

## PROFESSIONAL LIABILITY UPDATE

### FIDUCIARY DUTY

By Jennifer A. Becker

*Broadway Victoria, LLC v. Norminton, Wiita & Fuster* (2017) 10 Cal.App.5th 1185

*The Second District holds facts supporting a legal malpractice claim are insufficient to support a breach of fiduciary duty claim. Breach of fiduciary duty requires an additional showing the attorney breached a duty of confidence or loyalty.*

Broadway Victoria, LLC, was a commercial real estate company owned by Anita Lorber. She also owned a textile manufacturing business, Lorber Industries of California, Inc. Lorber Industries leased a parcel of industrial land from Elixir Industries. The lease gave Lorber Industries a right to first refusal if a third party offered to buy the property during the lease term. Elixir sold the property without extending Lorber Industries its right of first refusal.

When Lorber Industries reorganized under Chapter 11, it asked the bankruptcy court to authorize it to assume the lease as debtor-in-possession, and to assign it to the highest bidder. Broadway Victoria submitted the highest bid, and the bankruptcy court authorized Lorber Industries to assume the lease and assign it to Broadway Victoria.

Anita Lorber retained Thomas Norminton and his firm Norminton, Wiita, & Fuster to represent Broadway Victoria, as the assignee of Lorber Industries, in a claim against Elixir for denying Lorber Industries its right to first refusal. Elixir raised a lack of

standing defense against Broadway Victoria, claiming the lease assignment did not include the right of first refusal claim. After extended litigation, the trial court granted summary judgment on this issue, which was affirmed on appeal.

Broadway Victoria sued Norminton asserting it should have sought clarification in the bankruptcy court to determine whether the right of first refusal claim was included in the lease assignment. Broadway Victoria claimed this would have efficiently resolved the standing question, and avoided substantial attorneys' fees. Broadway Victoria alleged both legal malpractice and breach of fiduciary duty based on this error. The trial court granted a nonsuit motion on the breach of fiduciary duty claim.

Breach of fiduciary duty requires existence of a fiduciary duty; breach; and damage proximately caused by the breach. An attorney's fiduciary duty can be determined as a matter of law based on the Rules of Professional Conduct, statutes, and general principles relating to other fiduciary

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relationships. Breach is a question of fact. Expert testimony, although not required, is admissible to establish breach where proper attorney conduct is a matter beyond common knowledge.

Breach of fiduciary duty is distinct from a legal malpractice claim. It requires some further violation of the obligation of trust, confidence, or loyalty to the client. Breach of fiduciary duty allegations duplicative of negligence, which do not implicate the fiduciary duties, are insufficient and should be dismissed.

The Court observed Broadway Victoria's evidence might have proven professional negligence because Norminton arguably failed to present an important litigation strategy to its client. However, the evidence did not show Norminton breached a distinct duty of confidentiality or loyalty to support breach of fiduciary duty.

The Court rejected as conjecture and speculation the notion the evidence supported a finding that Norminton put his interests over those of his client by concealing the option to litigate in a more efficient forum simply to generate greater fees. It is not fair to conclude an attorney seeks to fleece a client anytime the attorney is compensated for pursuing a losing litigation strategy not vetted with the client.

*Conclusion:* This case is a welcome clarification of the distinction between professional negligence and breach of fiduciary duty.