

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials&TRIBULATIONS

Legal malpractice plaintiffs face tough road

A plaintiff in a legal malpractice action, apparently believing pleading alternative theories of liability will advance his or her claim, often attempts to assert additional causes of action.

It is not unusual in a legal malpractice action for the plaintiff to attempt to expand on his or her claims by also asserting a claim for breach of fiduciary duty. Even if the allegation that an attorney violated an ethical rule can be proven, a plaintiff attempting to establish a viable claim based on breach of fiduciary duty faces an uphill battle.

There is no question the attorney/client relationship is fiduciary in nature. As the New York State Court of Appeals recognized in *Matter of Cooperman*, 83 NY2d 465 (1994), the relationship of client and counsel is one of “unique fiduciary reliance” so that “[t]he duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients’ interests over the lawyer’s.” *Id.* at 472.

The law is clear that any breach of fiduciary duty claim may not be duplicative of a legal malpractice claim: A breach of fiduciary duty claim against an attorney must be premised on a different set of facts and seek different relief than a legal malpractice claim.

To state a malpractice claim, a plaintiff must allege three elements — attorney negligence; that the negligence was the proximate cause of the loss and proof of actual damages. To sustain a breach of fiduciary duty claim, however, a plaintiff must base his or her claims on separate acts other than those serving as the basis for the negligence allegations. As a result, a breach of fiduciary duty claim often focuses on an attorney’s alleged breach of his or her ethical obligations.

An ethical breach, standing alone, is not enough. Rather, the plaintiff must prove both the breach of a duty and damages sustained as a result of the breach. Typically, an action for breach of fiduciary duty outside of the attorney/client context is governed by a lower standard of recovery than the proximate cause standard applicable to a negligence-based claim. Generally a breach of fiduciary duty claim requires only that the plaintiff identify a conflict of interest, which was a substantial factor in the plaintiff’s loss.

New York courts have distinguished the standard when dealing with a breach of fiduciary duty claim in the attorney/client context. In the case of an alleged breach of fiduciary duty against an attorney, the claims for malpractice and breach of fiduciary duty are governed by the same standard of recovery. See *Weil, Gotshal & Manges LLP v. Fashion Boutique of Short Hills Inc.*, 10 AD3d 267, 271 (First Dept. 2004). As the First Department held in *Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 (First Dept. 2008), “to recover under a claim for damages against an attorney arising out of the breach of the attorney’s fiduciary duty, the plaintiff must establish the ‘but for’ element of malpractice, irrespective of how the claim is denominated in the complaint.” *Id.* at 11.

As opposed to a typical breach of fiduciary duty claim, a “but for” causation test linked to the plaintiff’s damages must be proven when alleging an attorney breached his or her fiduciary duty.

The “but for” standard of causation is difficult to sustain. *Ulico Casualty Co.*, 56 AD3d at 11 (although attorney arguably violated fiduciary duties by surreptitiously advancing conflicting interests of plaintiff’s competitor, breach of fiduciary duty claim dismissed because plaintiff failed to demonstrate that it would not have sustained a loss of business “but for” defendant’s conduct).

In *Kirk v. Heppt*, 2009 WL 2870167 (S.D.N.Y. Sept. 3, 2009), the plaintiff/client asserted both legal malpractice and breach of fiduciary duty claims. U.S. District Judge Sweet dismissed the plaintiff’s breach of fiduciary duty claims on the ground that causation and damages could not be proven. Judge Sweet acknowledged he held previously in the same case that a breach of fiduciary duty claim did not require proof of damages; however, since that decision had been rendered, the First Department had decided *Ulico*, wherein the “but for” standard was plainly set. The plaintiff in *Kirk* failed to point to any injuries suffered as a result of the attorney’s alleged breach of fiduciary duty. As a result, summary judgment was granted in favor of the attorney on the breach of fiduciary duty claim. (Summary judgment with respect to the legal malpractice claim was denied.)



By **ELIZABETH A. WOLFORD**

Daily Record
Columnist

Continued ...

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

Also instructive is the district court's decision in *Trautenberg v. Paul, Weiss, Rifkind, Wharton & Garrison LLP*, 629 F. Supp.2d 259 (S.D.N.Y. 2007), recons. denied, 2008 WL 850163 (S.D.N.Y. 2008). The plaintiff had been a commission-based salesperson for Solomon Smith Barney, a wholly-owned subsidiary of Citigroup. In connection with regulatory investigations and subsequent civil lawsuits arising out of alleged fraud, the plaintiff and Citigroup were represented jointly by Paul Weiss (although the plaintiff also retained his own independent counsel). When the plaintiff's employment was later terminated by Citigroup, Paul Weiss became involved in advising Citigroup with the employment matter, placing itself in a position adverse to the firm's client. The plaintiff ultimately entered a separation agreement with Citigroup and received a \$5 million separation payment, but he claimed that had the firm not breached its fiduciary duties, he would have been able to negotiate a \$25 million separation payment.

The court was not impressed, and the decision included a reminder to the plaintiff that even if Paul Weiss's conduct violated New York's ethical obligations, "it is well-established that the violation of a disciplinary rule, without more, does not establish a claim for breach of fiduciary duty." *Id.* at 263.

The court dismissed the plaintiff's claims, reasoning he failed to allege a breach of fiduciary duty on the part of the firm that was the "but for" cause of damages.

Success with a breach of fiduciary duty claim in the attorney/client context is a challenge. The client not only must prove a separate and independent basis for his or her breach of fiduciary duty claim — distinct from the legal malpractice allegations —

but the alleged breach also must be the "but for" cause of the client's damages. The limited instances in which breach of fiduciary duty claims in the attorney/client context have been successful typically involve a situation where the attorney had an independent duty owing to the client separate and apart from the attorney/client relationship. In *Smartix International Corp. v. Garubbo, Romankow & Capese PC*, 2009 WL 857467 (S.D.N.Y. March 31, 2009), the court denied summary judgment directed to the plaintiff's breach of fiduciary claim against a member of the law firm that was also being sued for legal malpractice. The individual partner had served on the plaintiff's board of directors and, while there was some overlap between the malpractice and breach of fiduciary duty claims, they were not duplicative. The breach of fiduciary duty claim was based on the partner's membership on the plaintiff's board, therefore it was "not based on the fiduciary duty attorneys owe to their clients, as is typical in actions alleging both legal malpractice and breach of fiduciary duty against an attorney." *Id.* at *10. The damages sought also encompassed money paid directly to the partner on a personal basis, distinct from the damages sought for the alleged malpractice.

While breach of fiduciary duty claims may be asserted against attorneys based on facts separate and distinguishable from an underlying malpractice claim, a plaintiff is unlikely to prevail unless there is some separate and independent fiduciary relationship that arose distinct from the attorney/client relationship.

Elizabeth A. Wolford is a partner with The Wolford Law Firm LLP, a litigation firm that handles both civil and criminal matters, and has represented a number of clients in defense of legal malpractice actions.