It would be appropriate to send a case to a jury on both of those murder charges since one could consistently be found guilty of one but not the other, guilty of both, or guilty of neither. It would not, however, be appropriate to send a case to a jury on "murder" and "homicide." The words are different appellations for the same conduct, so one is either guilty of both or neither.

When you are faced with the question of whether the verdict form should include both "breach of fiduciary duty" and "malpractice," force the plaintiff's attorney to articulate the different conduct that constitutes the breach of duty of loyalty, or which different damages were sustained, or out of which relationship the duty arose. If the answer is that the duty arose out of the fiduciary relationship, the obligation that was breached was the fiduciary's duty of care, and if the damage was the same as that suffered as a result of the malpractice, it is a duplicative claim in which the breach of fiduciary duty claim should be withheld from the jury.

Another reason to be cognizant of the distinction, and to keep fiduciary duty breach allegations from a jury, if possible, is that breach of fiduciary duty claims put in the plaintiff's arsenal more inflammatory arguments. Consider this hypothetical: A client goes to a lawyer when the client is considering a business deal. The lawyer is retained to conduct the due diligence. The lawyer, through inadvertence and mistake, fails to discover that the seller in the transaction is involved in litigation. After closing, the client learns of the litigation, which is expensive and risky and not taken into account when the client agreed to the terms and conditions of the deal. The client sues the lawyer for legal malpractice and breach of fiduciary duty. The client's new lawyer argues that "this lawyer had the duty of absolute loyalty to the client. Disregarding that duty entirely, he failed to discover this litigation. Had client known about the litigation, he never would have closed the deal on the terms and conditions that he did."

The argument is incendiary and misleading. The duty of loyalty had nothing to do with the lawyer's responsibility to discover and disclose the litigation. (The duty of loyalty precluded the lawyer from hiding the litigation from the client if it had been found.) That duty arose from the contract between the lawyer and the client for the lawyer to conduct the due diligence. The duty was the same: to fulfill the terms of the retention agreement as a reasonably prudent person would, regardless of any fiduciary duty. The client could have chosen a business analyst, an accountant, or a doctor, for that matter, to complete the task. Regardless of the duty of loyalty (fiduciary duty) that was owed, the due diligence had to be completed with reasonable care and skill. The breach of fiduciary duty argument does nothing but lead a jury to believe that a fiduciary has a greater duty of care than someone else, which is not the law in most jurisdictions, despite lax language that might lead one to believe otherwise. In this regard, see the Delaware case of *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Although the court said that it was deciding the "fiduciary duty of care," it then said that the fiduciary was obligated, "in making business decisions, [to] consider all material information reasonably available, and that the directors' process is actionable only if grossly negligent." *Id*. at 259. That is no different a standard than all people owe to each other: to act as a reasonably prudent person under like and similar circumstances. *See also Lifespan Corp. v. New Eng. Med. Ctr., Inc*., 2011 U.S. Dist. Lexis 56525, 2011 WL 2134286 (D. R.I. May 24, 2011).

And last, but certainly not least, the differences between the two duties must be kept in mind because the measure of damages for breach of each duty is different. While this article cannot exhaustively review the measure of damages in the different states, it is sufficient to note that general or nominal damages are often permitted for breach of fiduciary duty, while a breach of duty of care often requires a showing of actual damages to recover. *Alloy v. Wills Family Trust*, 944 A.2d 1234, 179 Md. App. 255 (Md. Ct. Spec. App. 2006) (nominal damages available for breach of fiduciary duty even in absence of proof of monetary loss); *SKMDV Holdings, Inc. v. Green Jacobson, P.C*., 494 S.W.3d 537 (Mo. 2016) (aggrieved client only entitled to monies it would have had, but for negligence of attorney).

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In short, while courts may use the terms casually and interchangeably, it is important for those of us who are fiduciaries and those of us who represent fiduciaries to keep the two distinct duties separate, even though they are of equal importance. A duty of care is always owed and may be breached regardless of whether the one who owed the duty also was a fiduciary. The duty of loyalty is owed only by (and by reason of the duty being undertaken) a fiduciary. The obligations of the duty, the proof of breach, and the damages available are different for each. FD