

FRONTISPIECE

PREFACE

ACKNOWLEDGMENTS

Introduction

Chapter One: How Does Fiduciary Duty Arise?

Section A: Explicit Agreement

1:1 In General

1:2 Trust Agreements

1:3 — Formal

1:4 — Informal

1:5 Wills

Section B: Relationships of Which Fiduciary Duty Is an Incident

1:6 In General

1:7 Joint Venturers

1:8 Partners and Partnerships

1:9 Corporations

1:10 — Directors

1:11 — Officers

1:12 — Controlling Shareholders

1:13 Agents and Principals

1:14 Spouses

1:15 Personal Representatives and Trustees of Estates

1:16 Professionals

1:17 Associations

1:18 Other Relationships

Section C. Elements Affecting Existence of Fiduciary Duty

1:19 In General

1:20 Direct, Consensual Relationship

1:21 Trust and Confidence

1:22 Management and Control

1:23 Alternative or Inconsistent Legal Relationship

Section D: Quasi-Fiduciary Duties

1:24 In General

1:25 Banks Towards Depositors and Borrowers

1:26 Insurance Companies Towards Policyholders

1:27 Physicians Towards Patients

1:28 Employers Towards Employees

1:29 Other Relationships

Section E: Vicarious Liability for Breach of the Duty

1:30 In General

1:31 Vicarious Liability

1:32 Vicarious Disqualification of Law Firms

Chapter Two: To Whom Is Fiduciary Duty Owed?

Section A: When Cestui Is a Single, Natural Person

2:1 In General

2:2 Heirs, Successors, and Personal Representatives of the Cestui

2:3 Relatives of the Cestui

2:4 Entities in Which the Cestui Has Major Interests

2:5 Assigns of the Cestui

2:6 Business Associates of the Cestui

Section B. When There Is a Class of Cestuis

- 2:7 In General
- 2:8 Reporting and Control Issues
- 2:9 Conflicts of Interest
 - 2:9a — Actual vs. Potential Conflicts
- 2:10 Consequences of Conflict of Interest
 - 2:10a — Canceling Proceedings or Transactions to Which the "Conflicted Fiduciary" Was a Party
 - 2:10b — Holding the "Conflicted Fiduciary" Accountable to the Beneficiary
 - 2:10c — Removing the "Conflicted Fiduciary" from the Fiduciary Post
 - 2:10d — Excused Conflicts
- 2:11 Informed Consent
- Section C. When Cestui Is a Partnership
 - 2:12 In General
 - 2:13 From Third Party Towards Individual Partners
 - 2:14 Limited Partners
 - 2:15-2:16 <Open>
- Section D. When the Cestui Is a Corporation
 - 2:17 In General
 - 2:18 Towards Directors and Officers Individually
 - 2:19 Majority and Minority Shareholders
 - 2:20 Nonprofit Corporations
 - 2:21 Governmental Employees
- Section E. When the Cestui Is a Juridically Created Estate
 - 2:22 In General
 - 2:23 Decedent's Estates and Trusts
 - 2:24 Bankruptcy and Receivership Estates
 - 2:25 Class Actions
- Chapter Three: The Scope of the Duty
 - Section A. Identifying the Res
 - 3:1 In General
 - 3:2 Subject of Agreement
 - 3:3 Focus of Relationship
 - 3:4 Natural Extensions
 - 3:5 Fiduciary Opportunities
 - Section B: Duty of Management
 - 3:6 In General
 - 3:7 Reasonable Care and Prudence
 - 3:8 "Loyalty" in Its First Sense
 - 3:8a — Duty to Preserve Confidences
 - 3:9 Best Efforts
 - 3:10 Nondelegability of Fiduciary Duty
 - 3:11 Business Judgment Rule
 - 3:12 Limiting the Duty of Management
 - Section C: Duty of Preference
 - 3:13 In General
 - 3:14 Trustee's Duty Not to Take Any Advantage of Cestui
 - 3:15 — Fiduciary Scrutiny
 - 3:16 Exceptions to Duty of Preference
 - 3:17 Interests Without Financial Consequences
 - 3:18 "Loyalty" in Its Second Sense
 - 3:19 Limiting the Duty of Preference
 - 3:20 - 3:25 <Open>

Section D: Duty to Account

- 3:26 In General
- 3:27 Duty to Render Complete Account
- 3:28 Duty to Segregate the Res
- 3:29 Timing of Accountings
 - a. — Regular Accountings
 - b. — Accounting on the Beneficiary's Demand
 - c. — Interim and Final Accounts
 - d. — Accounting on Termination of the Fiduciary Relationship
- 3:30 Two Meanings of "Accounting" Distinguished
- 3:31 Tax Treatment of Transactions Related to the Res
- 3:32 Modification and Discharge of the Duty to Account
- 3:33 Sample Contested Accounting

Section E: Duty of Disclosure

- 3:34. In General
- 3:35 Duty to Account Distinguished
- 3:36 Material Facts vs. Insignificant Facts: Reliance
- 3:37 — Opinions as to Future Earnings or Value
- 3:38 Full Disclosure and Informed Consent
- 3:39 The Duty Not to Disclose Opinions Too Early
- 3:40 Secret Profits
- 3:41 Modifying the Duty of Disclosure
- 3:42 Inadvertent Failure to Disclose

Chapter Four: Termination of Fiduciary Duty

Section A. Staged Termination of the Fiduciary Duties

- 4:1 Termination of the Underlying Relationship
 - a. — Cases in Which the Fiduciary Relationship Is Replaced, at the Moment at Which It Terminates, with a Nonfidu
 - b. — Cases Involving Statutes of Limitation
- 4:2 Staged Termination of the Fiduciary Duties
- 4:3 Termination of the Duty of Management
- 4:4 Termination of the Duty of Preference
- 4:5 Termination of the Duty to Account
- 4:6 Termination of the Duty of Disclosure

Section B: Uncontested Terminations

- 4:7 In General
- 4:8 Apoptotic Termination of Fiduciary Relationship
- 4:9 Termination by Mutual Consent of the Parties
- 4:10 — Termination by Estoppel
- 4:11 Revising the Termination Deal
- 4:12 Revival of Fiduciary Duty After Termination
- 4:13-4:14 <Open>

Section C: Contested Terminations

- 4:15 In General
- 4:16 Entities Under the Corporations Code
- 4:17 Marital Dissolutions
- 4:18 Joint Venturers
- 4:19 Trustees and Receivers
- 4:20 Employees, Brokers, and Other Agents
- 4:21 <Open>

Section D: Termination by Operation of Law

- 4:22 In General

- 4:23 Loss of Capacity of Cestui
- 4:24 Loss of Capacity of Fiduciary
- 4:25 Discharge in Bankruptcy
- 4:26 Formalities of Termination

Chapter Five: Remedies for Breach of Fiduciary Duty

Section A. Statutory Remedies

- 5:1 In General
- 5:2 Partners
- 5:3 Corporate Directors
- 5:4 Spouses
- 5:5 Trustees and Executors
- 5:6 Receivers
- 5:7 Attorneys at Law; Professional Discipline in General
- 5:8 Copyright Holders

Section B: Damages at Law

- 5:9 Compensatory Damages—Basic Rule
- 5:10 The Distinction Between Contract Damages and Tort Damages
- 5:11 Fundamental Rule: Tort Damages Are Available for Breach of Fiduciary Duty
- 5:12 Different Damages for Different Kinds of Breach
- 5:13 Punitive or Exemplary Damages
- 5:14 Interest
- 5:15 Attorney's Fees

Section C: Equitable Remedies

- 5:16 In General
- 5:17 Accounting
- 5:18 Restitutionary Remedies—in General
- 5:19 Trusts and Tracing
- 5:20 The Rules of Tracing
- 5:21 — Disgorgement
- 5:22 Cancellation of Instruments
- 5:23 <Open>
- 5:24 <Open>
- 5:25 Injunctive Relief
- 5:26 Other Forms of Equitable Relief <Open>

Section D: Defensive Use of Fiduciary Duties

- 5:27 In General
- 5:28 Denying Relief to the Breaching Fiduciary
- 5:29 Estoppel to Raise Statute of Limitations
- 5:30 Other Settings <Open>

Chapter Six: Not-Quite-Fiduciary Duties

Section A. Professional Duties Distinguished

- 6:1 Definition of "Professional"; Statutory and Regulatory Apparatus
- 6:2 How Professional Duty Arises
- 6:3 Ambit of Professional's Duty
- 6:4 Scope of Professional's Duty; Definition of the Res
- 6:5 Professional's Duty of Management
- 6:5a — Role of Professional Rules in Establishing Malpractice Liability
- 6:6 Professional's Duty of Preference
- 6:7 Professional's Duty to Account
- 6:8 Professional's Duty of Disclosure
- 6:9 — "Informed Consent" in the Medical Setting

- 6:10 Conflicts Between Professional Duties and Fiduciary Duties
- 6:11 Termination of Professional Duties
- 6:11a — Termination of Attorney-Client Relationship
- 6:12 Remedies for Breach
- 6:13-6:19 OPEN
- Section B: The Covenant of Good Faith and Fair Dealing
 - 6:20 The Covenant's Two Aspects Described
 - 6:21 The Many Applications of the CGFFD in Contract Settings
 - 6:22a Tension Between Contract and Tort Principles
 - 6:22b Breach of the CGFFD in an Insurance Policy as an Independent Tort
 - 6:22c Breach of the CGFFD as an Independent Tort Outside the Insurance Area
- Section C: Joint Ownership Distinguished
 - 6:30 The Two Sources of Joint Ownership
 - 6:31 The Rights and Duties of Joint Ownership
 - 6:32 Differences Between Joint Ownership and Fiduciary Duties
- Chapter Seven: Special Considerations in Pleading and Procedure
 - Section A: The Complaint
 - 7:1 Elements of Cause of Action for Damages
 - 7:2 Pleading to Impose a Constructive Trust
 - 7:3 Pleading for Injunctive or Declaratory Relief
 - 7:4 Petitions Under Probate Code Sec. 17200 et seqq.
 - 7:5 Shareholder Derivative Actions
 - 7:6 The Demurrer
 - 7:7 Special Requirements for Suits Based on Professional Malpractice
 - Section B: The Answer
 - 7:8 In General
 - 7:9 Affirmative Defense of Unclean Hands
 - 7:10 Statute of Limitations—in General
 - 7:11 — Accrual of Cause of Action; Actual Harm
 - 7:12 — Tolling
 - 7:13 — Delayed Accrual and Equitable Tolling
 - 7:14. Actions for Legal Malpractice
 - 7:15 Actions Against Special Kinds of Fiduciaries
 - 7:16 Plaintiff's Breach of Fiduciary Duty
 - Section C: The Trial
 - 7:20 Trial to Court or Jury
 - 7:21 — Reference Proceedings
 - 7:22 The Burden of Proof—in General
 - 7:23 — In Cases over Transactions Between Fiduciary and Cestui
 - 7:24 Expert Testimony

Glossary

AUTHORITIES