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Developments in **Illinois Law**

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Many legal malpractice cases include a count alleging a breach of fiduciary duty by the lawyer-defendant. These claims are often dismissed when combined with conventional claims for breach of the duty to exercise reasonable care, which is the standard legal malpractice theory.

COURTS DISMISS THE BREACH OF FIDUCIARY DUTY claims on the ground that they are duplicative, allowing only the legal malpractice claims to proceed. *See Majumdar v. Lurie*, 274 Ill. App. 3d 267, 273-74 (1st Dist. 1995); *Calhoun v. Rane*, 234 Ill. App. 3d 90, 95 (1st Dist. 1992). The logic of these cases and others suggests that, except in unusual circumstances in which the lawyer acts as trustee for a client, fiduciary duty claims against lawyers as a part of a legal malpractice case are a thing of the past.

What is the Current Case Law?

In *Majumdar v. Lurie*, the Illinois Appellate Court dismissed the duplicative fiduciary duty claim against the attorney-defendant, relying on the identity of operative facts between the two claims: “[A]lthough an action for legal malpractice is conceptually distinct from an action for breach of fiduciary duty because not all legal malpractice rises to the level of a breach of fiduciary, when... the same operative facts support actions for legal malpractice and breach of fiduciary [duty] resulting in the same injury to the client, the actions are identical and the later should be dismissed as duplicative.”

The *Majumdar* court cited *Calhoun v. Rane* as supporting its conclusion, a case in which the Appellate Court dismissed a breach of fiduciary duty claim against a lawyer under similar, but distinct analysis, instead focusing on the fact that all lawyers owe fiduciary duties to clients, and therefore, “any alleged malpractice by an attorney also evidences a simultaneous breach of trust; however, that does not mean every cause of action for professional negligence also sets forth a separate and independent cause of action for breach of fiduciary duty.” While *Calhoun*’s reasoning is murky, it seems to rest on a policy judgment that the breach of fiduciary duty theory adds nothing to the plaintiff’s claim and should not be allowed.

The Illinois Supreme Court clarified the issue in the context of a medical malpractice case, *Neade v. Portes*, 193 Ill. 2d 433 (2000), where the patient’s executor sought to recover from the doctor both for breach of fiduciary duty owed the patient and for medical malpractice. The Supreme Court effectively adopted the *Calhoun* approach to bar fiduciary breach claims against doctors, although it also cited *Majumdar*. The Supreme Court’s reasoning suggests that claims for breach of fiduciary duty in Illinois against doctors and against lawyers as part of malpractice lawsuits are not permitted.

In *Neade*, the Illinois Supreme Court concluded that the elements of a medical negligence (i.e., malpractice) claim and the elements of a breach of fiduciary duty claim against a doctor were so closely related that, as a matter of policy, Illinois law should not recognize a separate breach of fiduciary duty claim against physicians for actions related to their role as a health care providers. The same rationale applies to most breach of fiduciary duty claims against lawyers.

The doctor-defendant in *Neade* allegedly breached his fiduciary duty by failing to inform his patient that under the doctor’s contract with the referring HMO, the doctor could profit financially by declining to order certain tests for the patient. After the patient died of a heart attack, his wife sued, claiming that if a test had been performed, his heart condition would have been detected and the deadly heart attack prevented.

The Supreme Court reasoned that to prove the alleged breach of fiduciary duty, the plaintiff would have to prove that under the applicable medical standard of care the doctor should have ordered the test, an analysis identical to the standard of care issue in the malpractice claim. The court concluded that it “need not recognize a new cause of action for breach of fiduciary duty when a traditional medical negligence claim sufficiently addresses the same alleged misconduct.” 193 Ill. 2d at 445. The Court based its decision, in part, on a U.S. Supreme Court case, *Pegram v. Herdrich*, 530 U.S. 211 (2000), that had reached the same conclusion in a medical malpractice case in which the plaintiff also asserted claims of breach of fiduciary duty under ERISA.

The *Neade* Court recognized the possible inconsistency between its ruling and the Illinois Appellate decisions upholding breach of fiduciary duty claims against lawyers, such as *Coughlin v. SeRine*, 154 Ill. App. 3d 510 (1st Dist. 1987). It left open whether, if examined anew, *Coughlin* would be decided the same way, noting that *Coughlin* had “engaged in no discussion regarding the potential duplicative nature of those claims.” *Id.* at 449-50.

The dissent in *Neade* pointed out that there is no logical distinction to be made between a breach of fiduciary duty claim in a medical malpractice case and the same sort of claim in a legal malpractice case. The dissent would have held that both doctors and lawyers were subject to breach of fiduciary duty claims. But the dissent’s emphasis on the lack of justification for treating doc-

tors and lawyers differently underscores the logical reach of the majority's decision to reject breach of fiduciary duty claims in the medical malpractice context. Although not stating so directly, *Neade* indicates that it is bad public policy to allow a breach of fiduciary duty claim for conduct that can also be the basis for a malpractice claim, whether in the medical or legal context.

Can the breach of fiduciary duty theory be dealt with as a pleading issue?

One might argue that *Neade* is only a straightforward application of a duplicative pleading test: fiduciary breach claims should be dismissed only if they plead identical facts to a malpractice claim asserted in a different count. But that is not *Neade's* reasoning nor good policy.

A literal application of an identity-of-facts-and-injury rule would allow creative plaintiffs' lawyers to circumvent the rule by asserting one group of facts to support a malpractice claim in one count, labeled "negligence," and another group of facts to support a count labeled "breach of fiduciary duty," with somewhat different damage amounts attached to each, regardless of whether the facts arose out of the same core conduct by the defendant. *Neade* explicitly protects the doctor-defendant against this type of pleading by eliminating the breach of fiduciary duty claim entirely.

The Supreme Court in *Neade* relied on *Majumdar* to explain why such artful pleading practices were not sufficient to support a separate breach of fiduciary duty claim. It stated that the operative fact in both counts

was the failure to order the test that would have revealed the heart condition. Therefore, the additional allegation of a failure to disclose the doctor's possible economic benefit from reducing testing costs did not change the conclusion that the counts were duplicative. If the conduct that gives rise to the claim for breach of the duty of care includes some of the same conduct that is important for the breach of fiduciary duty count, then the latter is likely duplicative and should be dismissed. The rule is not a pleadings rule at all. It directs a court to examine the underlying issues in the lawsuit and draw its own conclusion as to what will have to be proven to establish liability on both theories.

What's wrong with breach of fiduciary duty claims against lawyers?

There are several policy reasons for rejecting the two-theory approach in both legal and medical malpractice cases, and to require the plaintiff to advance only the malpractice claim.

Fiduciary Duty Claims are Unnecessary

As *Neade* holds in a medical malpractice context and *Calhoun* in a legal malpractice context, the conduct underlying the breach of fiduciary duty claim is normally an essential part of the claim for breach of the duty of care. The plaintiff cannot prevail on either claim without proving overlapping facts in support of both claims. Thus the central issue in the breach of fiduciary duty claim will be tried and decided in the malpractice claim. The damages available to the

plaintiff are the same. As a result, a fiduciary duty claim simply is not necessary where a malpractice claim may be asserted as well.

Historically Fiduciary Duty Claims Were Not Designed to Cover Malpractice

Fiduciary duty originated in Anglo-American law in a context that had nothing to do with legal or medical malpractice, and does not today correspond to the lawyer's or doctor's role in dealing with the client or patient, except in the very infrequent situation in which the professional is acting as a classic trustee, administering funds or the like. As one respected academic commentator has explained in criticizing breach of fiduciary duty claims against lawyers:

Much of the law involving fiduciary duties was developed in the context of persons, such as trustees of express trusts, who undertook to act for another with respect to important property rights.... Much of the case law of fiduciary liability developed out of pre-modern settings, where defalcations of a fiduciary were likely to consist of nothing more than what would be called theft, usually accomplished through a devious and self-interested scheme concocted by the fiduciary. Liability of trustees and others, such as lawyers, for negligence (including negligence in investing entrusted assets) developed relatively much later, not until well into the nineteenth century in England and the United States. Negligence based liability for harm caused by a professional has now become well-accepted as the central concept behind lawyer liability to clients.

Charles Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 Hofstra L. Rev. 689 (Spring 2006).

The U.S. Supreme Court rejected breach of fiduciary duty claims against doctors and HMOs in *Pegram*, applying reasoning very similar to that of the Illinois Supreme Court in *Neade*: "the common law trustee's most defining concern historically has been the payment of money in the interest of the beneficiary," and modern medical decisions "bear no more resemblance to trust departments than a decision to operate turns on

the factors controlling the amount of a quarterly income distribution.” 530 U.S. at 231-2.

Expert Testimony Should Be Required

In a legal malpractice case, “[e]xpert testimony usually is mandatory to prove negligence...” Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* (2011 ed.), § 36:20 (collecting cases). “Failure to present such testimony is generally fatal to a legal malpractice action unless the attorney’s negligence is so apparent that a lay person would have no difficulty seeing it.” *First Nat. Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 196 (1st Dist. 2007). The reason is that the “standard of care is predicated on the skill and care ordinarily exercised by lawyers, a measure rarely within the common knowledge of laypersons.” *Legal Malpractice*, § 36:20. (The same rule applies in medical malpractice litigation.) Courts have reached inconsistent conclusions on whether expert testimony should be required to prove fiduciary breaches. See *Legal Malpractice*, § 36:20; see also *ABC Trans Nat’l Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817, 831 (1st Dist.1980). In *ABC Trans Nat’l*, the Court held that expert testimony is required to prove that a defendant attorney had breached his fiduciary duty by engaging in what might be conflicting representations. 90 Ill. App. 3d at 831. By contrast, the same court upheld the exclusion of expert testimony supporting a fiduciary breach claim in another case. See *McCormick v. McCormick*, 180 Ill. App. 3d 184, 205 (1st Dist. 1988) (holding trial court did not abuse its discretion in excluding proposed expert testimony regarding whether trustee breached fiduciary duty by taking imprudent actions). This inconsistent treatment of the expert-witness requirement in fiduciary-breach litigation is another reason that the fiduciary-breach theory ought not to be part of litigation involving professional standard of care issues.

When a lawyer is charged with violating the standard of care, expert testimony should be required because, as the courts have repeatedly stated, that standard is not within the knowledge of the average juror or often of the average judge. Clever plead-

ing—by calling a claim “breach of fiduciary duty” instead of “legal malpractice” or “negligence”—should not be allowed to eliminate the requirement of expert evidence.

Possible Jury Prejudice

An order *in limine* should bar reference to “breach of fiduciary duty” before a jury since such claims are tried to the Court, not a jury. *Prodromos v. Everen Sec. Inc.* 389 Ill. App. 3d 157, 174 (1st Dist. 2009). Otherwise, the reference to a “breach of fiduciary duty” has automatic negative connotations for jurors. The mere fact that a plaintiff has alleged two claims (breach of fiduciary duty and legal malpractice) instead of one (legal malpractice) may lead jurors erroneously to believe that the lawyer’s conduct is more serious or that the lawyer is more likely to have acted improperly. The mere assertion of a claim for conduct that is largely the same as that covered by the standard malpractice claim should not tip the playing field unfairly.

Is There Ever a Basis for a Separate Breach of Fiduciary Duty Claim?

In most legal malpractice cases there is no real difference between the malpractice claim and the breach of fiduciary duty claim, except the title and rhetoric that goes with it. Both grow out of the client-lawyer relationship and relate to how well the lawyer performed his or her duties. But there can be a subset of cases where the lawyer truly acts as a fiduciary, and the harm to the client from breach of fiduciary duty is entirely separate from how well or how poorly the lawyer carried out the duties of a lawyer. For example, lawyers can be sued when they misappropriate client funds, commit torts against clients (other than professional negligence) or take advantage of trust and confidence to establish sexual relations with clients. See, e.g., *Suppressed v. Suppressed*, 206 Ill. App. 3d 918-19 (1st Dist. 1990). Some of these cases may be based on breach of fiduciary duties and should support separate breach of fiduciary duty counts.

As the *Neade* Court pointed out, many of the reported appellate cases involving alleged breaches of fiduciary duty against professionals were brought “sounding in

both breach of fiduciary duty and negligence. Thus, the courts [in such cases] did not determine whether the plaintiffs’ injuries were sufficiently addressed by traditional negligence claims.” 193 Ill. 2d at 449. A claim for breach of fiduciary duty, when joined with a claim for medical malpractice, is sufficiently addressed by the traditional negligence action to not warrant separate status. The reasons for this conclusion apply with like force to breach of fiduciary duty claims against lawyers. Such claims against lawyers should not be allowed in the same complaint as conventional legal malpractice claims.

In addition, *Neade*, *Majumdar* and *Calhoun* uniformly foreclose the option of allowing a breach of fiduciary duty claim against lawyers or doctors to survive a motion to dismiss where the conduct at issue is brought on both theories. All three cases hold that only the malpractice claim can survive. *Neade*, 193 Ill. 2d at 445; *Calhoun*, 234 Ill. App. 3d at 95; *Majumdar*, 274 Ill. App. 3d at 273-74.

What happens if the claim is brought only as a breach of fiduciary duty, standing alone? The logic of the *Neade* rule suggests the same result as in claims against doctors—there can be no separate free-standing breach of fiduciary duty claim in litigation over conventional professional services, medical or legal. If the patient or client wishes to sue the doctor or lawyer for conduct related to providing professional services, he or she is only allowed to bring a conventional negligence-based malpractice claim. ■

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