COMMERCE CASE MANAGEMENT PROGRAM DECISIONS:

FIDUCIARY DUTY CASES

by

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The following summaries address breach of fiduciary duty and duty of loyalty Commerce Court Opinions. We have included some examples of fiduciary duty in the insured/insurer context, but have not included all Commerce Court Opinions on the subject, as this will be addressed more comprehensively in a separate chapter on disputes between insureds and insurers. Nor have we included all Opinions addressing the breach of the covenant of good faith and fair dealing, which will have their own chapter as well.

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This work is part of a joint project that originated between the Philadelphia Bar Association's Business Law Section and its Business Litigation Committee, and Temple's Beasley School of Law; which effort has now been expanded to include students from the Rutgers-Camden School of Law. Students work with a lawyer mentor/editor to summarize and describe opinions in the Commerce Case Management Program by distinct areas of subject matter. Each lawyer works with one, two or three law students on a particular area of the law in which the Commerce Program Judges have issued opinions, with the students doing the research and writing and the lawyer guiding and editing the work. As completed, each "chapter" will be posted on the Business Litigation Committee's web page, which can be located on the Bar Association's website, http://www.philadelphiabar.org/, with the goal to catch up to the hundreds of opinions already written, and then to keep up with the well over 100 opinions added annually. Ideally, we hope to publish this compilation in a single book. If you are interested in participating in this project, that has so many potential benefits, please contact Lee Applebaum at (215) 893-8702 or lapplebaum@finemanlawfirm.com. Temple Law Professor William J. Woodward, Jr. was and is essential to the creation and development of this effort, and Professor Eve Klothen has brought Rutgers-Camden School of Law students into the effort.

BREACH OF FIDUCIARY DUTY CASES

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This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/wyatt.pdf.

Plaintiff, Aaron Wesley Wyatt ("Wyatt") and Defendant Richard G. Phillips ("Phillips") were each 50% shareholders in Pilot Air Freight company ("Pilot"). Wyatt had initially wanted to exercise his right to purchase Phillips' shares of Pilot to become sole owner under a Shareholders' Agreement and sought equitable relief from the Court. Phillips contested whether Wyatt properly exercised his right and countered that Wyatt had breached his fiduciary duty to Pilot, and was therefore precluded from exercising his right. Phillips claimed that Wyatt's dealings with another freight company, D.F. Young ("Young"), caused the breach of fiduciary duty.

The Court found that Wyatt's actions with Young did not breach his fiduciary duty to Pilot. Both Pilot and Young are in the freight forwarding business. However, Young's business involves ocean freight whereas Pilot's business deals primarily with air freight. Young also engages in a custom brokerage business in which Pilot does not engage. Therefore, Young is not a major competitor of Pilot's.

Wyatt's relationship with Young's CEO (Mosimann) did not constitute a breach of fiduciary duty. Wyatt did loan Mosimann approximately $8,000,000 to purchase Young. Wyatt also possessed a stock option for the purchase of at least 50% of Young's stock. However, this option was conditioned on Wyatt owning either all or none of Pilot's stock. Wyatt had no current ownership interest in Young. Therefore, the Court found that there was not sufficient evidence presented to prove that Wyatt's relationship with Young breached a fiduciary duty owed to Pilot in this non-jury trial on equitable issues.

The Court reasons that (1) because Young is not a major competitor of Pilot's and (2) because he is precluded from exercising his option to purchase shares of Young's stock, that no breach of fiduciary duty to Pilot occurred. The issue of whether Wyatt can exercise his option to purchase 100% of Pilot's stock is still pending more factual evidence. In order to protect the Pilot's franchisees from any harm, all communications of sale by either Wyatt or Phillips must be given to their counsel. Secondly, Wyatt is precluded from disclosing any financial and confidential information he obtains regardless of the source. The Court's Order is an attempt to lay out certain rules so that either party may end the litigation by buying out the other.

Worldwideweb Networx Corp. v. Entrade, Inc., December Term 2001, No. 3839, (C.C.P. Phila. February 19, 2003) (Cohen, J.) (CFO and company did not owe individual shareholder the duty to see that his shares are registered according to SEC regulations).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/www303.pdf.

Plaintiff Worldwideweb Networx Corp. ("WWWN") entered into a merger agreement ("the Agreement") with Artra Group Incorporated ("Artra"). Under the Agreement, WWWN agreed to sell one of its subsidiaries to Artra, which would then be merged with Artra. The surviving entity was to assume the name Entrade, Inc. ("Entrade"). Entrade and Mark Santacrose ("Santacrose"), Entrade's CEO, were the Defendants in this matter.

When the transaction closed on September 23, 1999 ("the Closing Date"), WWWN owned approximately 15% of Entrade's publicly traded common stock. The Agreement required that Entrade register the WWWN shares "as promptly as practicable" after the Closing Date. Santacrose did file an initial form to register WWWN's shares, but failed to consummate the registration by incorporating Entrade's audited financial statements. In February of 2000, shares of Entrade were trading at $53.75 per share, but subsequently dropped to less than $0.25 per share by December, 2001.

WWWN wanted to borrow against its Entrade stock. WWWN claimed that because the shares were not registered, however, it could not act on its desire to borrow money against the shares. By the time WWWN was able to use the shares as collateral, in August 2000, the price had dropped to $2.00 per share. WWWN contended that the amount of the loan that it obtained was $74 million less than one it could have received in February 2000.

In its Amended Complaint, WWWN claimed that Santacrose breached his fiduciary duty to WWWN, and that he intentionally failed to register WWWN's shares. Santacrose argued that both the gist of the action doctrine and the economic loss doctrine barred Plaintiff's breach of fiduciary duty. Santacrose further argued that he had no fiduciary duty to register Plaintiff's shares because, as CEO, he had no duties to an individual shareholder. WWWN countered that such a fiduciary duty existed outside of any contract between Plaintiff and Defendant, and that the violation of this duty was tortious in nature. Plaintiff further asserted that since the tort was intentional, it was not barred by the gist of the action doctrine or the economic loss doctrine.

The Court stated that it was not familiar with such a claim as "intentional breach of fiduciary duty." As a matter of law, Santacrose did not owe WWWN any fiduciary duties, including registering of the shares. Santacrose was also correct that he had no duties to an individual shareholder. The Court cited to Pennsylvania statutory law: "The duty of the board of directors, committees of the board, and individual directors… is solely to the business corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or any other person or group." 15 Pa. C.S. §1717. Since WWWN was not suing on behalf of the corporation, Plaintiff's direct action was barred.

Liss v. Liss, June Term 2002, No. 2502, 2005 Phila. Ct. Com. Pl. LEXIS 288 (C.C.P. Phila. June 30, 2005), aff'd, 911 A.2d 193 (Pa. Super. Sept. 28, 2006) (without opinion), appeal denied, 917 A.2d 315 (2007) (even assuming that equal owners in a close corporation could bring claims for breach of fiduciary duty, there was no evidence to establish a dispute of material fact that could avoid summary judgment).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/020603502.pdf.

Two brothers, William and Sheldon Liss, created the closely held corporation, Liss Brothers, Inc. ("LBI"), which faced financial collapse. Each owned half of LBI. At the time of the pending collapse, William sought no solution other than an asset liquidation. Sheldon liquidated the company, reacquiring many of its assets for a new company, Liss Global, Inc. ("Liss Global"), in which Sheldon was sole shareholder. Thereafter, William filed a complaint and amended complaint asserting claims for breach of fiduciary duty, breach of contract, breach of duty of good faith, promissory estoppel, conversion, fraud, intentional misrepresentation, appointment of a custodian/receiver, appointment of a constructive trust, and conspiracy. The Court granted summary judgment to Sheldon Liss on all claims.

In alleging a breach of fiduciary duty, William claimed that Sheldon "engaged in a pattern of oppressive conduct" aimed at depriving William "of any active roll in the management of LBI"; undermining "William's duties as an officer and director of LBI"; causing LBI's liquidation; and preventing "William from receiving any consideration for his interest in LBI; and ensuring “that [Liss] Global would be in place and immediately take over the operation of LBI for the sole and exclusive use and benefit of Sheldon.….”

The Court generally observed that breach of fiduciary duty claims focus on the existence of a confidential relationship, which shows “’trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other.’”[2] Such a confidential relationship requires that the parties do not deal on equal terms; rather one side has “’overmastering influence’” or on the other side there is “’weakness, dependence or trust, justifiably reposed.’”[3] The Court then observed that the law was unclear of whether 50/50 owners in a close corporation could be held to owe each other fiduciary duties. Without deciding the issue, the Court treated the claim as if it were a permissible cause of action; however, William could still obtain no relief.

The Court found no evidence of oppressive conduct. The record did not show that William was deprived of an office or computer access. as he had claimed; moreover, this would not have constituted oppressive conduct. More importantly, there was no evidence of overmastering influence, or weakness, dependence of trust. Even prior to Sheldon’s implementing his alleged scheme, William did not participate fully in LBI’s management. Further, both brothers historically were treated to the same generous level of reimbursement for personal expenses, with Sheldon tightening the personal expense account reins when LBI became financially troubled. The Court found these new restrictions were applied to the brothers equally in dealing with LBI’s economic issues,

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[2] Nardella v. Datillo, 36 Pa. D. & C. 4th 364, 380 (C.C.P. Dauphin 1997); In Re Scott’s Estate, 316 A.2d 883, 885 (Pa. 1974).
[3] Id. (citation omitted).

and were not imposed to oppress William. William continued to receive a full salary and had the ability to charge business expenses to LBI.

One of William's key claims was that Sheldon schemed to improperly liquidate LBI, with Liss Global ready to scoop of its assets for Sheldon's sole gain, while William received no consideration for his interest in LBI. The Court found that LBI was in dire financial condition and its principal lender decided to call its loans to LBI prior to the liquidation. There was insufficient evidence to find a material issue of fact that this lender would have allowed LBI to get a loan extension. To the contrary, on the record before it the Court found that liquidation was the only viable option. The Court further found: "Finally, and most importantly, at the insistence of Sheldon, a third-party liquidator was chosen by both shareholders to oversee the dissolution of LBI. This fact alone completely undermines the argument that Sheldon 'stole' the business."

As to Liss Global, there was no evidence that the neutral liquidator failed to realize the maximum value for LBI's assets. There were no legal impediments or restrictive covenants that prohibited Sheldon from establishing a new, similar, business; and doing business with LBI's former clients, or its suppliers, vendors or customers. In sum, the Court found no actual evidence in the record to support a breach of fiduciary duty theory.

<u>Liss v. Liss</u>, June Term 2002, No. 2502, 2002 Phila. Ct. Com. Pl. LEXIS 89 (C.C.P. Phila., 2002) (50% shareholder in close corporation has standing to bring direct action against other 50% owner for breach of fiduciary duty to shareholder and to corporation). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/liss3.pdf.

The claims in this case are set out immediately above, in the Court's 2005 decision on Defendant's Motion for Summary Judgment. In this 2002 Opinion, the Court addressed Defendant Sheldon Liss' preliminary objections.

Sheldon asserted that William, as merely a shareholder, lacked standing to assert LBI's breach of fiduciary duty claims, among others, for direct damages to the corporation. Sheldon relied on 15 Pa.C.S. § 1717, which limits shareholders to circumscribed derivative actions. The Court rejected his arguments. First, the Court observed that section 1717 addressed directors, and not a 50% shareholder in a close corporation who was allegedly trying to freeze out the other 50% shareholder. The Court also observed that some of William's claims were direct, and some derivative. It stated that Pennsylvania law permitted direct suits by minority shareholders, and at this stage of the proceeding would treat William as an oppressed shareholder, like a minority shareholder, in permitting the claims to proceed. The Court relied upon Baron v. Pritzker, discussed immediately below. Moreover, even where William's claims could be described as derivative, the claims would be permitted to proceed under the principles set forth in Baron v Pritzker and Levin v. Schiffman (also described immediately below).

Baron v. Pritzker, August Term 2000, No. 1574, 52 Pa. D. & C.4th 14 (C.C.P. Phila. March 6, 2001) (Sheppard, J.) (50% owner of close corporation could pursue breach of fiduciary duty claim against co-equal owner where other factors established that owner's power to dominate the corporation).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/baron.pdf.

Plaintiff Baron and Defendant Pritzker were 50/50 owners in two closely held corporations, of which they were the only directors and officers. However, Pritzker had two votes on each board, and Baron only had one vote. Baron alleged that Pritzker froze him out, wasted corporate assets and refused to honor a shareholder buyout agreement. The buyout provision addressed circumstances where a shareholder becomes disabled; in which event his shares would be purchased at a value determined by the board or by a formal appraisal that the board "may" obtain.

Baron became seriously ill. He claimed that after his illness, Pritzker froze him out, cut Baron's compensation, increased Pritzker's own compensation unreasonably, refused Baron access to company information, overcompensated a new COO who also was granted unreasonable authority, took corporate money for personal expenses and mismanaged the companies. Pritzker also allegedly refused to honor the disability buyout provision and refused to sign Baron's applications for disability benefits (which forms were eventually submitted during the litigation).

In addressing the breach of fiduciary duty claim, the Court observed that majority shareholders unquestionably owe fiduciary duties to minority shareholders. However, as a 50/50 owner, Pritzker was not a majority shareholder; and the Court was aware of no Pennsylvania precedent holding that a fiduciary duty existed between co-equal owners in a close corporation. However, the facts of the case and the policy reasons behind the general rule regarding majority shareholder duties coalesced in this case. Because Pritzker had two-thirds control of each board, and could not be removed by Baron -- who only had 50% ownership -- Pritzker had the same level of power as a majority shareholder " to dictate to minority shareholders the manner in which the corporations are to be run."[4] The law imposes fiduciary duties on majority shareholders to check that power; and the same rationale applies to Pritzker in this case because he had the power to dictate the corporation's operations and to oppress Baron. It was also noteworthy that, in a close corporation, "[e]ven were Pritzker to owe fiduciary duties only to the corporation,

[4] Orchard v. Covelli, 590 F. Supp. 1548, 1556-1557 (W.D. Pa. 1984).

as Pritzker argues, Baron could bring fiduciary duty claims against Pritzker without making demand."[5] Thus, Pritzker's preliminary objections were overruled.

Levin v. Schiffman, July Term 2000, No. 4442, 54 Pa. D. & C.4th 152 (C.C.P. Phila. Feb. 1, 2001) (Sheppard, J.) (Court permits shareholder in close corporation to bring corporation's breach of fiduciary duty claim as a direct claim). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/levin-dh.pdf.

Levin and Schiffman formed a corporation, Funds, in which each was a 50% owner. Schiffman allegedly was ambivalent about Funds upcoming business venture with the School District of Philadelphia, because it might put some limitations on another business, owned by Schiffman, carrying out similar activities in other venues. Allegedly, Schiffman prevented Funds from even beginning its business. Levin formed a second corporation to carry out the work originally planned for Funds, but alleges Schiffman undermined this effort as well. Levin brought suit, alleging breach of fiduciary duty, among other claims.

In her preliminary objections, Schiffman asserted that Levin made no demand on Funds Board, and had no standing to bring a derivate claim on Funds' behalf against Schiffman. The breach of fiduciary duty claim was raised solely on Funds' behalf. The Court considered section 7.01(d) of the American Law Institute Principles of Corporate

[5] American Law Institute Principles of Corporate Governance § 7.01(d); Levin v. Schiffman, July term 2000, no. 4442, 54 Pa. D. & C.4th 152, 167 (C.C.P. Phila. Feb. 1, 2000) (Sheppard, J.) (following section 7.01(d)). Section 7.01(d) provides: "In the case of a closely held corporation, the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons." In Warden v. McLelland, 288 F.3d 105, 112-113 (3d Cir. 2002), the Third Circuit cited Baron and Levin, and stated there would good reasons to believe Pennsylvania's Supreme Court would adopt section 7.01(d); see also Nedler v. Vaisberg, 427 F. Supp. 2d 563, 570-571 (E.D. Pa. 2006) (citing cases and applying section 7.01(d)).

Governance,[6] in determining whether Levin had standing.[7] In this case of first impression, the Commerce Court found section 7.01(d) both helpful and consistent with Pennsylvania law, and that it applied to the facts in this case. Thus, the Court ruled that demand requirements were unnecessary under certain conditions where the shareholders were owners in closely held corporations. It overruled the preliminary objections, and treated all of Levin's claims, whether putatively derivative or not, as direct claims.

Marucci v. Southwark Realty Co., November Term 2001, No. 391, 2002 Phila. Ct. Com. Pl. LEXIS 2 (C.C.P. Phila. May 15, 2002) (Herron, J.) (shareholder did not have standing to plead direct breach of fiduciary duty claim against the corporation). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/marucci.pdf.

Plaintiffs were members of a non-profit corporation. They raised claims against the corporation and a breach of fiduciary duty claim against one of its directors. The Court found that claim belonged to the corporation, not the individuals, and therefore Plaintiffs claim was derivative. Plaintiffs did not assert an exception under section 7.01(d) of the ALI Principles of Corporate Governance, see Liss, Baron, Levin, above; and it would have been inappropriate for the Court to proceed absent such allegations.

Burton v. Bojazi, April Term 2005, No. 3551, 2005 WL 1522040, 75 Pa. D. & C.4th 403 (C.C.P. Phila. Jun 17, 2005) (Abramson, J.) (no fiduciary duty owed by majority owners to minority owner in a closely held corporation simply because of status as a minority shareholder).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/050403551.pdf.

In Burton v. Bojazi, the Court sustained Defendants' preliminary objection to Plaintiff's breach of fiduciary duty claim on grounds of failing to plead material facts; rather than legal insufficiency/demurrer. The Plaintiff alleged that his minority

[6]See footnote 5 supra.
[7]The Court relied upon Supreme Court dicta in Cuker v. Mikalauskas, 547 Pa. 600, 613, 692 A.2d 1042, 1049 n. 5 (1997) that "Courts of the Commonwealth are free to consider other parts of the [the ALI Principles of Corporate Governance] and utilize them if they are helpful and appear to be consistent with Pennsylvania law."

shareholder status in a close corporation was enough to create the basis for a breach of fiduciary duty claim against the majority shareholders.

Plaintiff alleged that he held a 35% ownership interest in a close corporation, while the Defendant Mrs. Bojazi owning the remaining 65%.[8] Burton claimed that, by itself, this relationship created a fiduciary duty toward him. The Court stated that "a fiduciary duty exists where there is a confidential relationship between the parties." Relying primarily on the holding in E.I. Fan Co. v. Angelo Lighting Co.,[9] the Court defined a "confidential relationship" as one in which the parties do not deal on equal terms, "but on the one side there is an overmastering influence, or on the other, weakness, dependence or trust, justifiably reposed." The Court provided examples of such confidential relationships involving a fiduciary duty owed by one party to another, including "guardian and ward," "attorney and client," and "principal and agent." The Court further stated that it would not recognize a fiduciary duty, and breach thereof, without facts showing that the parties were not dealing on equal terms; and that such disparity gave rise to an abuse of power by one party over the other.[10]

As stated, the Plaintiff relied solely on the difference in the parties' ownership status in alleging the existence of a fiduciary duty. Applying the foregoing principles, this ownership status, in and of itself, did not lead the Court to conclude that the majority shareholders had an "overmastering influence" on the 35% minority shareholder. The

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[8]Mr. Bojazi was also named in this count, but is not alleged to have been a shareholder.
[9]April Term 2003, No. 327, 2003 WL 21990999 (C.C.P. Phila. August 18, 2003) (Sheppard, J.) (citing Basile v. H. & R. Block, Inc., 777 A.2d 95, 101 (Pa. Super. 2001)). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/eif.pdf.
[10]MRED General Partner, LLC v. Tower Economics Co., et al, November Term 2004, No. 2531, 2005 WL 957707 (C.C.P. Phila. April 12, 2005) (Abramson, J.). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/041102531.pdf.

pleaded relationship simply revealed that the shareholders were partners in their business. To plead a fiduciary duty, and breach thereof, a plaintiff must allege weakness, dependence, inferiority or a disparity in the parties' positions giving rise to an abuse of power. Absent such allegations, the claim was dismissed; however, the Court granted Plaintiff leave to amend his complaint, with leave to plead the fiduciary duty claim with more specificity.

Romy v. Burke, May Term 2002, No. 1236, 2003 Phila. Ct. Com. Pl. LEXIS 67 (C.C.P. Phila. May 2, 2003) (Sheppard, J.) (corporate entities may proceed on breach of fiduciary duty claims, but majority shareholder/guarantor/creditor may not raise identical claims).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/romy-op.pdf.
Romy v. Burke, May Term 2002, No. 1236, 2004 Phila. Ct. Com. Pl. LEXIS 15 (C.C.P. Phila. December 28, 2004) (Sheppard, J.) (corporate plaintiffs breach of fiduciary duty claims against attorneys survives summary judgment).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/020501236.pdf.
Romy v. Burke, May Term 2002, No. 1236, 2005 Phila. Ct. Com. Pl. LEXIS 26 (C.C.P. Phila. January 20, 2005) (Sheppard, J.) (person would not be treated as a de facto director to create a fiduciary duty).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/050201236-1.pdf.

May 2, 2003 Opinion – Romy I

This multi-Plaintiff/multi-Defendant claim was rooted in the "alleged mismanagement of several related professional medical service corporations by a number of their officers, directors and/or employees, and the employees' alleged improper use of the corporations' business plan and assets to set up competing professional medical service corporations." There were 5 Plaintiffs making claims against 11 Defendants. A number of these Defendants raised preliminary objections.

The Plaintiffs included two medical services corporations, The Spine Center of Pennsylvania ("SC-PA") and The Spine Center of New Jersey ("SC-NJ"), a management company TSC Management of Pennsylvania, Inc. ("TSC"), its parent American Life

Center, Inc. ("ALC") and Dr. Romy. Dr. Romy was the majority shareholder of SC-PA and SC-NJ, as well as a guarantor and creditor; and he managed ALC and TSC.

The Defendants included: Pain & Rehabilitation Institute of Pennsylvania ("PRI"), a competitor of SC-PA and SC-NJ; the Blaeuers,[11] officers, directors and/or employees of the 4 entity Plaintiffs, with one of the Blaeuers working for Defendant Pleasant Hill Consulting ("PHC"); Tindall, an employee of TSC, SC-PA, SC-NJ and PRI[12]; Martello, a CPA and officer and director or employee of ALC, PRI and Defendants Healthcare Consulting Associates ("HCA"), Northeast Management Consulting Associates ("NEMCA"), P.M. Healthcare, Inc. ("PMH")[13] and a non-party entity, L-Four Five, LLC ("LFFC")[14]; Kalogredis, Sansweet, Dearden and Burke, Ltd. ("KSD&B"), a law firm representing, SC-PA, SC-NJ, TSC, PRI, the Blaeuers, Martello, PRI, NEMCA, HCA and non-party Center City Medical Associations ("CCMA")[15]; and Burke, a KSD&B lawyer who worked for SC-PA, SC-NJ, TSC, PRI, the Blaeuers, Martello, PRI, NEMCA, HCA and CCMA. A non-party, Dr. Swartz, was a CCMA shareholder, who performed services for SC-PA and SC-NJ and was allegedly a "straw doctor" in PRI's incorporation.

First, the Court addressed Dr. Romy's claims, which included, among others, breach of fiduciary duty claims against KSD&B. The Court found he lacked standing because the harms alleged were to TSC, SC-PA and SC-NJ, not Romy personally. TSC, SC-PA and SC-NJ brought the same claims directly, and thus there was no basis for

[11]William and David Blaeuer alleged received improper payments from SC-PA and SC-NJ.
[12]Tindall allegedly received improper payments from SC-PA and SC-NJ.
[13]PMH allegedly received improper payments from SC-PA.
[14]Martello allegedly received improper payments from SC-PA.
[15]CCMA was managed by TSC and provided services to patients at SC-PA and SC-NJ.

Romy to assert a derivative claim under 15 Pa.C.S. § 1782(a) and Pa.R.C.P. 1506. Romy did not allege any facts showing that the law firm or Burke owed him any personal fiduciary duty. Any advice he sought was for the business entities, and they did not owe him a fiduciary duty "simply because he was the majority shareholder of their clients."

As stated, TSC, SC-PA and SC-NJ brought direct claims against the lawyers. Following Gorski v. Smith,[16] the Court stated that a client can maintain a breach of contract claim against its lawyer where it can set forth evidence of a breach of fiduciary duty. Herein, these Plaintiffs claimed that the lawyers engaged in impermissible conflicts of interest that were "inconsistent with the provision of services by the legal profession at large," which was sufficient to set out a breach of contract claim against counsel.

TSC, SC-PA, SC-NJ and ALC also brought breach of fiduciary duty claims against the Blaeuers and Tindall as officers, directors and employees. The Court stated that officers and directors has fiduciary duties as a matter of statutory mandate,[17] and employees had a fiduciary duty not to act against their principal's interests.[18] TSC, SC-PA and SC-NJ, though not ALC, were permitted to pursue fiduciary breaches where they claimed that these Defendants formed and worked for a competitor, PRI; misappropriated business plans and trade secrets; wrongfully obtained money in the form a misappropriated tax refund and unjustified checks drawn in their favor and for others; and by the unauthorized purchase of sports tickets. The Court generally described these breaches of fiduciary duty as "usurping assets."

[16] 812 A.2d 683 (Pa. Super. 2002) (appeal denied).
[17] 15 Pa.C.S. § 512.
[18] SHV Coal, Inc. v. Continental Grain Co., 376 Pa. Super. 241, 545 A.2d 917 (1988), rev'd on other grounds, 526 Pa. 489, 587 A.2d 702 (1991).

The fiduciary duty claims against Martello were rejected. He was alleged to be an ALC (TSC's parent) director, and the recipient of one of the improperly drawn checks from SC-PA's funds. This did not make out a breach of fiduciary duty claim for any of the Plaintiffs.

<u>December 28, 2004 Opinion – Romy II</u>

KSD&B and Burke brought a summary judgment motion to have the TSC, SC-PA and SC-NJ claims dismissed. These Plaintiffs claimed that the attorneys represented them, and then later represented the Blaeuers, Tindall and Martello in connection with setting up various other corporate Defendants to compete with these Plaintiffs. Among other claims, these Plaintiffs alleged breach of their fiduciary duty of undivided loyalty in light of the conflict of interest.

The Motion was denied. The Court observed that "'An attorney's representation of a subsequent client whose interests are materially adverse to a former client in a matter substantially related to matters in which he represented the former client constitutes an impermissible conflict of interest.'"[19] The burden is on the former client seeking damages for this type of conflict of interest to show that there was a prior attorney/client relationship; that it is adverse to the later representation of another client; that the subject matter of both relationships are substantially related; that the attorney "acquired knowledge of confidential information from or concerning the former client, actually or by operation of law"; and that this resulted in damages to the former client.[20]

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[19]<u>Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz</u>, 529 Pa. 241, 602 A.2d 1277, 1282-83 (1992).
[20]<u>In re Estate of Walter C. Pew</u>, 440 Pa. Super. 195, 655 A.2d 521, 545-6 (1994).

TSC, SC-PA and SC-NJ proffered sufficient evidence to support their breach of fiduciary duty claims: these attorneys represented them for approximately 5 years; the individual Defendants requested that these attorneys do work for the corporate Defendants; some of this work was "substantially similar to the work that they did for the plaintiffs"; the corporate Defendants were potential competitors; and the Plaintiffs have claimed that they were driven into liquidation by unfair competition from the corporate Defendants. Thus, it would be left to a jury to determine the facts.

January 20, 2005 Opinion – Romy III

The non-lawyer Defendants sought summary judgment on Plaintiffs claims, including claims for breach of fiduciary duty. Plaintiffs alleged that the individual Defendants (Martello, the Blaeuers and Tindall) improperly acted in setting up the various corporate competitor Defendants, while the individual Defendants were Plaintiffs' officers, directors and/or employees.

Martello was successful in showing that he owed no fiduciary duties to the remaining Plaintiffs.[21] He "was never formally appointed or hired as an officer, director, or employee" of these Plaintiffs. They argued, however, that he should be deemed to owe them fiduciary duties as a *de facto* corporate agent because he "exercised control over some or all of the Plaintiffs' activities…." The evidence offered was insufficient to defeat summary judgment.

These Plaintiffs claimed that Martello executed an insurance application as President of ALC; that ALC was TSC's parent; that he ordered Dodge vans on Defendant

[21]Martello's earlier Preliminary Objections were successful, but Plaintiffs were given leave to re-plead. The docket reflects an Amended Complaint was filed 19 days after the Court's May 2, 2003 Opinion and Order.

HCA's stationary; that SC-PA paid for the vans through a check signed by one of the Blaeuers and Tindall; that Defendant HCA, rather than SC-PA got the rebate check from Dodge; that the attorney Defendants wrote to Martello at Defendant HCA confirming they would represent HCA in connection with SC-PA and SC-PA would be and was billed for this HCA work; that Martello occasionally gave the attorneys direction to bill certain legal work to HCA; that he wrote a memo into HCA files about expanding certain TSC activities and in which there was an instruction from W. Blaeuer to review certain aspects of SC-PA's business; and that Blaeuer testified that "it would be incorrect to say that Martello was never involved in any management functions of the Spine Center."

The Court found that, at most, this might show a fiduciary relationship with HCA or possibly ALC; and that Martello may have acted as a consultant to one or more of the Plaintiffs. However, the evidence did not show that "Martello exercised the necessary control over Plaintiffs to sustain a claim for breach of fiduciary duty…."

The Plaintiffs had better success against the Blaeuers and Tindall. It was undisputed that they were officer, directors and employees; and that they owed fiduciary duties as such. These Defendants further conceded they were instrumental in setting up the corporate Defendant competitors. Plaintiffs claimed that these individual Defendants used their assets to enable the corporate Defendants to compete against Plaintiffs. The individual Defendants asserted that everything they did in establishing the other corporations was authorized by Plaintiffs and was even for Plaintiff's benefit. Clearly there remained a disputed issue of material fact that could only be decided at trial.

<u>Mogilyansky v. Sych</u>, June Term 2000, No. 3709, 2001 WL 1807820 (C.C.P. Phila. April 30, 2001) and **2002 WL 372950 (C.C.P. Phila February 4, 2002) (Herron, J.)** (No fiduciary relationship needed to establish right to accounting in instance of fraud; fiduciary duty owed by director wife, but not unaffiliated husband).
The first Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/mogily2.pdf, and the second Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/mogilan.pdf.

Plaintiff Mogilyansky brought numerous claims against Svetlana Sych and her husband. Mogilyansky and Sych were originally partners in a newspaper, Russian Market. Russian Market later incorporated as Russian Market, Inc. ("RMI"), in which both Plaintiff and Sych were officers and equal shareholders. RMI purchased the partnership's assets. Plaintiff alleged that the Sychs' diverted funds from the corporation for their private used, and that Svetlana eventually seized Plaintiff's assets and shut him out of the business, conspiring with her husband. He claimed, among other things, that Sych refused to deliver his shares of stock and to open the corporate records to him.

The Plaintiff sought, among other remedies, an equitable accounting and a constructive trust due to the Defendants' alleged unjust enrichment as a result of their alleged wrongful possession of the Plaintiff's shares in the company, other assets, and compensation. He brought these claims against both spouses. RMI was never listed as a plaintiff.[22]

Mr. Sych sought dismissal of the claims against him, as he was not a corporate officer or shareholder. The Court indicated in its April 30, 2001 Opinion that an equitable accounting can be permitted when a fiduciary duty exists. However, because an equitable accounting can also be permitted when the Plaintiff alleges fraud or misrepresentation, and the Plaintiff's Complaint did in fact allege "numerous fraudulent

[22]RMI was originally named as a Defendant in three counts, and another count asserted claims as a shareholders' derivative suit. All of these claims were voluntarily dismissed.

transactions," involving Mr. Sych as well as his wife, the Court was not required to perform an analysis regarding whether the Complaint set forth facts sufficient to establish a fiduciary relationship. The claim was allowed to proceed against both husband and wife.

In a second Opinion, the Court addressed a summary judgment motion seeking dismissal of a putative constructive trust claim seeking to enjoin the Sychs from taking further funds from RMI, appointing a trustee over RMI and a return of funds to RMI. Plaintiff claimed relief in both his and RMI's name, though as stated above, RMI was not a named plaintiff. Defendants' asserted this was simply an individual conversion claim or breach of fiduciary duty claim that had to be dismissed on statute of limitations grounds (two years); and Plaintiff said it should be treated as a derivative claim, which had a much longer statute of limitations period.

In the Court's February 4, 2002 Opinion, it refused to permit Plaintiff to proceed with a direct claim under the holdings in Baron and Levin, discussed in this section, above, as to when a shareholder in a close corporation may be deemed to have a direct claim, nor as a derivative claim. Thus, it was treated as a conversion claim and dismissed. In a footnote, the Court rejected the argument that it was a breach of fiduciary duty claim, since it was raised against both Sychs, and Mr. Sych had no fiduciary duty, although as an RMI director, Mrs. Sych owed fiduciary duties to the corporation, confirming that directors "stand in a fiduciary relation to the corporation."[23] Again, however, the Court did not find any justification that Mrs. Sych's spouse, otherwise

[23] 15 Pa.C.S. § 1712(a).

unaffiliated with the corporation, owed any fiduciary duties to the Plaintiff or to the corporation, and this did not recognize that the claim was pleaded as such.

<u>Fibonacci Group v. Finkelstein & Partners</u>, January Term 2005, No. 1399, 2005 WL 1620388 (C.C.P. Phila. June 30, 2005) (Abramson, J.) (employee owes a fiduciary relationship to his employer) and **2007 Phila. Ct. Com. Pl. LEXIS 23 (C.C.P. Phila. January 31, 2007)** (Abramson, J) (directors owe fiduciary duty to corporation). The first Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/050101399.pdf, and the second Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/050101399-013107.pdf.

Plaintiff Fibonacci Group ("Fibonacci") claimed the following. Fibonacci had developed certain litigation related computer services and programs. Defendant Altman was a majority shareholder and employee. Defendants Casey and Schrack were minority shareholders and employees, but there was a dispute of fact as to whether they were directors. These Defendants eventually began a relationship with Defendant law firm, and dealt with at least two of its lawyers. This relationship allegedly began they still were shareholders and employees of Fibonacci. These individuals were to perform similar services for the law firm as they had for Fibonacci. While still affiliated with Fibonacci, these individuals, working with the law firm, contacted Fibonacci clients about the move and drafted a public relations piece on the relationship between Fibonacci and the firm. Other allegations were made showing these individuals taking actions while still connected to Fibonacci, but allegedly working for the firm.

Fibonacci brought claims against the three former shareholder/employees, the two lawyers and the firm. Plaintiff alleged, among several other claims, that Defendants breached their fiduciary duties and/or aided and abetted the breach of fiduciary duties owed to the Plaintiff.

In its 2005, Opinion, the Court addressed in detail only one aspect of these fiduciary duty claims, and that was in the context of a negligence claim against Schrack. The Court sustained his preliminary objections to Plaintiff's negligence claim because it was simply repetitious of Fibonacci claims for breach of fiduciary duty. In so doing, the Court plainly overruled the preliminary objections for failure to plead a breach of fiduciary duty. The Court focused on Schrack's status as an employee, as set forth in Plaintiff's Complaint, as sufficient to establish the fiduciary relationship in which Schrack owed fiduciary duties to Plaintiff. Plaintiff alleged that Schrack had simultaneous employment with the competitor firm, served the law firm's interest while still in Fibonacci employ, transferred books and records to the firm, and traveled for the firm at Fibonacci expense.

In the 2007 Opinion, the Court addressed Defendants' summary judgment motions. The law firm and lawyers, competitors of Fibonacci, were found to owe it no fiduciary duty; having no special relationship or confidence reposed in them by Fibonacci. No fiduciary duty could arise between organizations that compete. The Court further held that there was no cause of action against the lawyers for aiding and abetting a breach of fiduciary duty.[24]

As to the other individual Defendants, the Court first found that Altman's director status created a fiduciary duty of good faith, even if he may have been otherwise able to take certain actions if he were a mere employee; and focused on his handing out the law

[24]But see Orianna Associates, LLC v. Transamerica Occidental Life Companies, August Term 2003, No. 2250, 2007 Phila. Ct. Com. Pl. LEXIS 158 (C.C.P. Phila. May 29, 2007) and Lichtman v. Taufer, March Term, 2004, No. 5560, 2004 Phila. Ct. Com. Pl. LEXIS 68 (C.C.P. Phila. July 13, 2004), summarized below. Aiding and abetting claims are discussed generally at greater length under the Orianna Associates summary.

firm's business card while attending a conference for Fibonacci. As to the other two, a dispute of fact remained as to whether they were directors, which had to be decided at trial.

Age Institute Holdings v. KPMG, LLP., May Term 2002, No. 4028, 2003 Phila. Ct. Com. Pl. LEXIS 5 (C.C.P. Phila. June 13, 2003) (Sheppard, J.) (Court permits third party claims against director by a non-shareholder defendant in an action initiated by the corporation against that defendant).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/age-inst.pdf.

A corporation brought a claim against KPMG, which brought a third party claim against three of Plaintiff's corporate directors for indemnification and contribution, fundamentally on the basis of a breach of fiduciary duty to the corporation. The directors claimed that the non-shareholder Defendant lacked standing to assert such a claim, which was in fact a derivative claim. The Court permitted the claim to proceed, finding that the director Defendants citation to authority did "not address the issue of whether a non-shareholder defendant may join a breach of fiduciary duty claim against an additional defendant director" (emphasis in original); having only addressed the "procedural scenario where a plaintiff sues a defendant director for breach of fiduciary duty." Thus, "in view of the liberal standard for determining preliminary objections, and based on Pa. R. Civ. P. 2252(a), pursuant to which a defendant may join an additional defendant who may be liable to that defendant on a cause of action arising out of the transaction or occurrence upon which the plaintiff's cause of action is based" the court permitted this claim for indemnity and contribution to proceed.

Del Borrello v. Del Borrello, 62 Pa. D.&C. 4th 417 (C.C.P. Phila. August 28, 2001) (Herron, J.) (court adopts reasonable expectation test for determining oppression of minority shareholder).

In this case, the Court gives a lengthy analysis of the reasonable expectation test for determining oppressive conduct against non-controlling shareholders in a close corporation. In this case, a ¼ shareholder in a close corporation alleged various action by the other three shareholders to freeze him out of any say in the corporation. He brought claims for oppression and breach of fiduciary duty, seeking the appointment of a custodian.

The Court focused considerable attention on interpreting the meaning and application of the reasonable expectations test to determine if there was oppressive conduct. In looking to non-Pennsylvania law for guidance, the Court came to focus on New Jersey law, with the distinction that Pennsylvania law requires that actionable relief for illegal or fraudulent requires that such conduct be specifically directed at the minority shareholder; and not at third parties. The fraudulent and illegal conduct alleged did not meet that standard in this case, as it was not directed at Plaintiff. However, not all of the shareholder's claims fell into that category, and the allegations of conduct directed at the Plaintiff minority shareholder were sufficient to allow the remaining claims to proceed, including a claim for breach of fiduciary duty.

In that regard, the Court had looked to scholarly as well as legal authority on issues evidencing an overlap between oppressive conduct and conduct breaching fiduciary duties, which we quote at length:

> "A person acquiring a substantial interest in a close corporation often invests a large percentage of his personal resources to acquire that interest. Typically, he enters the corporation expecting to participate actively in the

corporation's affairs as a key employee and perhaps as a director and principal officer. He may give up other employment with accumulated seniority and security features to work full-time for the corporation. He may have no income other than his salary. As a close corporation usually does not pay dividends or pays only small and infrequent dividends, a shareholder who is excluded from employment is effectively denied anything more than a token return on his investment, even though the investment may be substantial. Therefore, discharge of the shareholder-employee often produces an immediate financial crisis for him. He is forthwith deprived of his sole source of income; the majority shareholders, in order to make the squeeze more effective, may cause the corporation to cancel its insurance policies on him and may try to deprive him of every economic benefit he derives from the corporation so that he may even find himself without life, accident, hospitalization or health insurance or the prospect of income when he reaches retirement age." F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 Clev. St. L. Rev. 121, 126-27 (1986/1987). See also, Thompson, 38 Bus. Law. at 701 ("shareholders in a close corporation usually expect employment and a meaningful role in management, as well as a return on the money paid for the shares"); Adam Chernichaw, *Oppressed Shareholders in Close Corporations: A Market-Oriented Statutory Remedy*, 16 Cardozo L. Rev. 501, 507 (1994) ("investors in close corporations usually expect employment, a return on their capital, and a 'meaningful role in management' "). Cf. Orchard v. Coveli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984) (the fiduciary duty owed a minority shareholder may be breached by "restricting or precluding employment in the corporation. . . and excluding the minority from a meaningful role in the corporate decision-making"); Douglas K. Moll, *Shareholder Oppression v. Employment at Will in the Close Cooperation: The Investment Model Solution*, 1999 U. Ill. L. Rev. 517 (1999) (reconciling at will employment law with a close corporation shareholder's reasonable expectations by positing that an expectation of employment may be part of a shareholder's investment).

Experts similarly have concluded that cutting off a minority shareholder's access to corporate information may constitute oppression:

"An attempt to squeeze out a minority shareholder often includes deliberate withholding of information from the

> shareholder. The chance of a squeeze technique succeeding is usually improved if the squeeze remains in the dark about the affairs of the corporation and the actions of its directors and officers. The type of information withheld varies with the squeeze techniques being employed, but most commonly concerns the value of the enterprise and of an interest in it, the corporation's prospects for profitable operations in the future, the controlling shareholders' plans for the business, and any plans they may have for disposing of their interests in it. Since the public reporting and disclosure requirements of the federal securities law do not apply to close corporations, shareholders in a close corporation do not have access to sources of information available to securities holders in a public-issue corporation." O'Neal, 35 Clev. St. L. Rev. at 130. See also, *Leech v. Leech*, [762 A.2d 718, 720 (Pa. Super. 2000)] (holding that, in certain situations, it is oppressive for majority shareholders "to parse out the information or documents that the duly elected and constituted secretary/treasurer has access to"); Miller, *Note*, 12 J.L. & Com. at 81 (arguing that "withholding information relevant to the operation of the corporation as to important corporate matters" would indicate the existence of oppressive conduct). Cf. *Orchard*, 590 F. Supp. at 1557 (tactics employed against a minority shareholder to effect a squeeze out and thus breaching the fiduciary duty owed such a shareholder may include "withholding information relating to the operation of the corporation"); Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 Wash. U. L.Q. 1099, 1115 (1999) ("denying the minority access to corporate information [has] contributed to findings of breach of fiduciary duty in the close corporation context").[25]

Jewelcor Mgmt. v. Thistle Group Holdings, Co., 2002 Phila. Ct. Com. Pl. LEXIS 79 (C.C.P. Phila. March 26, 2002) (Herron, J.) (change in voting date could be a breach of fiduciary duty to shareholders).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/jewel3.pdf.

In this case, Plaintiff shareholder brought a petition to enjoin Defendant and its directors from changing the date of the annual shareholders' meeting. In looking at

[25]In Adler v. Tauberg, 881 A.2d 1267 (Pa. Super. 2005), the Superior Court cited and quoted from Del Borrello with approbation: "While little Pennsylvania case law exists addressing the matter of the appointment of counsel, an informative analysis has been provided by a case from the Court of Common Pleas of Philadelphia County."

Delaware and Pennsylvania case law, the Court stated: "It appears from these cases that HN6 tinkering with corporate elections to interfere with shareholders' electoral rights violates a director's fiduciary duty to shareholders and is enjoinable." The Court found that the date change was intentional, improper and infringed on the shareholders' voting rights, and restored the original date.

PARTNERSHIP CASES

Wurtzel v. Park Towne Place, June Term 2001, No. 3511, (C.C.P. Phila. September 11, 2001) (Herron, J.) (fiduciary duty is breached when general partners misinform limited partners in merger). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/wurtz831.pdf.

Wurtzel v. Park Towne Place, June Term 2001, No. 3511, (C.C.P. Phila. January 11, 2002) (Herron, J.) (fiduciary duty not breached when full disclosure of material facts made in connection with tender offer). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/wurtz02.pdf.

Wurtzel v. Park Towne Place, June Term 2001, No. 3511, (C.C.P. Phila. November 5, 2002) (Herron, J.) (limited partner class certified on breach of fiduciary duty claims and fraud claims where fiduciary duty owed to plaintiffs). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/wurt02.pdf.

September 11, 2001 Opinion – Wurtzel I

Plaintiff, Alan Wurtzel ("Wurtzel") is a limited partner in defendant Park Towne Place Associates Limited Partnership (the "Partnership"). The Partnership, a Delaware limited partnership, owns an apartment complex in Philadelphia. Its sole general partner is Defendant PTP Properties, Inc. ("PTP"), a Delaware corporation. In 1999, PTP became a wholly owned subsidiary of Defendant AIMCO Properties, L.P. ("AIMCO"), a Delaware limited partnership. AIMCO also controls the property manager.

The Partnership sold 380 limited partnership units for prices ranging between $75,000 to $100,000 each. Wurtzel purchased one out of 380 limited partnership units for $100,000. In 1986, a Partnership Agreement had been entered between the original general partner and limited partner, to be governed by Delaware law. The agreement specifically provided that the general partner had a fiduciary obligation to the Partnership and the limited partners. In 1996, the Partnership Agreement was amended to require both (1) the general partner's consent and (2) the consent of two-thirds of the limited partners for any action "[c]ausing the Partnership to consolidate, merge or enter into any form of consolidation with or into any other entity or to convey, transfer, or lease its assets substantially as an entirely to any person or entity except to a bona fide purchaser for cash consideration."

This agreement is the issue before the Court. From March 1999 until February 2001, multiple offers were made to buy partnership units. AIMCO was one of two offerors. In response to a March 1999 offer of $5,000 per unit, AIMCO offered a little over $8,000 unit, which included a stated that PTP considered this a fair price. A year later, in response to a $12,000 offer per unit, AIMCO offered $45,533, again including a statement that PTP thought that price fair. Nine months later AIMCO offered over $66,000 per unit, with PTP once again stating that price was fair. By May 29, 2001, AIMCO owned 58.14% of the limited partnership units.

On or about that same date, the Partnership announced its merger with Park Towne Place Transitory Company ("TC"), an entity wholly owned by AIMCO. The merger was to occur on June 29, 2001. This merger would force minority limited partners to give up their interests in exchange for $81,422 in cash or, alternatively, 1776 AIMCO partnership units. Any limited partner who failed to make an election between cash and AIMCO units would receive cash. The Partnership took the position that because AIMCO held 58.14% of the units, no other unit owner approval was required. AIMCO and PTP both consented to the merger offer and believed it to be fair.

Wurtzel filed a class action complaint on June 28, 2001 against PTP, the Partnership and AIMCO, alleging, among other things, breach of fiduciary duty. He also sought a temporary restraining order and preliminary injunction against the Defendants. The Court granted a TRO on June 29, 2001, barring the merger. The instant Opinion addressed Wurtzel petition for a preliminary injunction.

In addressing the preliminary injunction, a Court must determine whether or not the petitioner's right to relief is clear. It was in this context that the Court addressed fiduciary duties issues between PTP as general partner, and the unit owners as limited partners.

Wurtzel claimed that he and other limited partners had a clear right to relief because a supermajority of the partners did not agree to the merger. The Defendants' argued that the supermajority clause did not apply because the merger is a sale or transfer to a bona fide purchaser for cash consideration. The Court disagreed. The contractual language at issue addressed two classes of transactions: (1) mergers and consolidations, and (2) conveyances, transfers, and leases of assets. It determined that the only reasonable reading of the bona fide purchaser exception was that it solely applied to conveyances, transfers, and leases of assets; and not to mergers and consolidations. Thus, a partnership cannot "consolidate, merge, or enter into any form of consolidation… to a bona fide purchaser."

PTP argued that since AIMCO owned a majority of the units, they could eliminate the supermajority requirement in order to carry out the merger. Applying Delaware law, the Court disagreed. The agreement stated that Delaware law controlled its construction and enforcement. Delaware Corporation Code § 242(b)(4), which codified the common law, requires a supermajority vote to amend a supermajority provision in a corporate charter. The Court predicted that Delaware courts would apply this principle to a supermajority provision in a limited partnership as well. With 58% of the units, AIMCO did not hold a supermajority vote and so by itself could not eliminate the two-thirds requirement.

The Court further found that PTP breached its fiduciary duty of full and fair disclosure to the unit owners by informing them that AIMCO and PTP could approve the merger. The Court stated that corporate directors owe a duty to their shareholders to disclose fully all facts material to the transaction in an atmosphere of fairness. Smith v. Van Gorkom[26]; Eisenburg v. Chicago Milwaukee Corp.[27] A fact is material if there is a "substantial likelihood that under all circumstances, the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder." PTP failed to fully and fairly disclose to the limited partners that they could vote on the merger. These fiduciary duty principles apply to the relationship between a general partner and limited partner(s) as well.[28] The duty of a general partner to limited partner(s) is also codified.[29]

The Court found that Wurtzel had a clear right to relief, and met each of the other criteria for obtaining injunctive relief, and entered an order enjoining AIMCO from proceeding with the merger, and from purchasing more limited partnership units. It reasoned that allowing the merger to take place would deprive Wurtzel and the other minority limited partners of their right to approve or disapprove the merger; a harm that

[26] 488 A2d 858, 890 (Del. 1985).
[27] 537 A.2d 1051, 1057 (Del Ch. 1987).
[28] Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc., 1996 WL 506906, at *12 (Del.Ch.), aff'd, 692 A.2d 411 (Del. 1997); Litman v. Prudential-Bache Properties, Inc., 611 A.2d 12, 15 (Del.Ch. 1992).
[29] 6 Del C. § 17-1101(d).

is imminent and not reparable by damages. Further, greater injury would occur from refusing the injunction than from granting it.

As will be set forth immediately below, this litigation did not end here.

January 11, 2002 Opinion – Wurtzel II

After the foregoing preliminary injunction was granted putting a halt to the merger and further unit purchases, Defendants filed a Motion for Clarification specifically seeking to link the prohibition on unit purchases to unit purchases made in connection with the original merger plan. Defendants informed the Court that: the merger plan had been abandoned, the unit owners were put on notice of this fact, no future merger or sale involving the Partnership would occur while the case was pending and there would be no future reliance on a previously used appraisal. The Court clarified its order to limit it to purchases in connection with the original merger plan; thus limiting the complete prohibition on purchasing units. The Court explained that an injunction was necessary to prevent irreparable harm in unit owners losing their voting rights in connection with a merger. Thus, the original order should have been tailored to protect that interest and no more.

On November 2, 2001, AIMCO presented its tender offer to the unit owners pursuant to a private placement memorandum that made extensive disclosures concerning, among other things, the earlier merger effort and the preliminary injunction issued in Wurtzel I; its desire to make a profit; its affiliation with PTP, and PTP's substantial conflict of interest along with AIMCO's conflict with the unit owners who would like to sell for higher prices whereas AIMCO wanted to make a profit; and the earlier appraisals. Wurtzel sought to enjoin this tender offer. The Court denied the injunction because, among other reasons, there was no clear right to relief.

Under Delaware law, a corporate director or majority shareholder owes a fiduciary duty of full disclosure of material facts in "an atmosphere of entire candor" to the shareholders, citing Eisenberg, supra; and stating that similar standards govern the relationship of general partners to limited partners.[30] In the context of a tender offer, which is deemed voluntary absent evidence of a material non-disclosure or coercive terms, a general partner has no fiduciary duty to offer a fair price so long as coercion is absent and full disclosure is made. In the context of a preliminary objection, which may differ from trial on the merits, the burden falls on the limited partner to establish a clear right to relief on the basis that the general partner has breached its fiduciary duty of disclosure of material facts. However, where the sole source of the disclosures to the limited partners originates with the fiduciary holding a conflict of interest, the courts will examine the disclosure with more exacting scrutiny in light of the fiduciary obligation of entire candor.

The parties focused on the private placement memorandum as to this duty of disclosure, Wurtzel arguing that it was misleading or incomplete in a number of different material areas. The Court found that there were no material non-disclosures or misleading representations that would lead to a violation of the general partner's fiduciary duty.

Among the issues raised was that Defendants used the same appraisal that had been used in the merger; an appraisal as to which the Court had been critical. However,

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[30]In re Marriott Hotel Properties II Limited Partnership Unitholders Litigation, 2000 Del. Ch. LEXIS 17, 2000 WL 128875, *10 (Del. Ch. 2000).

the private placement memorandum addressed the Court's criticisms and other potential flaws with the appraisal, in a seller's eyes; and the Court found that there was adequate disclosure of material facts such that the voluntary nature of the tender offer remained in tact n the Court's eyes and no fiduciary duty had been breached. As stated above, under these circumstances, there is no fiduciary duty to give a fair price. The Court also rejected the argument that the private placement memorandum failed to adequately disavow the appraisal in the prior merger documents, but this argument was rejected as well. The Court also rejected the notions that the private placement memorandum hid AIMCO's profit motive; and that disclosing what the effect of a successful tender offer would be was the equivalent of threatening had no choice but to sell. As to the claim that a fair price was not offered, this was a matter for address by a money damages claim, not a preliminary injunction. Finally, the Court rejected the argument that there was a breach of fiduciary duty in failing to include a recommendation against the tender offer in the private placement memorandum, in light of the disclosures actually made.

<u>November 5, 2002 Opinion – Wurtzel III</u>

This third Opinion addressed a motion for class certification of those owning units up to May 29, 2001. The allegations focused on the three tender offers purportedly being part of an effort to buy units at below market values, and then freeze out non-selling limited partners at a price beneath market value via the merger.

As set out above, the original unit purchases were in the $75,000 to $100,000 range, but the first tender offer was a little over $8,000. Wurtzel averred that Defendants did not reveal that they intended to increase the tender offer prices over relatively short time periods thereafter. In each instance, PTP and AIMCO purported the prices to be fair.

Further, Wurtzel averred that after promising not to raise general partner and manager's fee structure, a $1,000,000 increase in annual fees occurred as of January 2000. The general partner and management company were under AIMCO's control. Thus, AIMCO was allegedly scheming to both obtain the units at low values and to increase the fees. Wurtzel claimed that the alleged scheme breached the partnership agreement, were breaches of fiduciary duty – both as a direct action by the unit owners, and a derivative against PTP and AIMCO -- and were fraudulent. The Court certified a class action on all of these claims.

The Partnership agreement placed a mandatory obligation on the general partner to act in a fiduciary manner toward the Partnership and the limited partners "at all times." Among other things, Wurtzel claimed that the below market prices AIMCO paid for the 58.14% of the units was a common scheme that hurt both the unit sellers (who were underpaid) and the non-sellers who were deprived of their voting rights. The May 29, 2001 tender offer documents similarly were misleading in connection with voting rights. The Court had little trouble finding commonality on the breach of contract and fiduciary duty claims.

The fraud claims were the subject of greater analysis because of the usual assertion that fraud claims are unsuitable for class certification in light of the unique nature of the reliance element in fraud claims. After a choice of law analysis, the Court looked to Pennsylvania law. In that context, the presence of a fiduciary relationship eases the standards for establishing that fraud claims are appropriate for class certification. Thus, "where a defendant is bound by fiduciary duties 'reliance by the class plaintiffs is implicit and is established by operation of law as to all matters within the scope of the agency.'"[31] The Court stated that partners owed each other fiduciary duties, that these duties arise from the partnership agreement and that "the Pennsylvania Supreme Court has evinced a special concern for providing a remedy for fraud among partners by easing the standards for establishing fraud."[32] In such a case, favorable inferences and presumptions are to be drawn in favor of the partner claiming fraud. The Court concluded that the Supreme Court's decision that a partner claiming fraud was entitled to favorable inferences because of the fiduciary relationship, and the Superior Court's statement that the presence of a fiduciary duty operates to create reliance as a matter of law were analogous.

Poeta v. Jaffe, November Term 2000, No. 1357, 51 Pa. D. & C.4th 78 (C.C.P. Phila. May 30, 2001) (Sheppard, J.) and **53 Pa. D. & C.4th 225 (C.C.P. Phila. October 2, 2001) (Sheppard, J.)** (Partners owe fiduciary duties to each other during the life of the partnership, including wind-up and dissolution). The May 30, 2001 Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/poeta-op.pdf and the October 2, 2001 Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/poeta102-op.pdf.

In Poeta v. Jaffe, the Court affirmed that partners owe fiduciary duties to each other, including the duty to act in good faith during the life of the partnership. This includes winding up, through the partnership's dissolution and termination. However, partners generally do not owe such a duty to "partners who withdraw prior to a partnership's dissolution." Applying these principles, the Court overruled the Defendant's preliminary objections, holding that the Plaintiffs could proceed because

[31] Basile v. H & R. Block, Inc., 729 A.2d 574, 584 (Pa. Super. 1999), vacated on other grounds, Basile v. H & R. Block, Inc., 563 Pa. 359, 761 A.2d 1115 (2000).
[32] Clement v. Clement, 436 Pa. 466, 260 A.2d 728, 729 (1970) ("There is a fiduciary relationship between partners. *Where such a relationship exists, actual fraud need not be shown.* . . . . It would be unduly harsh to require that one must prove actual fraud before he can recover for a partner's derelictions. Where one partner has so dealt with the partnership as to raise the probability of wrongdoing, it ought to be his responsibility to negate that inference.") (emphasis in original).

they pleaded claims for breaches of fiduciary duties that arose during the time in which the parties were partners.

LLC CASES

Consolidated actions Harbor Hospital Services, Inc. v. GEM Laundry Services, L.L.C., July Term 2000, No. 4830, Harbor Hospital Services, Inc. v. GEM Laundry Services, L.L.C., August Term 2000, No. 207, 2001 WL 1808556 (C.C.P. Phila. July 18, 2001) (Sheppard, J.) (Members of a limited liability company owe fiduciary duties to each other). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/harbo-op.pdf.

In these consolidated cases, the Court addressed for the first time in Pennsylvania the issue of whether limited liability company members can hold each other liable for breaches of fiduciary duty. The Court focused on the relevant provisions of Pennsylvania's Limited Liability Company Law of 1994, and determined that it was authorized to review general principles of partnership and/or corporate law to determine whether an LLC's members owe fiduciary duties to each other. The Court found that Pennsylvania's Uniform Partnership Act, including the rule, albeit with limits, stated in Clement v. Clement that "partners stand in a fiduciary relationship to each other,"[33] applies to limited liability companies via 15 Pa.C.S.A. § 8311(b). The Court also determined that, because the operating agreement in this case vested the LLC's management in its members, the Court should treat the members like partners; thus, each had standing to bring breach of fiduciary duty claims against the other members.

[33] 260 A.2d 728, 729 (1970).

CONDOMIUM CASES

Greencort Condominium Association v. Greencort Partners, January Term 2004, No. 4045 (C.C.P. Phila. Oct. 4, 2005) (Abramson J.) (condominium developer's fiduciary only attaches where ownership in common elements vests in unit owners). This Opinions is *available at* http://courts.phila.gov/pdf/cpcvcomprg/040104045-100405.pdf.

The Greencort Condominium Association (the "Association") brought claims against the partnership that developed and sold units in the Greencort Condominium ("Greencort Partners"). The Court applied the Uniform Condominium Act (the "UCA") to the Condominium's Declaration and By-Laws, which were drafted before 1993 when the UCA was amended; and applied the amendments to all alleged acts occurring after that time. The Court addressed the issue of determining when the fiduciary relationship arises between the developer on the one hand and the Association and prospective unit purchasers on the other.

Greencort Partners filed the Declaration of Condominium in December 1986. Greencort Partners issued the Public Offering Statement in October 2003. Greencort Partners rented units prior to that time. The Association asserted that the partnership's fiduciary duties as declarant arose in December 1986. The Court found that the fiduciary relationship only began, however, when Greencort Partners issued the Public Offering Statement in October 2000. Therefore, it dismissed the Association's fiduciary duty claims that were based upon conduct prior to that time.

Among other things, the Court looked to UCA section 101, which provided that: "Real Estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners." As landlords leasing units, the ownership of both the units and common elements remained vested in Greencort Partners until issuing the Public Offering Statement. It was at that point that Greencort Partners took the steps that would allow ownership interests to vest in the unit purchasers. Thus, by itself, filing the Declaration of Condominium did not create a condominium, and no fiduciary duties arose towards the prospective condominium unit owners.

EMPLOYER/EMPLOYEE, INDEPENDENT CONTRACTOR, AGENT, SERVICE PROVIDER CASES

Goldstein & Co., P.C. v. Goldstein, January Term 2001, No. 3343 (C.C.P. Phila. June 14, 2001) (Herron, J.) (a non-compete agreement creates a fiduciary duty to employer). This Opinion is, available at http://fjd.phila.gov/pdf/cpcvcomprg/gold601.pdf.

The case involves two unrelated Goldsteins. In 1983, Jerry E. Goldstein, C.P.A. ("Jerry") created J. Goldstein and Company (Plaintiff). He owned all of its issued and outstanding shares of stock. Plaintiff hired Joel Goldstein ("Joel") in 1990 as an accountant, though Joel had little prior accounting experience. Jerry took Joel under his wing and Joel eventually passed the CPA exam in 1993. Four months late, Joel was issued one share of Plaintiff's stock. Around this time, Plaintiff and Joel allegedly entered into an agreement ("Agreement") whereby Joel would solicit clients for Plaintiff. In return, Joel would be paid 50% of the gross revenue collected from these clients, in addition to his base salary.

In November 2000, Joel secretly formed Joel D. Goldstein, C.P.A., P.C. ("the Firm") and allegedly began luring away Plaintiff's clients. Joel allegedly copied Plaintiff's files relating to particular clients, as well as Plaintiff's entire customer list. He used Plaintiff's tax preparation software for work at his Firm. On December 13, 2000, Joel informed Jerry that he was terminating his employment with Plaintiff. Joel's last day was December 22, 2000. Jerry discovered Joel's activities and filed a complaint against Joel, claiming, among other things, breach of fiduciary duty.

Under Pennsylvania law, "an agent is subject to a duty not to compete with the principal concerning the subject matter of the agency" unless otherwise agreed.[34] "To permit [an agent] to be placed in a position where he inevitably must be subjected to the demands of conflicting duties is not only harmful to the business in which he is engaged, but also against sound morals and public policy."[35] This relationship between agent and principal has been described as being fiduciary in nature.

Joel argued that his ownership of one share of stock did not create a fiduciary duty. However, even if true, simply being employed by Plaintiff gave rise to a separate and distinct duty. Thus, the preliminary objections to Plaintiff's breach of fiduciary duty claim are overruled.

MRED General Partner, LLC v. Tower Economics Co., November Term 2004, No. 2531, 2005 WL 957707 (C.C.P. Phila. April 12, 2005) (Abramson, J.) (no fiduciary duty owed by professional services vendor to customer, even though it possessed superior skill and expertise).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/041102531.pdf.

In MRED General Partner, LLC v. Tower Economics Co., the Court sustained Defendants' preliminary objections to Plaintiff's breach of fiduciary duty claim. The Court agreed that Plaintiff's complaint failed to allege facts sufficient to establish a fiduciary relationship that would give rise to a fiduciary duty owed by the Defendant.

MRED General Partner, LLC ("MRED") entered an Exclusive Agreement with Tower Economics Co. ("Tower"). MRED alleged that Tower was an independent contractor engaged to provide its "skill and expertise in the area of cellular towers." The

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[34] East & W. Coast Serv. Corp. v. Papahagis, 344 Pa. 183, 186, 25 A.2d 339, 340 (1942)(quoting Restatement of Agency §393). See also Levy & Surrick v. Surrick, 362 Pa. Super. 510, 513-14, 524 A.2d 993, 994 (1987) (quoting Restatement (Second) of Agency §393 for the proposition that an agent "is subject to a duty not to compete with the principal concerning the subject matter of his agency").
[35] Onorato v. Wissahickon Park, Inc., 430 Pa. 416, 423, 244 A.2d 22, 26 (1968).

complaint alleged facts showing that the parties were not dealing on equal terms, and that MRED relied on and trusted Tower in its position as advisor and counselor. The Court determined, however, that these facts alone were insufficient as a matter of law to establish the "special relationship" necessary to create to a fiduciary duty.

The Court acknowledged that MRED may have relied on Tower's "superior skill or expertise," but stated that most commercial contracts governing professional services involve one party relying on the superior expertise of the other; and that this reliance alone does not give rise to a confidential relationship. The Court then pointed out that a fiduciary relationship exists only when it "goes beyond mere reliance on superior skill" and instead becomes a relationship involving one party's "overmastering influence," or "weakness, dependence, or trust, justifiably reposed" in the other.[36] The Court further stated that a confidential relationship exists where there is a large disparity in the parties' positions, and the inferior party places complete trust in the superior party.

In order to establish a fiduciary relationship, the complaint must allege facts showing such weakness, trust, dependence, inferiority or disparity in position among the parties; and that the superior party had ample opportunity to abuse its power. Facts showing mere reliance by one party on the professional skills and/or expertise of another do not meet these requirements.

The Court also found that, although agency relationships give rise to fiduciary duties, MRED's agency claim was legally insufficient. Tower was unable to "bind [MRED] or alter [MRED's] legal relations," which power is a critical element of an

[36] eToll, Inc. v. Elias/Savion Adver. Inc., 811 A.2d 10, 23 (Pa. Super. 2002).

agency relationship. In fact, MRED asserted that no such right existed in the parties' contract. Accordingly, the Court dismissed MRED's claim for breach of fiduciary duty.

<u>Babiarz v. Bell Atlantic-Pennsylvania, Inc.</u>, August Term 2000, No. 1863, 2001 Phila. Ct. Com. Pl. LEXIS 94 (C.C.P. Phila. July 10, 2001) (Herron, J.) (fiduciary duty owed by employer to employee in connection with employee's intellectual property interest in a marketing plan submitted by employee to employer).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/babiarz2.pdf.

In <u>Barbiarz v. Bell Atlantic-Pennsylvania, Inc.</u>, the Court determined that the Plaintiff met Pennsylvania's pleading requirements by alleging facts sufficient to set out the existence of a fiduciary relationship between an employer and employee. Barbiarz was employed by Bell Atlantic-Pennsylvania, Inc. ("BA-PA"). BA-PA was allegedly controlled by Bell Atlantic Corp. ("Bell"). The fiduciary duty claims were asserted against BA-PA and/or Bell.

Babiarz alleged that BA-PA solicited "innovative ideas" from its employees. Babiarz, a service technician, had developed a marketing and technical plan. He only revealed his plan to his immediate BA-PA supervisor after being assured that Babiarz would be recognized as the creator, and that his idea would be protected. With this understanding, and the further understanding that he would be compensated, Babiarz presented his ideas to other BA-PA management personnel. Babiarz alleged that BA-PA informed Bell and another Bell entity of Babiarz plan; attributing its creation to a BA-PA management level employee. Babiarz claimed that he was not compensated for their eventual appropriation and commercial use of his ideas; not given credit for his creation; and that BA-PA failed to keep his idea confidential.

The Court reviewed the standards for determining the existence of a confidential relationship, as set forth in Basile v. H. & R. Block, Inc.,[37] and agreed that Barbiarz allegations were sufficient to establish a confidential relationship between him and his employer. The Court highlighted the allegations that Barbiarz trusted his employer to maintain the confidentiality of his submitted marketing plan, and his belief "that his idea would be protected and he would receive recognition."

The Court also stated that the superior party in a fiduciary relationship must "act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage."[38] The Court then reviewed the pleaded facts alleging that the Defendants acted to serve their own interests over those of Barbiarz with respect to the marketing plan. This resulted in the Defendants allegedly deriving millions of dollars in profits from the use of the marketing plan, to Barbiarz's detriment. The Court overruled the Defendants' demurrer to Plaintiff's breach of fiduciary duty claim, stating that the pleaded factual allegations were sufficient to set forth a claim that BA-PA and/or Bell owed Plaintiff a fiduciary duty, and that Plaintiff could proceed with his claim for a breach thereof. The Court noted that normally, the fiduciary duty runs from employee to employer, but that "it is not clear that an employer can never owe a confidential or fiduciary duty to his employee if the circumstances warrant such a finding." The Court added that Babiarz would "have to adduce clear and precise evidence to maintain his claim and prove the existence of a fiduciary relationship."

[37]777 A.2d 95, 101 (Pa. Super. 2001) (appeal denied).
[38]Id.

Further, the Court cited to the presence of a fiduciary duty in overruling preliminary objections to Babiarz constructive trust claim; permitted an accounting claim to stand, in part, because the fiduciary duty claim was not dismissed; and likewise did so for the civil conspiracy claim.

However, the Court reconsidered its decision in light of the subsequent production of an executed and unambiguous contract governing Babiarz idea.[39] As the primary basis for overruling Defendants' original preliminary objections was the absence of such an unambiguously binding agreement, its belated revelation caused the Court dismiss all claims. The fiduciary duty claim could not survive because the contract stated that the idea belong to Bell Atlantic, thus undermining the allegation that Babiarz had only revealed his idea in confidence.[40]

Thomas Jefferson Univ. v. Wapner, June Term 2001, No. 2507, 2004 WL 24740981 (C.C.P. Phila. October 22, 2004) (Jones, J.), aff'd, 903 A.2d 564 (Pa. Super. 2006) (no breach of fiduciary duty by doctors toward hospital).[41]
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/010602507.pdf.

In denying Plaintiffs' post-trial motion for a judgment notwithstanding the verdict, the Court in Thomas Jefferson Univ. v. Wapner reviewed the evidence in light of the jury instructions given by the trial court on the duty of loyalty claims to determine if

[39] Babiarz v. Bell Atlantic-Pennsylvania, Inc., August Term 2000, No. 1863, 2001 Phila. Ct. Com. Pl. LEXIS 93 (C.C.P. Phila. Nov. 20, 2001) (Herron, J.). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/babiarz3.pdf.

[40] The Commerce Court has subsequently cited to Judge Herron's original July 2001 opinion, despite the later reconsideration. See, e.g., Temple University Health System, Inc. v. National Union Fire Insurance Company of Pittsburg, PA, February Term 2004, No. 1547, 2005 WL 167583 (C.C.P. Phila. January 7, 2005) (Jones, J.), aff'd in part, rev'd in part, 898 A.2d 1143 (Pa. Super. Mar. 30, 2006) (w/o opinion) ("Normally, it is the agent or the employee who owes the fiduciary duty to his principal or employer, and not the other way around.")

[41] For purposes of appeal, the Commerce Court issued an Opinion incorporating its 2004 Opinion, Thomas Jefferson Univ. v. Wapner, June Term 2001, No. 2507, 2005 Phila. Ct. Com. Pl. LEXIS 48 (C.C.P. Phila. Feb. 1, 2005) (Jones, J.).

the jury's verdict was "against the weight of the evidence" and "such that no two minds could reasonably disagree."[42]

Thomas Jefferson University ("TJU") brought claims against two doctors, including claims for breach of the duty of loyalty. The doctors successfully defended these claims before a jury and TJU filed a motion for JNOV or a new trial on these claims, among others. The initial issues were whether the Court had failed to issue a binding jury instruction on the duty of loyalty claims which would preserve the JNOV motion, and whether TJU has properly preserved any exceptions or objections to the jury instructions given. The Court found that there was no basis to give a binding instruction as there were issues of fact and so that motion was not preserved, and TJU has not preserved its objections to the jury instructions given; but rather acquiesced in the instruction actually given.

The Court also found that TJU was not entitled to a JNOV on the actual instruction given, which stated:

> An employee owes a duty of loyalty to his or her employer during his or her employment. This duty requires that the employees act in good faith in the furtherance and advancement of the interests of his or her employer while employed. And prohibits an employee from acting or agreeing to act for persons whose interest conflict with those of his or her employer. This duty does not, however, continue after the employee resigns.
>
> To recover on these claims the plaintiffs must establish by a preponderance of the evidence that defendants failed to act in good faith in the furtherance and advancement of the interest of the plaintiffs prior to resigning their employment.

[42] Moure v. Raeuchle, 529 Pa. 394, 604 A.2d 1003 (1992) (setting out standard for review on a motion for a judgment notwithstanding the verdict).

The issue for the jury was whether the two doctors acted "good faith in further and advancement of [their employer] TJU prior to resigning their employment." (Emphasis in original). The central issues included, among others, whether or not either of the doctors, who were going to another hospital, had disclosed information against TJU's interest or solicited a satellite hospital from leaving TJU and joining another hospital. The Court reasoned that the jury could have found, among other things, that there was no disclosure of unknown information, that there was no solicitation on behalf of the second hospital, that a meeting was arranged by the satellite and not the doctors, and that a conflict of interest did not exist simply because the doctors discussed that they were going to another institution, and even expressed some disgruntlement with their employer, especially in the absence of a definition of the phrase "conflict of interest" or what was confidential under TJU's conflict of interest policy.

Feldman v. Philadelphia Trust Co., April Term 2005, No. 1925, 2006 Phila. Ct. Com. Pl. LEXIS 502 (C.C.P. Phila. November 27, 2006) (Bernstein, J.) (issue on whether employee breached fiduciary duty for simultaneously working as a consultant). This Opinions is available at http://fjd.phila.gov/pdf/cpcvcomprg/050401925.pdf.

A former employee sued his employer for compensation based upon an alleged oral contract. The employer denied liability, claiming among other things that the employee breached his duty of loyalty by working as a consultant for a competitor during their employment relationship. The employee alleged that the business for which he consulted was not a competitor, and his work for that business was known to, and acquiesced in, by his employer. Thus, a genuine issue of material fact existed and summary judgment was denied.

<u>Pollack v. Skinsmart Dermatology and Aesthetic Center, P.C.</u>, September Term 2002, No. 2167, 68 Pa. D.&C.4th 417 (C.C.P. Phila. October 5, 2004) (Cohen, J.) (doctors employed by medical practice found to have agency relationship and misappropriating trade secrets for use in competing business violated duty of loyalty owed by agent).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/020902167.pdf.

Plaintiff Dr. Pollack was sole proprietor of a business ("PID") offering certain medical services. The Opinion states that Defendant Drs. Shawe and Badawy were independent contractors, working at PID, and Defendant Wilson was a medical assistant, employed by PID. Patient lists were kept by PID, on its computer system to which there was limited access. The doctors appointment books were kept by PID. Drs. Pollack, Shawe and Badawy entered negotiations of selling PID's practice, and a tentative agreement was reached; however, Drs. Shawe and Badawy resigned two months later. These two doctors had copies made of their appointment books by PID staff members, and also had them print out portions of the computer data base as to patients they had seen. One month later, they opened a new practice, Defendant Skinsmart Dermatology & Aesthetic Center ("Skinsmart"). The doctors offered Defendant Wilson a job with Skinsmart while she was still with PID, and she accepted. At Skinsmart, she used the patient lists to reschedule appointments set at PID to be moved to Skinsmart. The two doctors also sent out mailings and made calls to patients and referring physicians. Skinsmart gained a substantial number of patients, allegedly resulting in $700,000 in profits to it.

Among other claims, Plaintiff Pollack brought claims for the breach of an "implied duty of loyalty." The Court stated that the duty of loyalty "is a component of the agent-principal relationship." Thus, the agent owes the principal a duty of loyalty "' in all matters affecting the subject of his agency, [and] he must act with the utmost good faith in the furtherance and advancement of the interests of his principal.'"[43] To establish an agency relationship, a plaintiff must show "the manifestation by the principal that the agent shall act for him"; "the agent's acceptance of the undertaking"' and "the understanding of the parties that the principal is to be in control of the parties."

Defendant Wilson's agency was readily established because she was a PID employee. The following facts established the doctors agency relationship: they treated patients at PID; PID managed their patient billing; PID paid their overhead; and PID paid the two doctors. Skinsmart could not be considered an agent.

As agents, the doctors use of PID's patient list to establish a competing business was "a clear breach of their duty of loyalty to PID." The further conceded the breach by admitting taking patients from PID that they did not bring to the practice. Defendant Wilson's providing a copy of the patient list to Dr. Badawy, while she was still working for PID, violated here duties; as did telephone calls made attempting to reschedule patients from PID to Skinsmart. The Court rejected the argument that the duty ended with the end of the business relationship, purported under Restatement (Second) of Agency § 396, because that section provides that an agent's duty not to compete survives the relationship where the agent seeks to use the former principal's trade secrets; the patient list constituting a trade secret. The Court granted partial summary judgment to plaintiff on liability.

Medical Resources, Inc. v. Miller, November Term 2000, No. 2242, 2001 Phila. Ct. Com. Pl. LEXIS 109 (C.C.P. Phila. January 29, 2001) (Sheppard, J.) (former employee's conduct to not rise to level of agent's breach of loyalty).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/mr0011-2242.pdf.

[43] Sylvester v. Beck, 406 Pa. 607, 178 A.2d 755, 757 (1962).

This matter arose via preliminary injunction between parties in the diagnostic imaging business. Plaintiffs Medical Resources, Inc. ("MRI") and ATI Resources, Inc. ("ATI") sought to enjoin Defendants Miller and Northeast Open MRI, Inc. ("Open MRI") from using trade secrets, doing business with Plaintiffs' patients, referring doctors and customers, hiring their employees, among other things.

Plaintiffs operated a diagnostic center called Northeast Imaging, where Miller, the center manger, was an at-will employee not subject to a restrictive covenant, but where he did execute a confidentiality agreement. Plaintiffs used a computerized system to keep detailed information on referring physicians. This was only accessible by administrative staff, who had to use a password. Miller accessed information on the system once or twice month. Miller was also knowledgeable about Northeast Imaging's marketing plan, which included some generally available information, and some information known only to Northeast Imaging, e.g., its reimbursement rates to physicians.

Miller eventually took steps to open his own MRI facility, including setting up a corporation. He spoke with Northeast Imaging's chief salesperson to brainstorm, and about a list of potential referring physicians that Miller could use to market his business to financial backers. The salesperson contacted these doctors and obtained commitments from some of them to provide Miller with a client base; though other than conversations with individual referring physicians, there was no other evidence that Miller solicited customers while in Plaintiffs' employ.

Miller did eventually set up his own business, after he left Northeast's employ. He did not keep any of Plaintiffs' property. Two of Northeast's' employees called him about jobs. Miller business was approximately ½ mile from Northeast Imaging. Open

MRI provides only open modalities, but Northeast provides this and others. Miller contacted another entity about possible referrals, and in doing so disclosed information he had learned at a Plaintiff MRI marketing meeting concerning direct solicitation of that entity's clients by MRI.

Based on these facts, the Court denied the preliminary injunction. On the duty of loyalty issue, the Court observed the agent's obligation to act in utmost good faith in advancing the principal's interests, but further observed the obligation was not absolute. Quoting from Spring Steels, Inc. v. Molloy[44]:

> After the termination of his agency, in the absence of a restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed . . . . even before the termination of the agency, he is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete . . . .

Although the Court observed some might view Miller's conduct as reprehensible, he had not restrictive covenant and there was no evidence that he competed with Plaintiffs during the term of his employment, or that he used any of their confidential information or trade secrets.

[44] 400 Pa. 354, 162 A.2d 370, 372 (1960) (citing Restatement (Second) of Agency § 393 cmt. e).

BORROWER, LENDER, INVESTOR, BANK AND CREDITOR CASES

Koch v. First Union Corp., May Term 2001, No. 549, (C.C.P. Phila. January 10, 2002) (Herron, J.) (plaintiffs failed to plead fiduciary duty claim against lender, but claim against financial advisors was permitted to proceed). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/kochpo1.pdf.

The Plaintiffs in this case are homeowners, suing a contractor and a group of financial service providers with whom Plaintiffs dealt in purchasing their homes. Pennsylvania Resource Corporation ("PRC") was a contractor providing home repair services. PRC also provided financing for home improvements through its mortgage broker, First Liberty Financial Services, Inc. ("First Liberty"). Plaintiffs, through PRC and First Liberty, obtained home equity loans from First Union National Bank of Delaware ("FUNBD"), a subsidiary of First Union Corporation ("First Union"). All of these entities were Defendants in the case. Plaintiffs claimed that the Defendants worked in concert to secure home equity loans on the basis of misleading "good faith cost estimates."

The Plaintiffs claimed that the same good faith estimate was given to all potential borrowers regardless of their financial status or creditworthiness. The estimates identified the closing costs as $470, which was far less than what they eventually paid. The loan origination fee was misleading in that it was listed as "N/A." In addition, Plaintiffs alleged that the mortgage broker fee of 4-7% did not reveal the figures upon which these percentages were based. Finally, the settlement charges that Plaintiffs actually paid were more than the amounts disclosed in the estimates. Based on these allegations, one of the counts Plaintiffs averred was for breach of fiduciary duty.

Defendants argued that because the Pennsylvania Mortgage Bankers and Brokers Act, 63 P.S. 456.01, et. seq, imposes no fiduciary duty on mortgage brokers, Plaintiffs fiduciary duty claims were unfounded. Plaintiffs argued, however, that a confidential relationship gave rise to a fiduciary duty which all Defendants breached.

The Court stated that the Superior Court has recognized that the essence of a confidential relationship "is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other." Basile v. H & R. Block.[45] "[A confidential relationship] appears when the circumstances make it certain that the parties do not deal on equal terms, but, on the one side there is an overmastering influence…." Frowen v. Blank.[46] A fiduciary duty also may attach "wherever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest."[47] The Court further stated that "the party in whom the trust and confidence are reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage." Young v. Kaye.[48] Applying these principles to Plaintiffs' allegations, the Court found that there were confidential relationships that gave rise to fiduciary duties as to some, but not all, of the Defendants.

The Court specifically found that a fiduciary duty had arisen from the confidential relationship between PRC/First Liberty and Plaintiffs. PRC and First Liberty acted as financial advisors and actively sought to inspire within Plaintiffs confidence that they would act in good faith for Plaintiffs' interests. Thus, PRC's and First Liberty's preliminary objections were overruled.

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[45] 777 A.2d 95, 101 (Pa. Super. 2001) (citing In re Estate of Scott, 455 Pa. 429, 316 A.2d 883, 885 (1974)).
[46] 493 Pa. 137, 425 A.2d 412, 416-17 (1981).
[47] Basile, 777 A.2d at 102.
[48] 443 Pa. 335, 279 A.2d 759, 763 (1971).

However, Plaintiffs did not sufficiently allege that the lender, FUNBD, owed them a fiduciary duty. "Under Pennsylvania law, the lender-borrower relationship ordinarily does not create a fiduciary duty…unless a creditor 'gains substantial control over the debtor's business affairs.'"[49] FUNBD was merely the lender in this case; Plaintiffs' advisory relationship and reliance thereon was with PRC and First Liberty. Thus, FUNDB's preliminary objections to the breach of fiduciary duty claim were sustained.

E.I. Fan Co. v. Angelo Lighting Co, April Term 2003, No. 327, 2003 WL 21990999 (C.C.P. Phila. August 18, 2003) (Sheppard, J.) (no fiduciary duty owed by owner of an indirect equity interest in a company that became insolvent after it entered into an asset purchase agreement with plaintiff). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/eif.pdf.

This action followed an arbitration award of approximately $1.4 million, payable by Encon Electric ("Encon") to E.I. Fan Co ("E.I. Fan"). The arbitration resulted from disputes over the parties' Asset Purchase Agreement, pursuant to which Encon agreed to acquire E.I. Fan's assets and certain of its liabilities. While the arbitration was pending, Encon divested substantially all of its assets to Angelo Lighting Company ("Angelo") and Sea Gull Lighting Products, Inc. ("Sea Gull"). These two entities continued Encon's operations using its pre-existing customer, supplier, and employee relationships. Angelo's and Sea Gull's principals also controlled Encon at the time of the divestitures. As a result of these transactions, Encon became insolvent and was unable to pay its debt to E.I. Fan.

E.I. Fan filed a five-count complaint in equity, alleging, among other things, a breach of fiduciary duty by Edwin N. Solomon. Solomon purportedly owned an indirect

[49] I & S Assoc. Trusts v. LaSalle Nat'l Bank, No. 99-4956, 2001 WL 1143319, *6 (E.D.Pa. Sept. 27, 2001) (Yohn, J.).

equity interest in Encon. The Court sustained Solomon's preliminary objection, finding that the complaint failed to allege sufficient facts to show that a confidential relationship existed.

In reaching its decision, the Court restated the "general concepts for finding a confidential relationship and the resulting fiduciary duty."[50] The Court stated that a confidential relationship attaches when the parties do not deal on equal terms, or when one party is in the "position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest."[51] Examples include attorney and client, principal and agent, and guardian and ward. A confidential relationship also exists when there is dependence and trust on one side, and "a corresponding opportunity to abuse that trust for personal gain on the other."[52] The Court also described the duty owed by the party in whom the trust is reposed, stating that it includes acting with "scrupulous fairness and good faith," and refraining "from using his position to the other's detriment and to his own advantage."[53]

In this case, the Court determined that the mere fact that Solomon was an owner of an indirect equity interest in Encon, without qualification, was not enough to establish a confidential relationship; however, it granted plaintiff leave to amend the complaint with sufficient facts supporting the existence of a confidential relationship and breach of the resulting fiduciary duty.

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[50] Pennsylvania Chiropractic Assoc. v. Independence Blue Cross, August Term 2000, No. 2705, 2001 WL 1807781, 9 (C.C.P. Phila July 16, 2001) (Herron, J.) (quoting Basile v. H. & R. Block, Inc., 777 A.2d 95 (Pa. Super. 2001)). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/pachiro.pdf.
[51] Id. (quoting Basile).
[52] Id. (quoting In Re Scott's Estate, 316 A.2d 883, 885 (Pa. 1974)).
[53] Id. (quoting Basile).

Consolidated actions Academy Industries, Inc. v. PNC Bank, N.A., May Term 2000, No. 2383, and PNC Bank, N.A. v. Academy Industries, Inc., July Term 2000, No. 634, 2002 WL 1472342 (C.C.P. Phila. October 9, 2002) (Sheppard, J.) (fiduciary duty owed by creditor to debtor in liquidation context.). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/academy.pdf.

In Academy Industries, Inc. v. PNC Bank, N.A., the Court explored the fiduciary duties owed by creditors to debtors, both generally and in the liquidation context. The Court determined that that the Plaintiff set forth sufficient facts to show that Defendant bank owed a fiduciary duty, and denied PNC's motion for summary judgment on this claim.

Citing Gonzalez v. Old Kent Mtge. Co.,[54] the Court stated that the lender-borrower relationship does not ordinarily constitute a fiduciary relationship, but quickly pointed out that this rule comes with certain exceptions.[55] For instance, the Court stated that if a creditor "gains substantial control over the debtor's business affairs,"[56] which includes situations where the "creditor liquidates the debtor's collateral," a fiduciary relationship arises. In the liquidation context, the creditor has a fiduciary duty to act in good faith to "maximize the proceeds of the collateral's sale."[57]

The Court also discussed the scope of this fiduciary duty owed by creditors to debtors in situations where creditors have assumed substantial control of the debtor's operations. The Court disagreed with Plaintiff's contention that the duty merely requires creditors to act in a "commercially reasonable" manner, i.e., that the duty "is not as deep

[54] Frowen v. Blank, 493 Pa. 137, 425 A.2d 412, 416-17 (1981) (quoting Basile, 777 A.2d at 101).
[55] 2000 WL 146313, 6 (E.D. Pa. Sept. 21, 2000) (citing Federal Land Bank of Baltimore v. Fetner, 410 A.2d 344, 348 (1979)).
[56] Blue Line Coal Co. v. Equibank, 683 F. Supp. 493, 496-97 (E.D. Pa. 1988) (citing Stainton v. Tarantino, 37 F. Supp. 1051, 1066 (E.D. Pa. 1986).
[57] Solfanelli v. CoreStates Bank, N.A., 203 F.3d 197, 200 (3d Cir. 2000).

as a conventional fiduciary duty". Instead, the Court found that the duty requires creditors to act in "good faith," which includes the creditor's duty to adhere to obligations of loyalty and fairness, among others.[58] Thus, the Court stated that the standard for breach of such duty is failing to act in good faith, and not simply failing to act in an objectively reasonable manner.

Temple University Health System, Inc. v. National Union Fire Insurance Company of Pittsburg, PA, February Term 2004, No. 1547, 2005 WL 167583 (C.C.P. Phila. January 7, 2005) (Jones, J.), aff'd in part, rev'd in part, 898 A.2d 1143 (Pa. Super. Mar. 30, 2006) (w/o opinion) (gist of the Action doctrine does not bar the breach of fiduciary duty claim by bondholders against the officers and directors of the corporations that agreed to repay loans to the bond issuer). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/040201547.pdf.

In Temple University Health System, Inc., et al, v. National Union Fire Insurance Company of Pittsburg, PA, the insurer Defendant, National Union Fire Insurance Company ("NUFIC"), argued that it was not required to indemnify certain insured individuals against an underlying claim for breach of fiduciary duty because that claim allegedly arose from a contractual relationship. NUFIC claimed that contract actions were not covered under the applicable policy. The individual insureds were the officers and directors of entities that had entered into loan agreements or management agreements.

The Montgomery County Higher Education and Health Authority (the "Authority") had loaned the proceeds from bond sales to GPHS to operate a nursing home. GPHS and Temple University Hospital ("TUH") were signatories on the loan. TUH was obligated to advance GPHS working capital. GPHS entered a separate management agreement with Temple University Health Systems ("TUHS"). TUHS was

[58] Id.

to manage and assist GPHS in running its nursing home. The individual insureds named in this case were officers and directors of GPHS, TUH and TUHS. GPHS and TUH subsequently defaulted on the loan agreements. In turn, the Authority defaulted on payments due to its bond holders. These defaults resulted in claims against the individual insureds, among others, which NUFIC argued were not covered. The later dispute was the subject of the instant litigation.

The insurance policy contained an exclusion for contractual disputes, which NUFIC argued applied to the underlying bondholder claims against the officers and directors. There included breach of fiduciary duty claims against these individuals. Specifically, the bondholders alleged that these people "had a duty to manage and cause GPHS to operate the facility in a manner consistent with their stated skill, experience and abilities and to place the interests of GPHS's creditors above their own actions and those of TUHS." The Court observed that these individuals were not parties to any of the loan related agreements; and as the TUHS/GPHS management agreement had not been attached to the Complaint, there was nothing before the Court indicating that the individuals were party to that agreement either.

The Court reviewed the standards for establishing whether a fiduciary relationship exists, initially observing that "[a] breach of fiduciary duty is in essence a breach of trust which does not require a professional relationship or a professional standard of care."[59] The Court determined that because the underlying breach of fiduciary duty claims did not allege that these individual's fiduciary duties arose out of a contractual relationship between the parties, the gist of the action doctrine did not bar the claim for breach of

[59] Nardella v. Datillo, 36 Pa. D. & C. 4th 364, 380 (C.C.P. Dauphin 1997).

fiduciary duty. Citing <u>eToll, Inc. v. Elias/Savion Advertising, Inc.</u>, [60] the Court affirmed that whenever the alleged fiduciary duties "extend beyond contractual duties the claim is not barred by the gist of the action doctrine." Thus, the contract exclusion did not apply.

<u>Sylk v. Bernsten</u>, January Term 2002, No. 1906, 2003 Phila. Ct. Com. Pl. LEXIS 75 (C.C.P. Phila. Feb. 4, 2003) (Sheppard, J.) (borrowing relationship did not create fiduciary duty).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/syl-op.pdf.

This case addressed the issue of whether the balance in a business relationship reached the level of creating a fiduciary duty, the Court finding that it did not.

Bernsten sought investment for a steel plant in Estonia. Bernsten met with Sylk and Winston J. Churchill, general partner of a limited partnership, Churchill Family Partnership ("CFP"), to negotiate such an investment in Bernsten' interest in the entities developing the facility. The parties reached an agreement, whereby Sylk and CFP would purchase a portion of Bernsten's interest in these entities; however, Bernsten claims Sylk and Churchill/CFP knew that their interest was indirect and they would have no actual ownership interest or voting rights. Rather, they would receive a share of Bernsten's profits if Bernsten received any profits.

Sylk and Churchill provided Bernsten with a letter that they informed him confirmed the agreement. Later, they provided him with a second letter in connection with an additional purchase of Bernsten's interest on the same terms concerning no direct ownership and only receiving a return from Bernsten's profits, if any. Bernsten alleged that Sylk and Churchill had deceived him by including terms in the letter agreement that would allow them to receive a percentage of his salary and expenses; and would allow them to sell their interests after giving Bernsten a right of first refusal. He claims that he

[60] 811 A.2d 10 (Pa. Super. 2002).

never would have agreed if he understood these terms; and that the later term was being used to put him in a position to force an excessive payment for their interests or to lose control of these interests to a third party.

Bernsten claims that Sylk and Churchill demanded a portion of his salary, demanded $10,000,000 for their interests and sought to do an additional deal under which they would obtain direct ownership. Bernstein claimed that he was forced to pay $75,000, out of desperation to salvage his position, but he refused the new deal and only offered $2,000,000 to re-purchase his interests from Sylk and CFP. Sylk and CFP eventually brought suit against Bernsten and Bernsten counterclaimed against Sylk and CFP and joined Churchill. Among other claims Bernsten asserted a breach of fiduciary duty claim.

Bernsten based his fiduciary duty argument on the premise that "'Sylk and the Churchill Defendants were, on the basis of the fact that they were sophisticated businessman [sic] who had the financing that Bernsten needed for his project, in a superior position to Bernsten because he needed their investment.'" Thus, the issue was one of the parties' relative positions. The Court stated the basic principles that:

> a confidential relationship and the resulting fiduciary duty may attach 'wherever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest.'" Basile v. H&R Block, Inc.[61] Stated in another way, a fiduciary relationship exists "when one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the

[61] 777 A.2d 95, 101-02 (Pa. Super. 2001), appeal denied, 569 Pa. 714, 806 A.2d 857 (2002) (quoting Brooks v. Conston, 356 Pa. 69, 76, 51 A.2d 684, 688 (1947)).

> other."[62] In the context of a business relationship, Pennsylvania courts have held that "[a] business association may be the basis of a confidential relationship 'only if one party surrenders substantial control over some portion of his affairs to the other.'"[63]

The Court found there was no fiduciary duty. It was not "persuaded that, simply because Bernsten sought additional funds to offset the expenses he incurred relating to the development of the proposed plant … and Sylk and Churchill Family Partnership had the funds and the motivation to purchase a portion of Bernsten's interest, a confidential relationship and resulting fiduciary duty were created." There were no allegations of overmastering dominance, weakness, dependence, or trust. The Court found Bernsten's reliance on a Seventh Circuit decision by Judge Posner inapposite. In that case there was a long history of dependence, advice, reliance and total trust. In the instant case, Bernsten initiated and negotiated a single business deal with Sylk and Churchill, with no allegations that he relied on their advice or reposed any degree of trust. In conclusion, after recognizing that "[o]ur Superior Court has stated that the Supreme Court's decisions which address fiduciary duty suggest that the 'disparity between the respective parties is to be adjudged subjectively, and may occur anywhere on a sliding scale of circumstances[,]'"[64] Bernsten's fiduciary duty claims were rejected.[65]

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[62] Commonwealth Dep't of Transp. v. E-Z Parks, Inc., 153 Pa. Commw. 258, 267, 620 A.2d 712, 717 (citations omitted), appeal denied, 534 Pa. 651, 627 A.2d 181 (1993).

[63] E-Z Parks, 620 A.2d at 717 (quoting In re Estate of Scott, 455 Pa. 429, 433, 316 A.2d 883, 886 (1974)).

[64] Basile, supra, 777 A.2d at 102.

[65] Absent a fiduciary duty, the Court had earlier found Bernsten's fraudulent omission claims could not be sustained absent a duty to disclose.

<u>IRPC, Inc. v. Hudson United Bank</u>, February Term 2001, No. 474, 2002 Phila. Ct. Com. Pl. LEXIS 77 (C.C.P. Phila. January 18, 2002) (Herron, J.).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/irpc-op.pdf.

In this case, involving alleged failures of a bank to prevent embezzlement from a customer's account by one of its employees, the Court recognized that a claim had been stated under 13 Pa.C.S. § 3307, "which sets forth rules that apply when certain persons are aware of a breach of fiduciary duty."

ATTORNEY/LAW FIRM CASES

<u>Roosevelt's Inc. v. Lieberman</u>, November Term 2003, No. 1929, 2004 Phila. Ct. Com. Pl. LEXIS 51 (C.C.P. Phila. June 10, 2004) (attorney owes fiduciary duty to client of undivided loyalty and not engaging in conflict of interest).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/031101929.pdf.

The Plaintiff was represented by Defendants law firm and attorney in a workers' compensation matter. The Plaintiff further alleged that the same counsel represented both the Plaintiff and the Plaintiff's workers' compensation insurer in that matter, and that the Plaintiff and the insurer had adverse interests in the outcome of a related law suit. The Plaintiff alleged that counsel could have taken action that would have benefited Plaintiff in the related action, but did not do so. The Court overruled Defendants' preliminary objections seeking to dismiss a breach of fiduciary duty claim. The Court stated that attorneys owe fiduciary duties of undivided loyalty and not engaging in conflicts of interest. The allegations in this matter were sufficient, if taken as true under the standard for ruling on preliminary objections, to show divided loyalty and a potential conflict of interest.

<u>Edelstein & Diamond, L.L.P. v. Orloff</u>, January Term 2004, No. 1310, 2005 WL 1648191 (C.C.P. Phila. June 29, 2005) (Jones, J.) (no fiduciary duty owed by law firm associate to law firm merely because of status as an employee). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/040101310.pdf.

In <u>Edelstein & Diamond, L.L.P. v. Orloff</u>, the Court granted summary judgment on Plaintiff's claim for breach of fiduciary duty. Defendant was hired as a salaried associate to manage a law firm's plaintiff's department, and occasionally to handle defense files. The Plaintiff firm decided things were not working out, and informed Defendant of its position. The firm claimed that Defendant ceased coming to work, ceased communicating with the firm concerning the status of his files and the transition of those files to other attorneys at the firm. Plaintiff claims this resulted in damages.

The firm alleged that it was owed a fiduciary duty under Restatement (Second) of Torts § 874, cmt. a (1979): "A fiduciary relationship exists 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." It claimed this could include a relationship of business or association. Specifically, the firm alleged that under the Rules of Professional Conduct, Defendant owed a fiduciary duty to manage the firm's plaintiff's department, and to handle all of his files, in "a diligent competent and professional manner."

Defendant had filed a summary judgment motion, thus, the firm had to demonstrate evidence in the record showing material issues of fact supporting its claim. The only fact Plaintiff adduced what that it had hired Defendant to run its plaintiff's department. This was insufficient. The Court stated that the mere fact that the Defendant was "hired to run the plaintiff's department at the law firm" was not enough to answer the critical fiduciary duty question, <u>i.e.</u>, did the relationship go "beyond mere reliance on superior skill and into a relationship characterized by 'overmastering influence' on one side or 'weakness, dependence, or trust, justifiably reposed' on the other side."[66] Put another way, was the firm in such an inferior position that it placed complete trust in Defendant's advice, seeking no other counsel, "so as to give rise to a potential abuse of power."

The record did not support such a relationship. Defendant was obligated to report to his superiors at the firm on his plaintiff's files; and he could not even settle a case without one of the named partner's approval. The record also did not establish that Defendant had the power to bind the firm or alter its legal relationships with third parties. Thus, summary judgment was granted on the fiduciary duty claim.

Consolidated actions <u>Crown Cork & Seal Co., Inc. v. Montgomery, McCracken, Walker & Rhodes, LLP</u>, December Term 2002, No. 3185, and **<u>Crown, Cork & Seal Co., Inc. v. Segre</u>, December Term 2002, No. 3192, 2005 WL 1324794 (C.C.P. Phila. May 25, 2005) (Jones, J.)** (Law firm does not owe a fiduciary duty to inform its client of "suggested" malpractice, especially since client was already aware of the issue). This Opinion is located at http://courts.phila.gov/pdf/cpcvcomprg/021203185-052505-02.pdf.

Plaintiff brought a claim for professional malpractice against two of its individual counsel and their firm ("Firm I") for allegedly failing to draft a clear and unambiguous termination provision in Plaintiff's lease with Universal Studios ("Universal"). Plaintiff also alleged malpractice for providing poor legal advice during the lease negotiations, as well as concerning the contemplated sale of the subject property. [67] Plaintiff also brought a claim against a second law firm ("Firm II"). Firm I's lawyers had joined Firm II, which

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[66] <u>eToll, Inc. v. Elias/Savion Adver. Inc.</u>, 811 A.2d at 23 (Pa. Super. 2002).

[67] The pertinent facts are set forth in the Court's May 25, 2005 Opinion on a separate motion, which is located at http://courts.phila.gov/pdf/cpcvcomprg/021203185-052505.pdf.

allegedly failed to inform Plaintiff that it believed that the Firm I lawyers had committed malpractice.

Plaintiff became involved in litigation with Universal. During a deposition in that case, Universal's counsel allegedly suggested that Firm I's lawyers had committed malpractice. The Court held that Firm II had no fiduciary duty to inform Plaintiff of "the suggestion of malpractice" made by Universal's counsel during that deposition. It reached that conclusion because Firm II did not itself admit that Firm I committed malpractice, and the evidence did not show that any of the law firm Defendants believed that malpractice was committed. Firm II had no duty to inform Plaintiff of the mere suggestion made by Universal's counsel. This was especially so in light of the fact that Plaintiff already had such information.

Axcan Scandipharm, Inc. v. Reed Smith, LLP, October Term 2000, No. 3827, 2006 WL 1462925 (C.C.P. Phila. March 26, 2007) (Abramson, J.) (law firms owe a duty not to undertake conflicting representation). This Opinion is available at http://courts.phila.gov/cgi-bin/opinions/crtsearch.cgi?dropdown=cptcv.

Axcan Scandipharm, Inc. ("Axcan") brought a claim for breach of fiduciary duty against a law firm for allegedly entering into an impermissible conflict of interest to Axcan's disadvantage. The alleged conflict arose because the firm represented Axcan in a patent litigation matter, while receiving payment from American Home Products Corporation and/or Eurand International, S.p.A. (together "AHP/Eurand") for Axcan's defense fees; and then the firm subsequently representing AHP/Eurand in an indemnification action against Axcan in connection with a separate matter.

Quoting In re estate of Pew,[68] the Court held that, in order to support its claim for breach of fiduciary duty, as well as professional negligence, Axcan had "the burden of proving: (1) that a past attorney/client relationship existed which was adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; (3) that the member of the law firm…acquired knowledge of confidential information from or concerning the former client, actually or by operation of flaw." The Court concluded that Axcan pleaded facts sufficient to support a claim for breach of fiduciary duty.

The Court stated that the breach alleged herein was a breach of the duty of loyalty, or the duty "not to undertake a conflicting representation or otherwise violate client confidences." If successful on its claims, the Court concluded that Axcan could recover punitive damages, in addition to compensatory and disgorgement damages.

Ace Am. Ins. Co. v. Columbia Cas. Co., July Term 2001, No. 77, 2002 Phila. Ct. Com. Pl. LEXIS 95 (C.C.P. Phila. Nov. 26, 2002) (Herron, J.)
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/aceop.pdf.

In this case denying a motion for attorney disqualification, the Court observed that:

> while an attorney might be subject to disciplinary action for breaching client confidentiality or failing to avoid conflicts of interest, "a court is not bound to await such development before acting to restrain improper conduct where it is disclosed in a case pending in that court." Rather, under its supervisory power, a court may disqualify and remove counsel for a breach of ethics or fiduciary duty to a client. Accord Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. at 245, 251-52 & n.2, 260, 602 A.2d at 1279, 1282 & n.2, 1286-87 (enjoining attorneys from representing a former client's competitors based on attorneys' breach of

[68] 655 A.2d 521, 545-546 (1994).

common law fiduciary duty upon which the Pennsylvania Rules of Professional Conduct are premised).

<u>DeStefano & Associates, Inc. v. Cohen</u>, June Term 2000, No. 2775, 2002 Phila. Ct. Com. Pl. LEXIS 54 (C.C.P. Phila. May 23, 2002) (Herron, J.) (summary Judgment granted where facts insufficient to set out fiduciary duty claim against attorney) and **2001 Phila. Ct. Com. Pl. LEXIS 18 (C.C.P Phila. April 9, 2001) (Herron, J.)** (claims stated for purposes of preliminary objections). The first Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/destef5.pdf and the second Opinions is available at http://fjd.phila.gov/pdf/cpcvcomprg/destef.pdf.

The underlying facts involved Plaintiffs' Richard DeStefano and DeStefano & Associates, Inc.'s ("DAI") asset purchase from Bob Gendelman and Co., Inc. ("BCG"). DAI was created to purchase BCG's assets. Originally, a single lawyer was hired to represent both sides in the transaction. Later, DAI engaged independent counsel. Subsequently, DAI used the same common original counsel to represent it in a separate dispute with a labor union.

DeStefano and DAI alleged that despite warranties and promises to the contrary, BCG's financial condition was something significantly less than represented. DeStefano and DAI brought suit against BCG, its principal, and their original common counsel, claiming intentional or negligent concealment of BCG's true liabilities and obligations. In the union dispute, DAI alleged that counsel's loyalty was compromised because of a close relationship with a local union business manager, and that this same counsel was currently representing five other businesses in collection actions against DAI. Among the various causes of action, DAI and DeStefano alleged breach of fiduciary duty against counsel, and sought to enjoin counsel from representing the five companies.

Counsel moved for summary judgment on all counts, and judgment was entered. The Court found a failure to present any evidence that counsel failed to disclose information, or that he betrayed Plaintiffs or lacked loyalty. The only testimony cited to this end was a deposition excerpt from a Montgomery County case that was not part of the instant record; and even if accepted, was insufficient to make out a prima facie case to defeat summary judgment. The Court also noted that a legal malpractice claim based "on allegations of betrayal, disloyalty and failure to advise" creating a conflict of interest, required expert testimony, which was absent in this case.

In its April 2001 Opinion, confronted with preliminary objections as opposed to a summary judgment motion, the Court had allowed the claims to proceed. Plaintiffs had averred sufficient facts to make out a claim that the attorney represented Plaintiffs when the alleged breaches of fiduciary duty to Plaintiffs had occurred. The Court did agree that a violation of the Rules of Professional Conduct, in itself, could not state a cause of action; however, if the conduct also breached a fiduciary duty, the claim would not be dismissed simply because it also may have violated a Rule of Professional Conduct.

Werther v. Rosen, May Term 2002, No. 1078, 2003 Phila. Ct. Com. Pl. LEXIS 82 (C.C.P. Phila. February 13, 2003) (Sheppard, J.) (no breach of fiduciary duty by counsel, where there were no actual damages from alleged conflict, attorney was not in a position to reveal unknown confidences and no allegations that counsel actual aided and abetted a breach of fiduciary duty or was counsel at time of alleged conflict).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/wer-op.pdf.

This case involved a dispute between shareholders in a close corporations, Cubitrol Leasing, Inc. and Cubitrol Medical Management, Inc. (collectively "Cubitrol"). Plaintiff Werther alleges he is the majority shareholder and that Defendant Rosen is the minority shareholder and manager of Cubitrol. Werther alleged that Rosen mismanaged Cubitrol, while operating competing businesses (the LBBJ Defendants) and diverting

Cubitrol's assets and opportunities to LBBJ. Werther claims that this was done with the assistance of attorney named as a Defendant in the case.

The Court assumed for purposes of the Opinion that Werther could bring a derivative action under Pa.R.C.P. 1506(a)(2) because Rosen's "operational control" over Cubitrol's affairs made it futile to make demand on Cubitrol to brings claims itself against Rosen and the attorney. However, most of the claims against Rosen, including a breach of fiduciary duty claim, were dismissed on the basis of a prior pending action between Werther and Rosen.

The Court did address Werther's derivative claims against the attorney. He alleged that Cubitrol's attorney worked with Rosen to provide legal services to Rosen in creating LBBJ to compete against, and divert business from, Cubitrol and in so doing assisted Rosen's breach of fiduciary duty; by counseling Rosen to breach his fiduciary duty in the management of Cubitrol itself by allegedly causing it not to pay debts and obligations including loans and taxes which lead to defaults and by counseling Rosen in the underlying litigation to Cubitrol's detriment, and in conflict with counsel's duty of loyalty to Cubitrol. The Court noted that Werther had no direct claim as he was not a personal client.

As to Cubitrol's putative claims, these were found to be claims for breach of the duty of loyalty, based upon the above asserted conflicts. The Court found that no claim actual damages had been asserted against the attorney, and this an essential element of Werther's derivative claims was missing. Counsel's involvement in the formal incorporation of the competitor "cannot in itself have caused Cubitrol any damage…." It is only Rosen who allegedly used LBBJ to harm Cubitrol after that legal act.

Further, there could not have been an impermissible conflict of interest under the rule in Maritrans GP Inc. v. Pepper, Hamilton & Scheetz.[69] "The underlying rationale … is the belief that one client will be harmed by the attorney's use, in his/her representation of the adverse party, of confidential information obtained from the first client." In the instant case, Rosen controlled both Cubitrol and LBBJ, so there was no danger that the attorney would disclose a confidence from Cubitrol that LBBJ did not already know, since Rosen had the information in any event.[70] As to the counseling a breach of fiduciary duty in not paying debts and obligations: (1) there was no actual allegation that this occurred, and the Court would not presume that a lawyer represented a client in every instance just because that lawyer represented the client in some activities; and (2) this alleged mismanagement took place before the attorney was engaged by Cubitrol, and thus there could have been no conflict even if it did occur. Thus, counsel's preliminary objections were sustained.

Itskowitz v. White and Williams, May Term 2003, No. 2926, 2004 Phila. Ct. Com. Pl. LEXIS 34 (C.C.P. Phila. June 25, 2004) (Cohen, J.) (breach of fiduciary duty claim not dismissed) and **2005 Phila. Ct. Com. Pl. LEXIS 595 (C.C.P. Phila. November 10, 2005) (Abramson, J.)** (motion for Summary Judgment on breach of fiduciary duty claim denied).
The first Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/030502926.pdf, and the second is available at http://fjd.phila.gov/pdf/cpcvcomprg/030502926-111005.pdf.

Plaintiff was expelled from a partnership as an alleged result of the legal advice received by the partnership from the Defendant law firm. The Plaintiff brought several claims against the Defendant as a result of the expulsion, including a breach of fiduciary duty claim. In its June 25, 2004 Opinion, the Court overruled Defendant's preliminary

[69] 529 Pa. 241, 602 A.2d 1277 (1992).
[70] The Court suggested a Motion to Disqualify as the proper course under the circumstances if the claim is true.

objections in the nature of a demurrer to the breach of fiduciary duty claim because the Defendant's demurrer relied on the partnership's underlying partnership agreement, which was not mentioned in or attached to Plaintiff's Complaint. The Court stated that because the partnership agreement "was clearly outside the face of the complaint" it could "not be considered at this stage of the litigation."

In the Court's November 10, 2005 Opinion, it denied Defendant's Motion for Summary Judgment on the breach of fiduciary duty claim because it was unable to determine the nature of the underlying relationship giving rise to this claim. The Court was unable to make this determination because it was presented with conflicting evidence by the parties. Also in this Opinion, the Court stated that pleading a claim for breach of fiduciary duty does not automatically entitle a Plaintiff to punitive damages; rather, the Plaintiff also has to set forth facts showing that "the defendants' actions were malicious, wanton, reckless, willful or oppressive."

Lichtman v. Taufer, March Term, 2004, No. 5560, 2004 Phila. Ct. Com. Pl. LEXIS 68 (C.C.P. Phila. July 13, 2004) (Jones, J.) (no breach of fiduciary duty or aiding and abetting claim against one law firm where sufficient relationship not pleaded).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/040305560.pdf.

Plaintiff Lichtman was originally a joint venturer with Defendant Lewis in an internet business, and then subsequently an equal shareholder with Lewis in Plaintiff Webnet Entertainment, Inc. ("WEI"). As joint venturers they had also agreed they would own all intellectual property on a 50/50 basis. Lichtman alleged that Lewis filed a patent application solely in her name, after having removed Licthman's name from a provisional patent application, on a product that Lichtman claimed to have co-invented and co-created. She allegedly marketed and sold the product as Adtraction, Inc., to the exclusion of Lichtman.

Lichtman claimed that the attorney Defendant and other lawyers from his firm (Firm I), were engaged to represent Webnet, Lichtman and Lewis in patent matters, among other legal matters. Plaintiff alleged that these attorneys purportedly represented Lewis: in removing Licthman's name from a patent; later filing the patent solely in Lewis' name; and in marketing and selling the product at issue for Lewis and Adtraction, Inc. The lawyer later went to a second firm (Firm II), also a named Defendant. Plaintiffs alleged various breach of fiduciary duty claims to which the lawyer Defendants brought preliminary objections.

Among other claims, Lichtman brought a breach of fiduciary duty claim against Firm II. The Court sustained Firm II's preliminary objection, finding a failure to plead that a lawyer-client relationship existed with Firm II, or that an implied lawyer-client relationship existed. Plaintiffs also brought a claim that Firm II aided and abetted Lewis' breach of fiduciary duty. It found that such a cause of action existed,[71] and that to state a claim a plaintiff had to show "1) a breach of a fiduciary duty owed to another; 2) knowledge of the breach by the aider and abettor; and 3) substantial assistance or encouragement by the aider and abettor in effecting that breach." The Complaint failed to allege any knowledge on Firm II's part, nor any substantial assistance, and the claim was dismissed with leave to re-plead solely on the aiding and abetting claim. By contrast, the Court found the Complaint sufficient to set forth a claim for both breach of fiduciary duty and aiding and abetting against Firm I.

[71] Koken v. Steinberg, 825 A.2d 723, 731-2 (Pa. Commw. 2003) (citing to Restatement (Second) of Torts § 876). For a discussion as to whether such a cause of action exists under Pennsylvania law, see the summary below of Orianna Associates, LLC v. Transamerica Occidental Life Companies, August Term 2003, No. 2250, 2007 Phila. Ct. Com. Pl. LEXIS 158 (C.C.P. Phila. May 29, 2007).

<u>Sagot Jennings and Sigmond v. Sagot</u>, April Term 2002, No. 3099 and June Term 2002, No. 3098, 2002 Phila. Ct. Com. Pl. LEXIS 22 (C.C.P. Phila. December 31, 2002) (Sheppard, J.) (law firm stated breach of duty of loyalty claims against former associates in firm).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/sa-op.pdf.

A law firm brought claims against a former partner and two former associates, who had set up their own firms. The two associates allegedly solicited clients while still at the Plaintiff firm, but did not establish files at the firm, and quietly moved the clients to their new firm. The Court overruled the former associates' demurrer to Plaintiff's breach of the duty of loyalty claims.

<u>See also Romy v. Burke</u>, May Term 2002, No. 1236, 2004 Phila. Ct. Com. Pl. LEXIS 15 (C.C.P. Phila. December 28, 2004) (Sheppard, J.), discussed above.

INSURANCE CASES

<u>Staples v. Assurance Company of America</u>, October Term 2003, No. 1088, (C.C.P. Phila. June 14, 2004) (Sheppard, J.) (no separate breach of fiduciary claim against insurer in breach of contract/bad faith action. This opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/031001088.pdf.

Plaintiffs Carl and Patricia Staples ("Staples") were insured by Defendant Assurance Company of America ("Assurance"), under a commercial policy (the "Policy"). The Staples alleged that they suffered a loss covered by the Policy and that Assurance unnecessarily delayed paying under the Policy.

In addition to breach of contract and bad faith claims, Staples also brought a breach of fiduciary duty count for Assurance's alleged failure to timely pay their claim. The Court sustained Assurance's preliminary objections to this claim because the

Staples' fiduciary claim was based upon the same allegations as their claims for breach of contract and bad faith. The Court cited Ingersoll-Rand Equipment Corp. v. Transportation Ins. Co.,[72] stating that "there is no separate tort-law cause of action against an insurer for… breach of fiduciary duty; such claims must be brought in contract," which was precisely what Staples did in this case. In the insurance context, "the breach of fiduciary duty and the [contractual] breach of the duty of good faith are…treated synonymously."[73]

Methodist Home for Children v. Biddle & Company, Inc., April Term 2001, No. 3510, 2002 WL 31320248 (C.C.P. Phila. October 9, 2002) (Sheppard, J.) (insurance broker did not breach a fiduciary duty when it failed to inform its customer of higher limits available on its insurance coverage). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/met-op.pdf.

Plaintiffs Methodist Home for Children and BASES (a day camp for children funded by Methodist Home) sued its insurance broker, Biddle & Company, Inc., for, among other things, breach of fiduciary duty for not obtaining a policy with the highest limits of sexual misconduct insurance coverage. This lawsuit followed a series of settlements between Methodist Home and the sexual assault victims of a Methodist Home "counselor-in-training." The settlements resulted in Methodist Home's payment of millions of dollars in excess of its sexual misconduct insurance coverage limits, which were $100,000 per occurrence, and $300,000 in the aggregate.

The Court reviewed the circumstances that can give rise to a confidential relationship in which one party owes fiduciary duties to another, indicating that the circumstances are not categorical; rather, there must be on one side an "overmastering

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[72]963 F. Supp. 452 (M.D. Pa. 1997).

[73]Pennsylvania Chiropractic Assoc. v. Independence Blue Cross, August Term 2000, No. 2705, 2001 WL 1807781 (C.C.P. Phila. July 16, 2001) (Herron, J.). This Opinion, discussed below, is available at http://fjd.phila.gov/pdf/cpcvcomprg/pachiro.pdf.

influence, or, on the other, weakness, dependence, or trust, justifiably reposed." The Court further indicated that when it comes to business relationships, there may be a fiduciary relationship "if others, by virtue of their own weakness or inability, the advisor's pretense of expertise, or a combination of both, invest such a level of trust that they seek no other counsel."[74] The Court found that no such unequal footing or disparity of expertise existed based on the facts and circumstances of this case (including the pleaded fact that Methodist Home had an ostensibly sophisticated insurance group that was in charge of procuring insurance for the company). Accordingly, the Court granted Defendant's Motion for Summary Judgment and dismissed the claim for breach of fiduciary duty.

Pennsylvania Chiropractic Association v. Independence Blue Cross, August Term 2002, No. 2705, (C.C.P. Phila. July 16, 2001) (Herron, J.) (breach of fiduciary duty claim against health insurer by subscribers did not survive demurrer because it sounded only in contract).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/pachiro.pdf.

There were three groups of named Plaintiffs in this class action. The first group consisted of two associations; one representing chiropractors in Pennsylvania ("PCA") and the other doing the same in Southern New Jersey ("SNJCS"). Next, was a group of four doctors who were members of the two associations ("Provider Plaintiffs"). Third, were two patients who had required chiropractic care ("Subscriber Plaintiffs"). The Defendants included Independence Blue Cross ("IBC") and a variety of subsidiaries including holding companies, HMOs, third-party administrators of health care plans, and insurance agencies. IBC provided and administered health insurance plans to millions of subscribers and had contracts with numerous health care providers, including Plaintiffs.

[74] Basile v. H & R. Block, Inc., 777 A.2d 95, 102 (Pa. Super. 2001) (appeal denied).

Plaintiffs sought relief from IBC's alleged policy and practice of improperly denying "medically necessary" chiropractic care in contravention of its contractual obligations with Plaintiffs. As a result, Provider Plaintiffs allegedly had been denied reimbursement for such services; and Subscriber Plaintiffs had been denied coverage for "medically necessary" care and forced to pay for such services out-of-pocket, despite having paid for quality health insurance. The Subscriber Agreements also stated that "Restorative Services," which included chiropractic services, were covered.

The instant focus is on the Subscriber Plaintiffs, who asserted claims for breach of fiduciary duty. They also claimed a breach of implied duty good faith and fair dealing. These Plaintiffs claimed that, in the health insurance industry, Defendants had assumed a fiduciary responsibility by overseeing the health care providers; in this case, the Provider Plaintiffs. Subscriber Plaintiffs also asserted that Defendants had the ability to determine what was "medically necessary" by assisting in determining the most appropriate treatment plans. Defendants countered that the breach of fiduciary duty claim merely duplicated Subscriber Plaintiff's claim for breach of the implied duty of good faith and fair dealing. Subscriber Plaintiff argued that the claim was not redundant because of Defendants alleged misrepresentations regarding coverage, which were made to entice existing subscribers to remain with Defendants.

The Court observed that the health plan was exempt from ERISA; thus there was no basis to address fiduciary claims under ERISA. The Court did not locate any applicable Pennsylvania cases that were exempt from ERISA, making this a matter of first impression.

The majority of cases examining whether an insurer owes its insured a fiduciary duty arise in the context of liability insurance involving the defense, handling, or settlement of claims.[75] A breach of fiduciary duty in the insurance context is a breach of the contractual duty to act in good faith when the insurer assumes responsibility to handle claims, control settlement or take over the litigation on the insured's behalf.[76] The breach of fiduciary duty and the contractual breach of the implied duty of good faith are thus treated synonymously in the insurance context. The Court found no reason to deviate from this rationale to provide a tort remedy for the alleged breach of fiduciary duty simply because the present case involved health insurance.

The Court noted a dissent in a case that it found persuasive. In Bata v. Prudential Ins. Co. of America,[77] the dissent relied on Pennsylvania's insurance bad faith statute, 42 Pa.C.S.A. §8371, which allowed for a statutory tort remedy in the insurance context for the bad faith denial of a claim.[78] However, as noted above, the Court did not find that

[75] See, e.g., Dercoli v. Pennsylvania Nat'l. Mut. Ins. Co., 520 Pa. 471, 477-78, 554 A.2d 906, 909 (1989); Gray v. Nationwide Mut. Ins. Co., 422 Pa. 500, 508, 223 A.2d 8, 11 (1966); Gedeon v. State Farm Mut. Auto. Ins. Co., 410 Pa. 55, 59-60, 188 A.2d 320, 322 (1963); Birth Center v. St. Paul Companies, Inc., 727 A.2d 1144, 1156-58 (Pa. Super. 1999), app. granted in part, 560 Pa. 633, 747 A.2d 858 (2000); Gilderman v. State Farm Ins. Co., 437 Pa. Super. 217, 226-27, 649 A.2d 941, 945-46 (1994); Strutz v. State Farm Mut. Ins. Co., 415 Pa. Super. 371, 375, 609 A.2d 569, 571 (1992); Hall v. Brown, 363 Pa. Super. 415, 420, 526 A.2d 413, 415 (1987).

[76] The Brickman Group, Ltd. v. CGU Ins. Co., July Term 2000, No. 909, slip op. at 22 (C.C.P. Phila Jan. 8, 2001) (Herron J.). This Opinion, discussed below, is available at http://fjd.phila.gov/pdf/cpcvcomprg/brickman.pdf; see also, Ingersoll-Rand Equip. v. Transportation Ins. Co., 963 F.Supp. 452,453 (M.D. Pa. 1997)(determining that Pennsylvania does not allow a separate cause of action in tort against an insurer for breach of fiduciary duty, but such a claim must be brought in contract). The Commerce Court's later denial of leave to amend on the bad faith claim in Brickman was addressed by the Superior Court in The Brickman Group, Ltd. v. CGU Ins. Co., 865 A.2d 918 (Pa. Super. 2004), upholding the trial court's decision.

[77] 2001 WL 286902 (N.Y.A.D., 1 Dept. Mar. 20, 2001).

[78] Id. At *8.

Subscriber Plaintiff's claims for breach of fiduciary duty could be addressed in this context. Pennsylvania law seemed to limit this duty to instances when the insurer had assumed the role of counselor or advisor in the handling of claims under a liability insurance policy. The Court found that Subscriber Plaintiff's allegations for breach of fiduciary duty were redundant with the contractual breach of the implied duty of good faith. A breach of fiduciary duty claim in the insurance context cannot be applied to these alleged misrepresentations, which represent conduct occurring prior to the contract's formation. Thus, the demurrer to this count was sustained.

The Brickman Group, Ltd. v. CGU Insurance Company, July Term 2000, No. 909, 2001 WL 1807923 (C.C.P. Phila. January 8, 2001) (Herron, J.) (no fiduciary duty owed by insurer to insured merely because of status as insurer, and failure to renew an insurance policy does not give rise to a legally cognizable claim for breach of fiduciary duty against insurer) and **53 Pa. D. & C.4th 71, 2001 WL 1736482 (C.C.P. Phila. August 3, 2001) (Herron, J.)** (no fiduciary duty merely because insurer engaged in setting reserves). The January 8, 2001 Opinion is available at http://courts.phila.gov/cptcvcomp.htm and the August 3, 2001 Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/brick801.pdf.

January 8, 2001 Opinion

The Brickman Group, Ltd. ("Brickman") alleged that General Accident Insurance Company ("GAIC") "agreed orally to sell Brickman a full program of Brickman's choice of liability insurance, including workers' compensation insurance, automobile liability insurance, general liability insurance and umbrella liability insurance, in five consecutive one-year policies subject to the same terms, conditions and premium rates." This was allegedly followed by a confirming letter. The Court referred to this as the 5 year contract. CGU Insurance Company ("CGU"), is GAIC's successor. Plaintiff further alleged that CGU extended the term of the terms of the 5 year contract an additional year. CGU sold Brickman policies per the agreed upon terms for the first 3 years. CGU began raising issues about the binding nature of the agreements, and just prior to the fourth year it proposed changing certain of the terms and premium amounts in CGU's favor. This allegedly "would have resulted in additional risks and increased costs [borne by Brickman] if it had accepted [CGU's] offer." CGU's subsequently issued a notice of non-renewal.

Brickman brought this action against CGU, asserting, among other claims, that CGU owed certain fiduciary duties to Brickman, by virtue of its status as insurer, and that CGU's failure to renew its policies on the terms of the alleged verbal agreement constituted a breach of fiduciary duty. The Court immediately stated that "Pennsylvania law does not recognize a cause of action for breach of fiduciary duty for failure to renew an insurance policy."[79] The Court explained that fiduciary duties that insurers actually do owe to their insureds -- which include the defense, handling or settlement of first or third party claims -- flow from the insurance contract; and that these are voluntarily assumed contractual fiduciary duties. Thus, mere status as insurance company that has entered into an agreement with an insured "does not automatically create a fiduciary relationship"; an insurer's fiduciary duty only exists "in representing the interests of the insured when handling [e.g., settling or defending], *inter alia*, all third party claims brought against the insured,"[80] or in the handling of benefits, and/or in addressing

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[79]The Opinion includes an analysis of two federal cases with inconsistent results on this point, which were also distinguishable on the facts.

[80]Birth Center v. St. Paul Companies, Inc., 727 A.2d 1144, 1155 (Pa. Super. 1999), aff'd, 567 Pa. 386, 787 A.2d 376 (2001), and overruled on other grounds, Mishoe v. Erie Ins. Co., 573 Pa. 267, 824 A.2d 1153 (2003) (citing Gedeon v. State Farm Mut. Auto. Ins. Co., 188 A.2d 320, 322 (1963)).

coverage, because of that agreement. Brickman pleaded nothing more to support its claim that CGU's status as its insurer, and thus the claim was dismissed.[81]

August 3, 2001 Opinion

Following the Court's January 8, 2001 decision, Brickman moved to amend its Complaint to plead additional facts in an effort to "resurrect its fiduciary duty claim." Brickman argued that CGU had fiduciary obligations because it had the power to set claim reserves, and that such power related to the "defense, handling, or settlement of claims"; activities which the Court had earlier stated involved fiduciary duties. The Court, however, disagreed with Plaintiff, concluding that setting reserves is not among the activities involved in the "defense, handling, or settlement of claims" that give rise to fiduciary duties. Again, the Court stated that Plaintiff had failed to set forth new facts satisfying Pennsylvania's fact pleading requirements to establish a claim for breach of fiduciary duty.

Steinberg v. Syndicate 212 at Lloyd's of London, October Term 2002, No. 2479 and December Term 2002, No. 4534 Phila. Ct. Com. Pl. LEXIS 72 (C.C.P. Phila. September 8, 2003) (Sheppard, J.) (D&O policy did not exclude claims on the basis that corporate directors breach a duty of loyalty by acting out of loyalty to themselves). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/steinberg-op9-08.pdf.

Among other issues in this coverage case, the carrier sought to disclaim coverage under the directors and officers portion of the policy on the basis that the directors acted

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[81]The Court stated: "Brickman based the existence of the fiduciary relationship by virtue of the fact that CGU was its insurance company. … Specifically, it alleged that 'in connection with its acting as an insurance company of Brickman, CGU occupied a position of utmost trust and confidence with Brickman, naming CGU a fiduciary of Brickman.' Id. However, Brickman does not allege that CGU's breach involved a breach of the insurance policy, itself, or derived directly therefrom." The Court noted that had it not dismissed the claim on the legal grounds addressed, it would have sustained the preliminary objection for insufficiently pleading facts to support the presence of a fiduciary relationship.

out of loyalty to themselves. The Court disagreed. After quoting from the policy's definition of wrongful act, the Court found: "In the face of such broad language, this court concludes that even if the Plaintiffs were loyal to themselves, their alleged actions are covered by the D&O Section. The motivation of the directors is not a determinative factor when deciding what acts are covered. If, by their argument, the Insurers are asserting that the directors breached their duty of loyalty to the company and its shareholders, the definition of wrongdoing explicitly covers the breach of any duty."

OTHER CASES

Consolidated class actions <u>Albertson v. Wyeth Inc.</u>, August Term, 2002, No. 2944, <u>Finnigan v. Wyeth Inc.</u>, August Term 2002, No. 0007 and **<u>Everette v. Wyeth Inc.</u>, December Term 2002, No. 0935, (C.C.P. Phila. July 8, 2003) (Sheppard, J.)** (consumers' breach of fiduciary duty claim against drug manufacturer is barred by the "learned intermediary doctrine").
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/wyeth-o.pdf.

This class action involved three consolidated cases. Defendant Wyeth Inc. ("Wyeth") manufactured, promoted, and distributed three estrogens or hormone replacement drugs. Plaintiffs alleged that Defendant failed to properly warn them of the risks and dangers associated with taking one in particular, Prempro. Among other allegations, Plaintiffs specifically claimed that Prempro's risks far outweighed its benefits. They claimed that brochures for Prempro did not warn about breast cancer possibilities. There had been a study conducted by the Women's Heart Initiative ("the Study") showing that the risk of invasive breast cancer increased by 26% after using Prempro for an average of 5.2 years. Plaintiffs further alleged that Wyeth misrepresented the cases by saying that the risk of breast cancer only increased after ten years of using the drug. The Study further showed that after five years of taking the drug, the overall risk outweighed the benefits.

As a result of the foregoing allegations, Plaintiffs sought recovery under a breach of fiduciary duty theory. They claimed that the Wyeth's breach of this alleged duty was the proximate cause of the injuries suffered. Wyeth contended that this claim was barred by the learned intermediary doctrine. The Court agreed and found that Plaintiffs had no cause of action for the breach of fiduciary duty in light of the learned intermediary doctrine. Therefore, Wyeth's preliminary objections were sustained.

<u>Firstrust Bank v. DiDio</u>, March Term 2005, No. 200, 2005 Phila. Ct. Com. Pl. LEXIS 376 (C.C.P. Phila. July 29, 2005) (Jones, J.) (breach of fiduciary duty claim not barred by gist of the action doctrine). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/050300200.pdf.

Firstrust Bank filed a complaint alleging violations of the Uniform Trade Secrets Act, breach of fiduciary duty, unjust enrichment, fraudulent misrepresentation and nondisclosure, negligent misrepresentation, conspiracy, and conversion against several of its officers and employees. The officers and employees had devised a plan to use the customer lists and other trade secrets to create a competing financial services firm, but filed preliminary objections to the bank's complaint.

Defendants asserted that the claim for breach of fiduciary duty was barred by the gist of the action doctrine because the fiduciary duty to which Defendants were bound was that set forth in the "ethics code," a signed statement of various contractual obligations. Defendants argued that this converts any fiduciary duty claim into one grounded in contract and is therefore barred by the gist of the action doctrine. Plaintiff bank contended that each employee maintained a position within the organization which gave rise to a fiduciary duty apart from or in addition to points laid out in the ethics code. The Court agreed that the fiduciary duty claim was not subsumed by the ethics code and therefore was not barred by the gist of the action doctrine.

Mercy Health System of Southeastern Pennsylvania v. Metropolitan Partners Realty LLC, November Term 2001, No. 3046, 2003 Phila. Ct. Com. Pl. LEXIS 55 (C.C.P. Phila. July 10, 2003) (Jones, J.) (the Court held a breach of fiduciary duty claim to be barred by the gist of the action doctrine). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/mercy703.pdf.

In Mercy, the Court held that the gist of the action doctrine barred a breach of fiduciary duty claim. Mercy Health Systems of Southeastern Pennsylvania ("Mercy") had entered into two fifteen-year agreements with Metropolitan Partners Realty LLC, Philadelphia Wellness Partners, Anchor Health Properties, and Metropolitan Partners, Ltd. Although the agreements were each labeled "Lease," Mercy contended that the relationship went far beyond that of the traditional landlord/tenant. Mercy asserted that the agreements provided the basis of a joint undertaking with the Metropolitan Partners to create a one-stop shopping integrated healthcare and retail project. Mercy believed that Metropolitan Partners failed to perform its duties in accordance with the agreements' terms. It attempted to address the problems by requesting a re-negotiation of the agreements, but the parties were unable to resolve the matter; and Mercy ultimately commenced this action.

Mercy's complaint asserted claims for rescission, declaratory judgment, breach of contract, breach of implied contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment. Metropolitan Partners filed an answer with affirmative defenses to the complaint, and a motion for judgment on the pleadings. The Court held that four claims (rescission, declaratory judgment, breach of contract, and breach of implied contract) survived the motion to dismiss, but granted the motion in favor of Metropolitan on the last three claims (breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment).

The Court held that the breach of fiduciary duty claim was barred by the gist of the action doctrine. The basis of the alleged fiduciary duty was Mercy's assertion that the relationship with Metropolitan was not that of landlord/tenant, but one of a joint venture partnership. The Court did not address whether there was a fiduciary relationship between the parties, because even assuming there was such a relationship, the gist of the action doctrine barred the claim. The Court applied the test used in eToll, Inc. v. Elias/Savion Advertising, Inc.,[82] and concluded that the breach of fiduciary duty claim was based on Metropolitan's alleged breaches under the agreements. Therefore, the agreements were central to the breach of fiduciary duty claim, instead of collateral, and the claim was dismissed under the gist of the action doctrine.[83]

Atchison Casting Corp. v. Deloitte & Touche, LLP, July Term 2002, No. 003193, 2003 Phila. Ct. Com. Pl. LEXIS 11 (C.C.P. Phila. March 14, 2003) (Jones, J.) (the Court held breach of fiduciary duty to be barred by the gist of the action doctrine). This Opinion is available at http://courts.phila.gov/pdf/cpcvcomprg/atchison303.pdf.

In Atchison, the Court granted preliminary objections in holding that the gist of the action doctrine barred claims of fraud, misrepresentation, and breach of fiduciary duty. Atchison Casting Corporation had hired the accounting firm Deloitte & Touche to audit its financial statements for the years 1996 through 2000. During that period of

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[82] 811 A.2d 10 (Pa. Super. 2002).

[83] The Court dismissed the breach of the implied duty of good faith and fair dealing claim because a breach of the covenant of good faith is nothing more than a breach of contract claim, and an alleged breach of the implied duty does not provide an independent ground for liability. The Court dismissed the unjust enrichment claim because there were express written agreements that governed the rights and obligations between the parties.

time, an officer of Atchison had misappropriated funds, submitted incorrect financial information to Atchison, and "cooked the books" of the subsidiary. Atchison sued Deloitte for failing to uncover the wrongdoings, which caused it to suffer significant economic and reputational harm. Deloitte counterclaimed that Atchison had caused its own harm and caused harm to Deloitte by immediately failing to inform it of the suspicious activities. Atchison filed preliminary objections against Deloitte's counterclaims of fraud, negligent misrepresentation, breach of covenant of good faith and fair dealing, and aiding and abetting fraud, but did not object to Deloitte's breach of contract claim.

Citing eToll, the Court dismissed the fraud and negligent misrepresentation claims because they were barred by the gist of the action doctrine. Atchison had contracted with Deloitte to deal honestly with Deloitte and fully disclose information. Therefore, Deloitte's fraud and negligent misrepresentation claims were actually claims that Atchison had breached its contract with Deloitte. The Court stated that the manner in which Atchison committed the alleged breach was irrelevant; it was simply a breach of contract, and the gist of Deloitte's action sounded in contract. Deloitte agreed to dismiss its claims for breach of covenant of good faith and fair dealing and aiding and abetting fraud.

Deloitte had also filed a third-party complaint against current and former Atchison employees, claiming that they had breached their fiduciary duties to Atchison, which resulted in a breach of duty to Deloitte. The Court relied on the gist of the action doctrine again in dismissing this claim. Any alleged fiduciary duties arose out of these individuals' employment contracts with Atchison. Therefore, Deloitte's breach of fiduciary duty claims, "if any," sounded in contract, not tort.

Behr v. Imhoff, March Term 2004, No. 589, 2007 Phila. Ct. Com. Pl. LEXIS 54 (C.C.P. Phila. March 5, 2007) (Sheppard, J.) (A breach of fiduciary duty claim may not be maintained simultaneously with a breach of contract claim when both claims allege the same underlying material facts). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/040300589.pdf.

Disputes arose among three business partners who entered into various operating agreements to create a private investment fund, which was comprised of two distinct Delaware limited liability companies and one Delaware limited partnership. As a result of these disputes, one of the partners filed a lawsuit claiming breaches of fiduciary duty and breaches of contract against the other two partners, as well as a malpractice claim against the law firm that drafted the operating agreements.

The Court applied Delaware substantive law, as dictated by contractual choice of law provisions. Applying Delaware law, the Court held that the claim for breach of fiduciary duty could not coexist with a claim for breach of contract when the facts underlying both claims were the same. Doing so would "undermine the primacy of contract law over the law of fiduciary duty." In order to maintain separate claims, the Plaintiff would have had to allege facts showing that the breach of fiduciary duty claim did not relate exclusively to the duties and obligations assumed under the governing contract(s). Plaintiff failed to do so, and summary judgment was granted on the fiduciary duty claim.

Sine v. PNC Bank, N.A., November Term 2001, No. 3221, 2002 Phila. Ct. Com. Pl. LEXIS 33 (C.C.P. Phila. November 15, 2002) (Cohen, J.) (Uniform Fiduciaries Act inapplicable where fiduciary did not have endorsement authority).

This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/sine.pdf.

The Plaintiffs, Testori, Mercurio and Sine were planning to invest up to $1.2 Million of Testori's funds. Through a chain of authority, Plaintiff Sine opened a joint account with Edward Mezvinsky at PNB Bank, into which investment funds were to be escrowed. An escrow agreement provided that the funds from this account could not be released without Sine's authority. Sine and Mezvinsky were co-signators, but the joint signature cards they executed stated that funds could only be released on Sine's authority. Further, PNC was provided with a letter from Mezvinsky that Sine could transfer up to $1 Million form the account on Sine's signature alone.

The escrow account was initially funded with $1 Million, only $500,000 of which was Testori's money. Half of that money was transferred out into another account, and the remaining $500,000 constituted Testori's funds. Plaintiffs learned that $500,000 was missing from the escrow account, despite the fact that they had not consented to or authorized its withdrawal. They brought claims against PNC for breach of contract and negligence. PNC asserted preliminary objections, arguing that the Uniform Fiduciaries Act, 7 P.S. § 6351, *et. seq*., ("UFA") required dismissal of the contract claim in the absence of bad faith; and completely barred negligence claims. The Court disagreed.

The Court stated that while the UFA "shields depository banks from liability in certain instances, the UFA does not relieve a bank from liability unless *the fiduciary actually has authority* to endorse the instruments at issue, and the bank has no actual knowledge that the fiduciary is breaching his duty."[84] Moreover, "[e]ven if the fiduciary possesses the requisite authority, 'the UFA does not permit a bank to ignore an

[84]7 P.S. § 6361 (emphasis in original).

irregularity where it is of a nature to place one on notice of improper conduct by a fiduciary.'"[85] The Plaintiffs averred facts which, when taken as true for purposes of preliminary objections, supported Plaintiffs' contention that Mezvinsky was not a fiduciary authorized to receive money from the PNC account absent Sine's authority. This made the UFA inapplicable to the breach of contract claim. Further, while negligence claims would be barred under the UFA, again, the UFA was inapplicable.

Brodie v. Morgan, Lewis & Bockius, February Term 2004, No. 2004, 70 Pa. D. & C.4th 240, 2005 WL 167460 (C.C.P. Phila. January 20, 2005) (Abramson, J.) (breach of fiduciary duty claim dismissed based on statute of limitations). This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/040202004.pdf.

In Brodie v. Morgan, Lewis & Bockius, the Court dismissed Plaintiffs' breach of fiduciary duty claim because the Plaintiffs failed to make the claim within two years (the applicable statute of limitations for breaches of fiduciary duty actions)[86] from when they "knew or should have known" that the Defendant's alleged breach "had caused them injury." The Court specifically stated that Pennsylvania's "discovery rule" (an exception, pursuant to which the statute of limitations can be tolled for a period of time) did not apply in this case, as Plaintiffs should have known of the injury when they became targets of a federal grand jury investigation.

Johnson v. Marrs, July Term 2002, No. 4706, 2004 Phila. Ct. Com. Pl. LEXIS 109 (C.C.P. Phila. December 27, 2004) (Jones, J.) (breach of fiduciary duty claim dismissed based on statute of limitations), and **2005 Phila. Ct. Com. Pl. LEXIS 119 (April 20, 2005) (Jones, J.)** (fiduciary duty does overcome due diligence in pursuing claim under discovery rule). The first Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/020704706.pdf and the second Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/020704706-042005.pdf.

[85]Robinson Protective Alarm Co. v. Bolger & Picker, 512 Pa. 116, 516 A.2d 299, 303 (1986).
[86]42 Pa.C.S. §§ 5524, 5525.

In Johnson v. Marrs, the Court dismissed Plaintiff's claim for breach of fiduciary duty on the basis of the statute of limitations and declined to apply Pennsylvania's discovery rule, which tolls the statute of limitations until the time that Plaintiff "knows or reasonably should know that [Plaintiff] has been injured and that [Plaintiff's] injury has been caused by another's conduct."[87] The Court also indicated that, under 42 Pa.C.S. §§5524(3), 5524(7), the statute of limitations for breach of fiduciary duty claims is two years from the date of the injury.

In a second Opinion issued on a motion for reconsideration, the Court again considered the existence of a fiduciary duty on the application of the discovery rule on starting the statute of limitations. The Court stated the while the presence of a fiduciary relationship is pertinent to the time when a duty to investigate arises, its mere existence cannot "substitute for an adequate pursuit of the cause of [a party's] injury." On realizing a harm has occurred, a party must exercise "'those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others.'"[88]

Orianna Associates, LLC v. Transamerica Occidental Life Companies, August Term 2003, No. 2250, 2007 Phila. Ct. Com. Pl. LEXIS 158 (C.C.P. Phila. May 29, 2007) (Sheppard, J.) (summary judgment granted on claim of aiding and abetting a breach of fiduciary duty for failure to provide sufficient facts to support claim).
This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/030802250.pdf.

This case involved claims by the estate of a shareholder and member (Most) in various entities against another shareholder/member (Lehman) and a creditor of those entities (Altman). Most have given Altman a guaranty for a loan to the entities. The estate alleged that Altman, conspiring with Lehman, improperly used the loan guaranty to

[87] Crouse v. Cyclops Indus., 560 Pa. 394 at 404, 745 A.2d 606 at 611 (2000).
[88] Cochran v. GAF Corp., 542 Pa. 210, 220, 666 A.2d 245, 250 (1995).

the estate's disadvantage vis-à-vis obtaining value from Most's shares in the entities. Lehman was the subject of various claims, including breach of fiduciary duty, and Altman was the subject of various claims, including conspiring with Lehman.

In addressing Altman's motion for summary judgment on the conspiracy claims, the Court found that even if a breach of fiduciary duty claim could be made out against Lehman, liability could not be imputed to Altman to show that he was attempting to defraud the estate. The Court looked at the law of aiding and abetting tortious conduct, and observed that one court had recognized a cause of action for aiding and abetting a breach of fiduciary duty, following Restatement (Second) of Torts § 876.[89] Again, however, even if viable, the Court stated that: "Although the Estate may be able to show that Lehman breached his fiduciary duty to the Estate and that Altman concurrently breached the terms of the Guaranty, such separate wrongs do not constitute a conspiracy without proof of collusion, which the Estate has not provided."

In Lichtman v. Taufer,[90] discussed above, the Court likewise cited Koken v. Steinberg for the proposition that Pennsylvania recognized a claim for aiding and abetting a breach of fiduciary duty. In Fibonacci Group v. Finkelstein & Partners,[91] also discussed above, the Court concluded as a matter of law that Pennsylvania did not recognize a tort of aiding and abetting a breach of fiduciary duty and distinguished Koken v. Steinberg. It also cited WM High Yield Fund v. O'Hanlon,[92] for the proposition "that because the Pennsylvania Supreme Court has declined to recognize aiding and abetting a

[89] Koken v. Steinberg, 825 A.2d 723, 731-2 (Pa. Commw. 2003).
[90] March Term, 2004, No. 5560, 2004 Phila. Ct. Com. Pl. LEXIS 68 (C.C.P. Phila. July 13, 2004).
[91] January Term 2005, No. 1399, 2007 Phila. Ct. Com. Pl. LEXIS 23 (C.C.P. Phila. January 31, 2007) (Abramson, J).
[92] No. 04-3423, 2005 U.S. Dist. LEXIS 33569, **49-50 (E.D. Pa. 2005).

breach of fiduciary duty, the Eastern District of Pennsylvania would not expand Pennsylvania law by recognizing the tort." In WM High Yield Fund, the District Court observed that this was the majority view in the United States District Court for the Eastern District of Pennsylvania.[93]

Monroe Court Homeowners Assoc. v. Southwark Realty Co., October Term 2004, No. 777, 2005 Phila. Ct. Com. Pl. LEXIS 379 (C.C.P. Phila. August 11, 2005) (doctrine of laches applied to claims rooted in alleged breach of fiduciary duty) and **2005 Phila. Ct. Com. Pl. LEXIS 28 (C.C.P. Phila. February 7, 2005) (Cohen, J.)** (court would not dismiss claim at preliminary objection stage where sheriff's sale could potentially be set aside where tainted by a breach of fiduciary duty). The first Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/041000777-081105.pdf and the second is available at http://fjd.phila.gov/pdf/cpcvcomprg/041000777.pdf.

The case involved a dispute over a piece of property, that was sold in a sheriff's sale after a default judgment. The judgment was obtained by Defendants in this action, a realtor and its principal; the realtor having been Plaintiff's manager at one time. Years of various pieces of litigation ensued. This was an equity action to set aside the title transfer by sheriff's deed. Plaintiffs claims were based on alleged breaches of fiduciary duty against the realtor's principal. Defendants asserted laches, among other things, arguing that the Court should follow the two year statute on limitations for breach of fiduciary duty. The Court rejected the argument that there was a resulting trust that would invoke a five year statute of limitations. While not bound by the statute of limitations, the Court could look to it for guidance. In the absence of due diligence, the Court found the doctrine of laches applied where the complaint was filed over three years after the alleged harm. In an earlier Opinion, the Court overruled preliminary objections seeking to

[93] But see, e.g., Chi. Title Ins. Co. v. Lexington & Concord Search and Abstract, LLC, No. 06-2177, 2007 U.S. Dist. LEXIS 27682, **31-33 (E.D. Pa. April 13, 2007) finding that the majority view in the Eastern District is that such a claim should be recognized under Pennsylvania Law.

dismiss the claim to undue the sheriff's sale, because a breach of fiduciary duty, as alleged, might have tainted the sale.