Fiduciary Duties & Financial Lines: The Origin, Evolution, & Future

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A little history....

What is a fiduciary duty and where did that thing come from?
Where did fiduciary duties originate?

A. King Arthur – his knights were considered moral fiduciaries to the goodwill of the crown while they traveled to faraway lands.

B. Sun-Tzu – his generals were expected to act as fiduciaries to the military code as they conquered new lands.

C. Hammurabi - the Code of Hammurabi created fiduciary duties to regulate merchants who traveled with the monies of wealthy investors.

D. The Romans - Emperor Cicero introduced fiduciary duties to facilitate trade on the Mediterranean.

E. English common law created fiduciary duties to regulate land and agriculture.
Origins - Babylonia

- Answer: A – Hammurabi.
- Hammurabi (1,800 B.C.) created 282 laws regarding crime, family, property, and fiduciary rules.
  - Rules developed to facilitate commerce in Ancient Mesopotamia.
  - The laws primarily governed situations in which a *tamkarum*, or principal/merchant, gives a *samallum*, or agent, money to use for investments and purchases while traveling, or goods to trade or sell.
  - Fiduciary duties are almost 4,000 years old!

Origins – Babylonia

- Under Hammurabi’s laws, an agent was required to keep a written receipt of transactions he performed for the principal and tabulate the loans that were due at the return of an expedition.

- An agent had a duty to account to the principal for interest on the entrusted money over the period of the agency.

- Hammurabi’s laws required an agent to generate profit for the principal. Failure to do so equated to having to pay double the original amount entrusted.

• You know, the normal stuff:
• Stole property from the court, put to death.
• Received the stolen property from the thief, put to death.
• If you stole an ass, pig, or goat belonging to the court, you had to pay thirtyfold therefor; if you had nothing with which to pay, put to death.
• If someone committed insurance bad faith, they were put to death. (Okay, not really)
Romans implemented fiduciary rules under Cicero (106 B.C. – 43 B.C.):

- Fiduciary relationships depended “…on the vicarious faith of friends…”

- We “cannot do everything ourselves; different people are more capable in different matters.” Preferable to divide up tasks by skill set.

- One who impair[ed] that confidence, attack[ed] the common [support system] of all men.”

- Romans saw breaches of fiduciary duties as a “betrayal” and they established penalties similar to those for theft.
Origins - England

• More modern version of fiduciary duties came from English land ownership and cases involving land waste, i.e., the exploitation by the tenant of natural resources on lands held in trust.

• For example: A child under age 21 (usually the eldest son) could not inherit property until he turned 21. In the meantime, a lord would take care of the land and be entitled to its profits. The lord could not waste the land, let it fall into ruin, etc., or he would breach his fiduciary duty.

What is a fiduciary duty today?
Modern Fiduciary Duties

• Duty of utmost good faith, trust, and confidence.
• Duty of candor owed by a fiduciary to the beneficiary.
• Duty to act with the highest degree of honesty and loyalty toward another person.
• Duty to act in the best interests of the other person.

Black’s Law Dictionary 523 (7th ed. 1999)
Other terms used to describe a fiduciary duty:

• Usually taking care of money or assets of another person.
• Other person, called a principal, is vulnerable.
• Seeks aid, advice or protection of fiduciary.
• A fiduciary must act for sole benefit of the other person.
• Cannot profit from position as fiduciary unless principal consents.
• Highest standard of care at equity or law.
Elements of Breach of Fiduciary Duty

(1) Defendant owes plaintiff a fiduciary duty;

(1) Breaches it;

(3) Breach was a proximate cause of the resulting injury; and

(4) Damages.

Source: RAJI (Civil) 4th Commercial Torts 1A-1D; Standard Chtd. PLLC v. Price Waterhouse, 190 Ariz. 6 (1996)
Do *you* Have a Fiduciary Duty?
YOU GET A FIDUCIARY DUTY! AND YOU
GET A FIDUCIARY DUTY!

EVERYONE GETS A FIDUCIARY DUTY!
Several business professionals may have fiduciary duties . . . or they may not....
Does an auditor have a fiduciary duty under Arizona law?

Company wants to acquire bank. Bank has an auditor that is responsible for bank’s financial audits. Auditor has held this role for decades and each year examined bank’s records as part of its audits. Auditor offered unqualified opinions supporting the accuracy and completeness of bank’s financials. Bank and auditor agree that company can review all of auditor’s files and ask auditor as many questions as it wants about bank. (Company and auditor even talk auditor doing work for the company after it acquires bank.)

Company agrees to acquire bank and raises $300M to do so. Company tells auditor it is relying on the information provided by auditor. Auditor was not required to do an audit just for the deal, but was required to provide all letters issued addressing weaknesses in bank’s internal controls. Company later discovers that auditor failed to thoroughly investigate bank’s internal loan controls and that bank had many bad loans on its books, which resulted in an over-statement of income by $27M. Company sues auditor for breach of fiduciary duty and claims it would not have bought bank but for auditor’s shoddy auditing.

Was there a fiduciary duty and breach?
Answer: No.

Why?

Auditor’s role was “independent” and not personal to the company.

Auditor assumed a responsibility to others that transcended any special relationship.

Functions did not exist only to benefit the company, but to benefit shareholders, the investing public and creditors.

Auditor did hold “anything of value” belonging to the company.

There was no confidential relationship, “intimacy” or “disclosure of [company’s] secrets.”

More like an arbiter, finder of fact, or watchdog.

Mere trust in another’s competence and integrity not enough.

Fiduciary’s will must be substituted in favor of the principal’s will.

Did the auditor have a fiduciary duty to the bank? No, the same principles apply.

Claims against auditors assignable because non-fiduciary in nature.

Does an insurance agent have a fiduciary duty under AZ law?

Customer buys a liquor store called The Vault. Customer buys business liability insurance from its agent. Agent failed to advise customer that customer could also buy liquor liability coverage to protect The Vault from liquor related claims. The Vault overserved a minor who crashed and killed his passenger. Passenger’s family sued and The Vault, which had no coverage. The Vault attempted to assign its right to sue its agent in return for complete protection from passenger’s family.

Did the agent have a fiduciary duty and breach it?
Arizona Fiduciary Duties

- Answer: No.
- Insurance agents, in general, do not owe fiduciary duties.
- Relationship is “transaction” based.
- Although customers share private information with agents, like their medical history, personal habits, claims history and financial data, this does not rise to the level of a fiduciary. It merely invokes privacy concerns.
- Compare to a lawyer – share private “conduct” with lawyer that may expose you to liability.

Arizona Fiduciary Relationships

• Generally: Yes
  – Accountant-client: *Gemstar v. Ernst Young*, 185 Ariz. 493 (1996)(accountant for corp. and shareholders; one shareholder, who accountant did personal work for, enticed other shareholders into investments and diverted funds to personal accounts)
  – Securities broker-client: *Stewart v. Phoenix Nat’l Bank*, 49 Ariz. 34 (1937)(confidential relationship existed when a bank acted as financial advisor for years and plaintiff relied on bank’s advice); *SEC v. Rauscher Pierce Refsnes, Inc.*, 17 F.Supp.2d 985 (1998)(existence of fiduciary duty for financial advisor is a question of fact examining whether one party has placed confidence in the other and there is an imbalance of knowledge so that the client relies on the advice; failure to disclose material information concerning Treasury securities to client actionable); *SEC v. Zanford*, 535 U.S. 813 (2002)(discretionary account trading)
• Maybe

Arizona: Fiduciary Relationships

- Generally: No
  - Broker/order clerk-client: *Walston & Co. v. Miller*, 100 Ariz. 48 (1966)(mere order takers are not fiduciaries, but investment advisors, managers of discretionary accounts, and brokers with a “special relation of trust” with his/her client are)
Did a Utah fiduciary relationship exist and was it breached?

First Party Scenario – the stolen car:
Driver is struck by another who stole a car. Driver files a claim against stolen car owner’s insurance, who denied knowledge or responsibility because her car had been stolen. Driver files claim for uninsured motorist benefits with his own carrier, which was substantially denied in part. Insurer only pays driver his medical expenses and lost wages. Insurer rejects claim for policy limit demand for uninsured motorist benefits.

Driver claims that by refusing to pay the claim, the insurer breached its contract of insurance with him, acted in bad faith by failing to investigate the claim, bargain with the other driver, or settle the claim, and that the insurer breached an implied covenant of good faith and fair dealing by refusing to bargain with the other owner.
First Party Scenario:

- Answer: No.
- Why?

- This was a first-party claim in which the insurer agreed to pay claims submitted to it by the insured for losses suffered by the insured. There is no special relationship of trust and reliance created in the contract. It simply obligates the insurer to pay claims submitted by the insured in accordance with contract law.

- In a third-party situation, since the insurer controls the disposition of claims against its insured – who relinquishes any right to negotiate on his own behalf – the contract itself creates a fiduciary relationship because of the trust and reliance placed in the insurer by its insured. In essence, the insurer is acting as the insured’s agent with respect to the disputed claim. Third-party agreements require the insurer to act in good faith and be “zealous in protecting the interests of the insured.”

Did a Utah fiduciary relationship exist and was it breached?

Second Scenario - “he said, she said” - same insurer for both drivers:

Driver is struck by a red light runner as he made an improper turn. Both drivers are insured by the same insurer and submit claims for damages. Insurer fails to contact the lone disinterested eyewitness. Insurer relies on police citations and past experience with similar situations in determining that one of its insureds, the improper-left-turning driver, was 60% at fault. Neither driver sues the other one.

Unsatisfied that he was stiffed with 60% liability, the left-turning insured files a claim against the insurer for (1) breaching a fiduciary duty to fairly and in good faith represent his interests by failing to conduct a more thorough investigation against its other insured, and (2) for only relying on the police citations and not contacting the eyewitness.
Second Scenario:
- Answer: No, not yet anyway.
- Why?
  - Insurer’s duties to each driver were contractual, rather than fiduciary.
  - “[A]n insurer’s ‘duty to defend’ does not arise until a formal lawsuit has been commenced by the insured.”
  - Only upon the initiation of formal legal proceedings does the insurer undertake a fiduciary duty to defend its insured, who relinquishes his right to negotiate and is exposed.

Utah Fiduciary Relationships

• Generally: Yes
  – Directors/officers: Utah Code §§ 16-10a-840(1), 16-10a-840(1); *Stevensen 3rd East, LC v. Watts*, 2009 UT App 137 (managing director of real estate company knew the risks of making changes to a project design after construction commenced - which risked depletion of funds needed to complete construction - but intentionally borrowed less than needed to complete construction as originally designed)
  – Advisor-stockholder: *Omega Inv. Co. v. Wooley*, 72 Utah 474 (1928)

• Generally: No

• Likely:
Did a Colorado fiduciary duty exist?

Husband and wife buy restricted stock that could not be sold unless, as required by an SEC rule: (1) the couple filed an SEC registration statement, or obtained the opinion of counsel, satisfactory to the issuer, that registration is not required, (2) held the stock for 2 years, and (3) the amount did not exceed 1% of outstanding shares. The couple wants to sell the stock years later, so they present it to the company with a letter from an attorney approving the sale. The company refuses to approve the sale and claimed the couple did not comply with SEC Rule 144.

The couple sued for breach of fiduciary duty, seeking the difference between the price of the stock at the time they sought approval for the sale and the price of the stock at the time the suit was commenced. Did the corporation have a fiduciary duty and breach it?

• Answer: Yes, the corporation had a fiduciary duty.
• Question of breach was a factual question for a jury.
• Trial court erred in its bright line ruling that the corporation owed no duty to stockholders.
• As a trustee for its stockholders, the corporation was bound to protect their interests and “occupie[d] a fiduciary relationship with them,” which included a duty of good faith in deciding whether to approve the sale.
• Plaintiff claimed the corporation sat on the request to avoid dilution prior to a public sale.
Colorado Fiduciary Relationships

- **Yes:**
  - Trustee-beneficiary: *Id.* (matter of law)
  - Principal-agent: *Id.* (matter of law)

- **Maybe:**
  - Securities broker-client: *Paine, Webster, Jackson, & Curtis v. Adams*, 718 P.2d 508 (1986) (no *per se* duty; court considers the degree of control exercised by the broker over the customer’s account and evidence the customer placed trust and confidence in the broker; here, broker had a duty due to his level of control on trades)
Did a Nevada fiduciary duty exist?

Driver is injured in a car accident with uninsured motorist. He makes a claim for UM benefits under his policy. Insurer denies the claim. He then files suit claiming his carrier refused to pay the UM coverage, failed to promptly investigate the claim, and made unfair settlement offers. He also alleges a breach of a fiduciary duty claiming the carrier did not act in good faith or fair dealing, which duties are fiduciary in nature.

Was there a fiduciary duty and was it breached?

• Answer: No.
• Why?
  – The court found that while an insurance contract is a complex, unilaterally prepared, and rarely understood by the insured, there is no recognized fiduciary duty between the insurer and the insured.
  – The duty of good faith and fair dealing is fiduciary in nature, but alone do not create a fiduciary relationship.
  – The covenant of good faith and fair dealing does not require that the insurer place the insured’s interests above its own as would be the case if the insurer were a fiduciary.
  – The special duties of an insurer to the insured do resemble duties owed by a fiduciary, but these duties “arise due to the unique characteristics of an insurance contract, not because the insurer is a fiduciary.”
Nevada: Fiduciary Relationships

• **Generally Yes**

• **Generally No**
  – Insurer-insured: *Martin v. State Farm Mutual Ins. Co.*, 960 F.Supp. 233 (D. Nev. 1997)(duties of good faith and fair dealing are fiduciary in nature, but do not create a fiduciary relationship; insurer is not required to place insured’s interests above its own)
Did a Florida fiduciary duty exist?

Two business associates start a joint venture and hire an attorney to defend the company and associates against claims of sexual harassment. Six months after the case is resolved, the attorney writes a letter to all shareholders of the company revealing confidential information learned during representation that was harmful to one associate. The company used the information to fire the associate.

Was there a fiduciary duty and was it breached?

Florida Fiduciary Duties

• Answer: Yes, a fiduciary relationship existed.
• The relationship between an attorney and client is a fiduciary relationship to the highest degree and exists even when an attorney represents a company and an alleged wrongdoer in the company.
• But, the court found no breach because:
  – Information in the letter was not confidential. Plaintiff disclosed the information to others and it was already known.
  – Plaintiff failed to prove how the disclosure caused damages.
Florida Fiduciary Relationships

• Generally Yes:
  – Attorney-client: *Elkind v. Bennett*, 958 So.2d 1088, 1091 (Fla. 4th D.C.A. 2007)(see above)
  – Directors/officers: Fla. Stat. § 607.0830; *Orlando Orange Groves Co. v. Hale*, 144 So. 674 (1932)

• Maybe:
  – Contracts can create one: *Capital Bank v. Mvb*, 644 So.2d 515 (1994)(“Fiduciary relationships are either express or implied.” Contract can create one when “confidence is reposed by one party and a trust accepted by the other.”)
  – Insurance broker-client: *Wachovia v. Ins. Serv. v. Toomey*, 994 So.2d 980 (2008)(insurance brokers who advise clients and assist in claims handling have a fiduciary duty to insureds and said duty is assignable)

• Generally No
  – Bank–borrower: *First Nat’l Bank & Trust Co. v. Pack*, 789 So.2d 411 (App. 2011)(generally the relationship between a bank and borrower is that of creditor to debtor, in which the parties engage in an arms-length transaction)
Florida Fiduciary Relationships

- Under Florida’s common law, the Florida Supreme Court defined the concept of fiduciary duties broadly – it can include *any relationship if the underlying facts support it*.
  - “[I]t may be confidently asserted that every instance in which a confidential or fiduciary relation in fact is shown to exist will be interpreted as such.”

*Source: Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927)*
Other Potential Fiduciary Relationships

- Parent – child
- Conservator – legal guardian
- Buyer’s real estate agent – buyer client
- Senior employee – company
- Government – indigenous peoples
- Doctor – patient
- Teacher – student
- Priest – parishioner
- Life coach – audience member
What Does Having a Fiduciary Duty Mean from a Risk & Exposure Standpoint?
Easier to prove a claim?  
Defending is more difficult?  
Greater potential for damages?
Easier to prove a breach of fiduciary duty claim?

- Fraud: requirements to prove fraud are reduced. Nine elements of fraud are inapplicable.
  - Plaintiff need not show intent to defraud, reliance, or the right to rely.
  - In some instances, proof of damages is not necessary. (damages need not be shown to defeat a real estate broker’s right to a commission). *Ornamental & Structural Steel v. BBG*, 20 Ariz.App. 16 (App. 1973).

- Negligence: generally easier for plaintiff to prove breach of fiduciary duty than action based in professional negligence.
  - In vast majority of professional negligence actions, expert testimony is required to establish each element of plaintiff’s cause of action: standard of care, breach, proximate cause, injury to plaintiff, and the extent of the damages.
  - Although a breach of fiduciary duty claim may require expert testimony, such expert testimony may not always be required.

Defending claims is more difficult.

- Burden shifting - if a suit challenges a transaction between a fiduciary and a beneficiary, the fiduciary may have the burden of proving it dealt candidly and fairly once the plaintiff proves that duty was breached.
- No causation requirement – may only have to prove the existence of a fiduciary relationship, breach, and resulting injury to plaintiff or benefit to defendant.

Defending claims is more difficult.

- Sometimes longer statutes of limitations. See *Gerdes v. Estate of Cush*, 953 F.2d 201 (5th Cir. 1992) (breach of fiduciary duty had 10 year limitations period - tort or contract claims only had 1 year period). No bright line SOL – it may follow underlying or related claim, such as breach of contract.
- Traditional tort defenses of contributory or comparative negligence may not be available. (Comparative fault available in AZ. *Gemstar, supra*.)
- Fewer defenses available generally.

Greater potential for damages?

• More remedies available - compensatory damages, punitive damages, prejudgment interest, avoidance of contract, restitution, disgorgement of commissions or profit, injunctive relief, constructive trust, etc.

• Potential to recover any benefit realized through the breach of fiduciary obligations, even in the absence of actual injury suffered by the client, **plus** actual loss suffered. (i.e., attorney fee forfeiture)

Where are we Headed With Fiduciary Duties?
Department of Labor Fiduciary Rule
What is the Federal Fiduciary Rule?

Elevates all financial professionals who work with retirement plans or provide retirement planning advice to the level of a fiduciary.

Limits fees and financial incentives that may cause advisor not to act in client’s best interests.

Exemptions to Rule – in order to be exempt from fee restrictions, broker must make specific written disclosures regarding fees and representations of fiduciary compliance.

Federal Fiduciary Rule

Impact and Consequences
Pros and Cons

- **Pros:**
  - Advisors must put client’s interest ahead of their own.
  - Advisors not as driven by referral fees and commissions.
  - Investors lose $17 billion per year in fees and bad advice (per DOL).
  - May result in less lawsuits.
  - Advisers can still receive commissions, but must execute a contract promising to put client interests first – “Best Interest Contract Exemption” or BICE.
  - Firms can use many of their current compensation models as long as they disclose conflicts of interest and information about their revenue model, etc.

**Sources:** Rachel Levy, Business Insider, *Trump has signed an order that could roll back a rule intended to protect Main Street’s retirement money*, Feb. 3, 2017; Christopher Robbins, Financial Advisor, *Understanding The Fiduciary Rule’s Best Interest Contract Exemption*, May 6, 2016; David Arthur Skeel, *Five Years after Dodd-Frank: Unintended Consequences and Room for Improvement*, Penn Wharton Public Policy Initiative
Cons

– Costs - many large financial service companies invested millions in preparation for compliance with the Rule.

– More lawsuits and breach of fiduciary duty claims. (Most FINRA claims are breach of fiduciary duty claims.)

– Smaller brokers priced out due to compliance costs. (May lead to mergers – e.g., Securities America acquiring Foothill Securities in 2016.)

– Commoditizes advice for lower net worth individuals and will result in robo-advice or them being put into index funds.

– Limits choice and risk taking.

– Changes in complex fee structures in preparation for the Rule challenging.

Sources: Rachel Levy, Business Insider, Trump has signed an order that could roll back a rule intended to protect Main Street’s retirement money, Feb. 3, 2017; Christopher Robbins, Financial Advisor, Understanding The Fiduciary Rule’s Best Interest Contract Exemption, May 6, 2016; David Arthur Skeel, Five Years after Dodd-Frank: Unintended Consequences and Room for Improvement, Penn Wharton Public Policy Initiative
Trumps February 3rd Order delayed implementation – was supposed to go into effect on April 10, 2017. Currently set to launch on June 9, 2017, and take full effect on January 1, 2018.
• Between now and January 1, 2018, the DOL will review the Rule and decide whether to propose changes to the Rule or exemptions.

• Under the terms of the extension, advisors to retirement investors will be treated as fiduciaries and have an obligation to give advice that adheres to “impartial conduct standards” beginning on June 9.

Practical consequences of delay

• Some large brokerage firms have already embraced the Rule despite the February 3, 2017, Executive Order.

• Merrill Lynch will “continue to implement a heightened standard of care for delivering personalized advice, especially for investment advice about retirement accounts.”

• Several federal courts upheld the Rule earlier this year.

Thank You!
Risk Management & Underwriting

Brian Snow, Managing Director, AIG
Changes Under the New Law:

- Broadens those defined as Fiduciaries
  - Broker-dealers (SagePoint)
  - Financial advisors
  - Insurance agents/brokers
  - DOL believes billions ($) wasted on excess retirement plan fees
- New compensation plans
  - Fee based
  - Additional Disclosures
- Being a fiduciary exceeds the “suitability” standard
- Costly implementation and disruption for advice firms
Suitability – “firms and their associates must have reasonable basis to believe a transaction or investment strategy involving securities is suitable for their customer based on information obtained through reasonable diligence”.

- FINRA Rule 2111
- Diligent information (age, risk tolerance, liquid net worth, investment horizon, tax status, other investments and income).
- Recommendations consistent with interest of customer achieving financial goals and needs.
- In case of broker-dealers owe a duty to client and the firm.
- Fees can’t be excessive, churning prohibited.
New Fiduciary Law Says:

• Advisors, dealers and agents must act in best interest of their clients and put clients interest above their own…be a fiduciary

• No room for potential conflicts of interest. Retirement plan/IRA fees must be disclosed in dollars ($).

• If advisor wishes to work on commission must disclose via Best Interest Contract Exemption “BICE”. Stating will act in clients best interest and only earn “reasonable” compensation.
  – Leaves firms open to suits if client believes “BICE” violated.
  – Fear that small retirements accounts could be dropped.
Registered Investment Advisors “RIAs”

• Registered with SEC or state securities authorities ($25m AUM or greater; SEC)

• Per SEC, RIAs already have fiduciary duty to clients.

• Form ADV, Part 2 requires RIAs to prepare narratives information for clients, including fee schedule, services offered, and potential conflicts. (Part 1; general information about firm)

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Low Fees
Small Account Balances
Self-service
Fast communication
New way of doing things
Science & Data

Robo Advisors…..
Impact to Insurance Agents

• In the law definition of “fiduciary investment advice” applies to all firms providing advice to retirement plans.

• “Game changing” for agents selling certain annuities, IRAs and small group retirement plans.

• Could force some agents to become RIAs.

• Most life & health insurance agents do not hold securities licenses.
Insurance Agents

……..continued

• Insurance agencies not regulated by FINRA, SEC, DOL or IRS – rather state insurance departments.

• “Suitability” replaced with fiduciary duties of prudence, care & loyalty and duty to offer “investment advice” in the best interest of client.

• Licensing and E&O issues for L&H agents.

• Agents encouraged to seek legal advice.
Insurance Carriers

Potential Issues for Insurance Carriers

• Life insurance companies concerned about annuity products – typically sold as retirement instruments.
• $200b market in the U.S.
• Captive agents would need to adhere to new rules
• Carrier marketing collateral revisions – fees, expenses, investment periods.
• Industry has lobbied against law stating would have material impact on business.
E&O Underwriting Concerns
• Theoretically, a higher degree of standards could make class (Financial institutions) better risks due to tightened controls.

But…
• Are policy forms current with law?
• Changes to E&O exposures (insurance, investment advisors).
• Retroactive dates and the new Law
• Civil fines and penalties?
• Potential for new claims and “laundry listing”.

• Robo Advisors pose additional concerns around data breach.
• Wait and see approach seems to be norm with E&O carriers.
• Many firms have already spent millions complying with the Law. Are staff trained?
• New E&O products could be needed.
Takeaways

- The Law will have an impact on our business
- DOL not likely to give up on Law.
- Encourage clients to seek expert advice.
Never a Solution..
Thank You!