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ACCOUNTANTS' LIABILITY

2nd Edition

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Chapter 7

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§ 7:1 General

An accountant who is a fiduciary is liable where he or she breaches his or her fiduciary duties to a client. A claim for breach of fiduciary duty is generally based upon state law, although at least one federal statute may give rise to fiduciary liability under certain circumstances, as discussed below.¹ However, in appropriate cases even a state-law-based claim for breach of fiduciary duty may be brought in federal court. First, the claim may be brought in federal court where the required diversity of citizenship exists among the parties and the amount in controversy exceeds \$75,000.² Second, in some cases a common law breach of fiduciary duty claim will be within a federal court's supplemental jurisdiction. Section 1367 of title 28 of the United States Code confers upon federal courts supplemental jurisdiction to entertain claims that are so related to federal claims "that they form part of the same case or controversy under Article III of the United States Constitution."³ However, a federal court may decline to exercise supplemental jurisdiction over state law claims where all claims over which it has original jurisdiction are dismissed.⁴

Although the fiduciary relationship is difficult to define and most business relationships are not fiduciary relationships, an accountant may be found to be a fiduciary where a client justifiably reposes a special trust and confidence in the accountant.

§ 7:1.1 Potential Advantages to Bringing a Fiduciary Duty Claim

There are a number of potential advantages to bringing a claim against an accountant on a breach of fiduciary duty theory rather than (or in addition to) other possible theories. First, a major advantage of a fiduciary duty claim over a negligence claim is that many claims for breach of fiduciary duty do not require expert testimony. For example, an accountant who is a fiduciary has a duty of undivided loyalty to the client. This duty is breached by a variety of types of misconduct, discussed below, that do not involve negligence. As a result, the breach of fiduciary duty may be proven without the use of expert testimony.⁵

Second, a major advantage of a fiduciary duty claim over a breach of contract claim is that the duties of an accountant who is a fiduciary extend beyond the obligations expressly assumed by the accountant as part of the contract with the client.

1. See *infra* section 7:1.4[C].

2. 28 U.S.C. § 1332(a).

3. 28 U.S.C. § 1367(a).

4. *Id.* § 1367(c).

5. See Anderson & Steele, *Fiduciary Duty, Tort and Contract: A Primer on the Legal Practice Puzzle*, 47 SMU L. REV. 235, 249 (1994).

Contract law generally assumes that parties bargain at arms length . . . and that the resulting bargain governs their relationship. Fiduciary relationships . . . usually begin with a contract. But in the eyes of the law fiduciary relationships are never arms length. With respect to such agreements, the law jettisons the general presumptions and standards of the law of contract and applies instead the stricter fiduciary standard.⁶

Third, in many fiduciary duty cases the accountant, as a fiduciary, will have the burden of proving that he or she has acted appropriately. For example, where the accountant-fiduciary enters into a business transaction with the client, the accountant has the burden of proving that he or she disclosed all material facts and that the transaction was fair.⁷ Since the accountant bears the burden of proof on these issues, he or she is at risk where the evidence on the questions is inadequate to reach a conclusion.

Fourth, an advantage of a breach of fiduciary duty claim over a negligence claim or a breach of contract claim is that in many breach of fiduciary duty cases the plaintiff is not limited to compensatory damages. The client may recover any profit of the accountant-fiduciary regardless of whether the breach of fiduciary duty caused the client any injury or whether the contractual expectations of the client were met.⁸ In addition, punitive damages may be available.

Fifth, in some states, a breach of fiduciary duty claim will enjoy a longer statute of limitations than other available claims.

Finally, since a fiduciary has a duty to disclose all relevant facts relating to matters within the scope of the fiduciary relationship, a failure to disclose may toll the statute of limitations. For example, in one case⁹ an accountant-fiduciary engaged in self-dealing in violation of his fiduciary duties. The court held that the failure of the accountant to reveal material facts tolled the statute of limitations until the fiduciary duty ended. According to the court, the plaintiffs trusted the accountant and relied upon his investment advice. Therefore, their failure to discover his wrongdoing was not the result of a lack of diligence on their part.¹⁰

6. *Id.* at 241–42.

7. *See infra* text accompanying notes 88–91, 125.

8. *See Anderson & Steele, supra* note 5, at 255–56; Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 900–01.

9. *Russell v. Campbell*, 725 S.W.2d 739 (Tex. Ct. App. 1987), *writ of error refused* (Apr. 15, 1987).

10. *Id.* at 748.

§ 7:1.2 **Fiduciary Relationship Defined**

It is very difficult to define a fiduciary relationship.¹¹ Some relationships, such as attorney-client, partner-partner, and trustee-cestui que trust, are fiduciary relationships as a matter of law.¹² In other cases, “[t]he problem is one of equity and the circumstances out of which a fiduciary relationship will be said to arise are not subject to hard and fast lines.”¹³ A fiduciary relationship exists “where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard for the interests of the one reposing the confidence.”¹⁴ Where the relationship of the parties is not a fiduciary relationship as a matter of law, the burden of proving a fiduciary relationship is on the party asserting the relationship.¹⁵

Most business relationships are not fiduciary relationships.¹⁶ This is true even though business persons often have some degree of trust and confidence in each other.¹⁷ “Subjective trust alone is not enough to transform arms-length dealing into a fiduciary relationship.”¹⁸ Where, however, one party is accustomed to being guided by the judgment and advice of another or is otherwise justified in believing that another person will act in his or her interest, a fiduciary relationship exists.¹⁹ Thus, important components of a fiduciary relationship

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11. *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1065 (9th Cir. 1972) (“A ‘fiduciary relation’ is an elusive status to define.”); *Keenan v. D.H. Blair & Co.*, 838 F. Supp. 82, 89 (S.D.N.Y. 1993) (“The precise contours of a fiduciary relationship are incapable of expression.”).
 12. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962).
 13. *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980).
 14. *Paul v. North*, 191 Kan. 163, 380 P.2d 421, 426 (1963). The RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (1979) states: “A fiduciary relation exists between two persons when one of them is under a duty to act or to give advice for the benefit of another upon matters within the scope of the relation.”
 15. *Shofstall v. Allied Van Lines*, 455 F. Supp. 351, 360 (N.D. Ill. 1978); *Paul*, 191 Kan. 163, 380 P.2d 421, 426.
 16. *Gutfreund v. Christoph*, 658 F. Supp. 1378, 1395 (N.D. Ill. 1987) (accountant owed no fiduciary duties to purchasers of limited partnership interests); *Shooshtari v. Sweeten*, 2003 WL 21982225, at *2 (Tex. Ct. App. Aug. 21, 2003) (mem.) (affirming summary judgment for accountants on fiduciary duty claim; “A fiduciary relationship is an extraordinary one and will not be lightly created.”).
 17. *Thigpen*, 363 S.W.2d at 253; *Thomson v. Norton*, 604 S.W.2d 473, 476 (Tex. Civ. App. 1980).
 18. *Thomson*, 604 S.W.2d 473, 476. *See also* *Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP*, 110 Wash. App. 412, 40 P.3d 1206, 1218 (2002) (testimony as to trust reposed in accountant held insufficient to create fiduciary relationship).
 19. *See Dominguez v. Brackey Enters.*, 756 S.W.2d 788, 791 (Tex. Ct. App. 1988), writ denied (Feb. 15, 1989); RESTATEMENT OF RESTITUTION § 182

appear to include discretion on the part of the fiduciary²⁰ and/or a dominance of one party over another.²¹ Generally, the question of whether a fiduciary relationship exists is a question of fact.²² Consequently, a court may be hesitant to dismiss a fiduciary duty claim against an accountant at the pleading stage.²³

Sometimes courts use the term “confidential relationship” in referring to such a relationship.²⁴

§ 7:1.3 **Circumstances in Which Accountant Is Not a Fiduciary**

An accountant has no fiduciary duties to persons who have no contractual or other relationship with the accountant.²⁵ For example, there is no fiduciary relationship between an accountant who is

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- cmt. c (1937); DAN DOBBS, REMEDIES § 10.04 (West 1973); *but see* Farragut Mortg. Co. v. Arthur Andersen, LLP, No. 95-6231-B (Mass. Sup. Ct. Nov. 15, 1996) (accountant who advised client on a pooling of interest question not held to be a fiduciary).
20. *See* DeMott, *supra* note 8, at 901 (“If the relationship, as the parties structure it, does not confer discretion on the ‘fiduciary,’ then his actions are not subject to the fiduciary constraint.”); Austin Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 541 (1949) (“The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty.”).
 21. Anderson & Steele, *supra* note 5, at 244 (“The basis for fiduciary responsibility is dominance of one person over another.”); DeMott, *supra* note 8, at 902 (“In many relationships in which one party is bound by a fiduciary obligation, the other party’s vulnerability to the fiduciary’s abuse of power or influence conventionally justifies the imposition of fiduciary obligation.”).
 22. Pope v. Univ. of Wash., 121 Wash. 2d 479, 852 P.2d 1055, 1063 (1993) (finding no genuine issue of fact), *opinion amended, cert. denied*, 510 U.S. 1115 (1994), 871 P.2d 590 (Wash. 1994) (mem).
 23. *See* Commscope Credit Union v. Butler & Burke, LLP, 764 S.E.2d 642 (N.C. Ct. App. 2014) (trial court erred in dismissing fiduciary duty claim), *review allowed*, 768 S.E.2d 560 (N.C. 2015) (mem.).
 24. *See* DAN DOBBS, REMEDIES § 10.04 (West 1973) (“Sometimes courts use the term ‘confidential relationship’ as a synonym for fiduciary relationship.”). Although they overlap, there is a technical difference between a confidential relationship and a fiduciary relationship. *See* Tamar T. Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 825 n.100 (1983).
 25. TSG Water Res., Inc. v. D’Alba & Donovan Certified Pub. Accountants, P.C., 366 F. Supp. 2d 1212, 1227–28 (S.D. Ga. 2004) (finding that investor plaintiffs were third parties to audit contract and had no relationship, professional or otherwise, with the auditors; therefore, auditors owed no fiduciary duties to these plaintiffs), *order vacated in part*, 269 F. App’x 191 (11th Cir. 2007); Baldwin v. Kulch Assocs., Inc., 39 F. Supp. 2d 111 (D.N.H. 1998) (dismissing fiduciary duty claim against accountant who had allegedly solicited the purchase of stock).

engaged to audit the financial statements of a corporation and creditors of the corporation to whom the corporation provides copies of the financial statements and the report of the accountant,²⁶ or between an auditor and the purchasers of a client corporation's shares.²⁷ In addition, absent special circumstances, an accountant does not stand in a fiduciary relationship to shareholders of or partners in a client,²⁸ or to the beneficiaries of a decedent to whom an accountant provided estate planning advice.²⁹ Similarly, an accountant generally has no

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26. *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 416 (Tex. Ct. App. 1986) (affirming summary judgment in favor of accountants on cause of action for breach of fiduciary duty), *writ of error refused* (Apr. 8, 1987). *See also* *Greenblatt v. Richard Potasky Jewelers*, 1994 WL 9754, at *4 (S.D.N.Y. Jan. 13, 1994) (holding that independent auditor was not fiduciary of person who entered consignment contract with audit client); *Fleet Nat'l Bank v. H&D Entm't, Inc.*, 926 F. Supp. 226 (D. Mass. 1996); *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 945 P.2d 317 (Ariz. Ct. App. 1996), *review denied* (Jan. 13, 1997).
 27. *Leder v. Shinfeld*, 609 F. Supp. 2d 386, 401–02 (E.D. Pa. 2009) (buyers of stock under stock purchase agreement were owed no fiduciary duty by accountant that provided professional services to companies whose shares they purchased); *Resolution Tr. Co. v. KPMG Peat Marwick*, 844 F. Supp. 431 (N.D. Ill. 1994); *Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 588 (E.D.N.C. 1992) (granting summary judgment for accounting firm on claims brought by venture capital firms for breach of fiduciary duty), *aff'd sub nom.* *Heritage Capital Corp. v. Deloitte Haskins & Sells*, 993 F.2d 228 (4th Cir. 1993) (table), *cert. denied*, 511 U.S. 1051 (1994); *FDIC v. Schoenberger*, 781 F. Supp. 1155 (E.D. La. 1992); *Mishkin v. Peat, Marwick, Mitchell & Co.*, 744 F. Supp. 531 (S.D.N.Y. 1990); *Shofstall v. Allied Van Lines*, 455 F. Supp. 351, 360 (N.D. Ill. 1978) (granting summary judgment for accountants on claim of breach of fiduciary duty; however, the accountants' motions for summary judgment on plaintiff's federal securities law and common law fraud claims denied); *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317 (Ariz. Ct. App. 1996), *review denied* (Jan. 13, 1997).
 28. *See, e.g., Golden W. Refining v. Pricewaterhouse*, 392 F. Supp. 2d 407, 413–14 (D. Conn. 2005) (granting summary judgment to defendant; under Connecticut law, accounting firm owed no fiduciary duties to parent corporation of its client); *Richard B. LeVine, Inc. v. Higashi*, 131 Cal. App. 4th 566, 32 Cal. Rptr. 3d 244, 258–59 (2005) (accountants for partnership did not owe an “attributed” fiduciary duty to partner with whom they had no contact; providing a Schedule K-1 to individual partners satisfied a partnership obligation under Internal Revenue Code), *review denied*, 2005 Cal. LEXIS 13129 (Nov. 16, 2005); *Kopka v. Kamensky & Rubenstein*, 354 Ill. App. 3d 930, 821 N.E.2d 719, 727–28 (2004) (affirming dismissal of breach of fiduciary duty claims; accountants did not owe fiduciary duty to plaintiff as a shareholder and partner of corporate client).
 29. *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 929 N.E.2d 1167, 1187 (finding that beneficiaries of trust had no standing to bring breach of fiduciary duty claims against accountant who assisted decedent in estate planning process), *appeal denied*, 237 Ill. 2d 555, 938 N.E.2d 520 (2010) (table).

fiduciary relationship with a director of a client, even where that director serves on the corporation's audit committee.³⁰

An interesting case³¹ on this point involved a person who was fired by his employer. He sued the employer's outside accountants alleging, among other things, that the accountants breached fiduciary duties owed to him by negligently or intentionally understating the employer's financial condition. The court dismissed the plaintiff's breach of fiduciary duty claim against the accounting firm.³²

Even where an accountant has a relationship with a party, the accountant is not a fiduciary unless the party is justified in expecting the accountant to act in his or her interest. For example, in *Franklin Supply Co. v. Tolman*,³³ two corporations agreed to employ an accounting firm to audit a third corporation which was to be sold by one corporation to the other. The parties agreed to share the accounting fees equally. One of the corporations subsequently brought suit against the accounting firm alleging, among other things, that its lack of independence constituted a breach of fiduciary duty.³⁴ The trial court held that the accounting firm had a fiduciary relationship with the plaintiff. On appeal, the court stated that the duty of the accounting firm was not to act as a fiduciary for one of the parties, but rather to act independently as a fact finder. Thus, it could be held liable for negligence or fraud, but not for breach of fiduciary duty.³⁵

An accountant is not a fiduciary where the accountant performs only tax preparation services.³⁶ In addition, an accountant is unlikely to be found to be a fiduciary where the plaintiff was not "accustomed" to being guided by the judgment and advice of the accountant.³⁷

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30. *Cf. PricewaterhouseCoopers, LLP v. Massey*, 860 N.E.2d 1252, 1259 (Ind. Ct. App.) (finding that any injury suffered by the plaintiffs was derivative in nature), *transfer denied*, 869 N.E.2d 458 (Ind. 2007) (table).
 31. *Hodge v. Dist. of Columbia Hous. Fin. Agency*, 1993 WL 121446 (D.D.C. Apr. 5, 1993).
 32. *Id.* at *2.
 33. *Franklin Supply Co. v. Tolman*, 454 F.2d 1059 (9th Cir. 1972).
 34. *Id.* at 1062.
 35. *Id.* at 1065. However, the court affirmed the trial court's conclusion that the accounting firm was negligent. *Id.* at 1076–77.
 36. *Iacurci v. Sax*, 139 Conn. App. 386, 57 A.3d 736, 750 (2012), *aff'd*, 313 Conn. 786, 99 A.3d 1145, 1156 (2014) (concluding, as a matter of law, that defendant-accountant did not owe fiduciary duty to plaintiff).
 37. *Staffenberg v. Fairfield Pagma Assoc., L.P.*, 944 N.Y.S.2d 568, 570 (App. Div. 2012) (affirming summary judgment; plaintiff sought investment advice, at most, once per decade; "These intermittent communications did not transform their conventional business relationship into a fiduciary relationship."); *In re Estate of Abernethy*, 390 S.W.3d 431, 438–39 (Tex. Ct. App. 2012) (affirming summary judgment for accountant; no competent summary judgment evidence that decedent accustomed to be guided by accountant's judgment and advice).

However, a court may conclude that “the relationship between a tax return preparer and a client is fiduciary in nature when a heightened risk of abuse of trust or confidence exists, such as when the tax return preparer or accountant acts as an investment advisor or manages the client’s funds.”³⁸

An accountant employed to audit the financial statements of a client is required to be independent of the client and, therefore, is not a fiduciary of the client.³⁹ The independence required of an auditor is fundamentally inconsistent with status as a fiduciary.⁴⁰ However, if an auditor “goes outside the normal role of independent auditor” and provides non-audit services to the audit client, a fact question may arise regarding whether the accounting firm has fiduciary duties to the client arising out of the non-audit services.⁴¹

§ 7:1.4 *Circumstances in Which Accountant Is a Fiduciary*

While the accountant-client relationship is generally not a fiduciary relationship,⁴² a fiduciary relationship exists where a client justifiably reposes trust and confidence in an accountant to act in the client’s interest. Such a relationship may exist where the accountant renders personal financial, investment, or tax advice to a client or where the accountant manages the assets or business of a client. In addition, an accountant for a pension fund who goes beyond the normal role of a fund auditor may be found to be a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA).

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38. *Iacurci v. Sax*, 313 Conn. 786, 99 A.3d 1145, 1156 (Conn. 2014) (citing cases, but finding that defendant-accountant who merely prepared plaintiff’s taxes did not owe fiduciary duty to him).
39. *Resolution Tr. Co. v. KPMG Peat Marwick*, 844 F. Supp. 431, 436 (N.D. Ill. 1994) (granting motion to dismiss breach of fiduciary duty claim against auditor of bank); *FDIC v. Schoenberger*, 781 F. Supp. 1155, 1157–58 (E.D. La. 1992).
40. *See Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1150 (3d Cir. 1989). *But see In re DeLorean Motor Co.*, 56 B.R. 936, 945 (Bankr. E.D. Mich. 1986).
41. *In re Smartalk Teleservices, Inc. Sec. Litig.*, 487 F. Supp. 2d 928, 932 (S.D. Ohio 2007) (denying accountant’s motion for summary judgment; genuine issue of material fact exists whether accountant’s “role went outside the normal role of independent auditor so as to give rise to a fiduciary relationship”).
42. *Stainton v. Tarantino*, 637 F. Supp. 1051, 1066 (E.D. Pa. 1986); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 545 F. Supp. 1314, 1356 (S.D.N.Y. 1982). *But cf. DeLorean Motor Co.*, 56 B.R. at 945 (“When performing audits, accountants are in the position of fiduciaries with their clients”; court denied motion by corporation’s accountants to dismiss third-party complaint alleging breach of fiduciary duty filed by director of corporation who was a member of audit committee board).

Given the right facts, an accountant who represents a small business organization may be held to owe fiduciary duties to participants in the venture.⁴³ For example, two cases hold that, under the circumstances of the particular cases, a fact question existed as to whether an accountant owed a fiduciary duty, in one case, to a shareholder in a closely held corporation⁴⁴ and, in the other, to limited partners of the partnership for which the accountant rendered services.⁴⁵

[A] Renders Personal Financial, Investment, or Tax Advice

An accountant may be a fiduciary where he or she renders personal financial, investment, or tax advice to a client. In *Dominguez v. Brackey Enterprises, Inc.*,⁴⁶ investors who had advanced money to a seafood broker sued, among others, the accountant who recommended the investment. The accountant testified that his duties as a certified public accountant included giving tax advice, certain investment advice, and advice on business operations. In addition, he testified that he had taken his clients to meet the president of the seafood broker and had told them that he was a person they could trust.⁴⁷ One of the clients testified regarding the investment advice he had received from the accountant, first as to an auto detailing business and then as to the seafood business. He stated, "I did nothing without Joe's approval."⁴⁸ The jury rendered a verdict against the accountant.

On appeal, the court rejected the accountant's argument that there was insufficient evidence to support the jury's finding of a fiduciary

43. *Herbert H. Post & Co. v. Sidney Bitterman, Inc.*, 219 A.D.2d 214, 639 N.Y.S.2d 329, 337 (App. Div. 1996) (accountant who acted simultaneously as accountant and tax adviser to companies and owners owed fiduciary duty to owners).

44. *De Pasquale v. Day, Berry, & Howard*, 1994 WL 133473, at *2 (Conn. Super. Ct. Mar. 31, 1994) (plaintiff alleged that the defendant served as accountant for both the corporation and the plaintiff-shareholder).

45. *See Gengras v. Coopers & Lybrand*, 1994 WL 133424, at *3 (Conn. Super. Ct. Mar. 31, 1994) (plaintiffs alleged that they were "clients" of the defendant which prepared tax returns for and conducted an audit of limited partnership); *but cf. Richard B. LeVine, Inc. v. Higashi*, 131 Cal. App. 4th 566, 32 Cal. Rptr. 3d 244, 258-59 (2005) (accountants for partnership did not owe an "attributed" fiduciary duty to partner with whom they had no contact; providing a Schedule K-1 to individual partners satisfied a partnership obligation under Internal Revenue Code), *review denied*, 2005 Cal. LEXIS 13129 (Cal. Nov. 16, 2005).

46. *Dominguez v. Brackey Enters., Inc.*, 756 S.W.2d 788 (Tex. Ct. App. 1988), *writ denied* (Feb. 15, 1989).

47. *Id.* at 790.

48. *Id.* at 791.

relationship. The court stated that where "a party is accustomed to being guided by the judgment or advice of another" and "there exists a long association," the party "is justified in placing confidence in the belief that the other party will act in his best interest."⁴⁹

Similarly, in *Burdett v. Miller*,⁵⁰ the court upheld the lower court's determination that a fiduciary relationship existed where a CPA who was a professor of accounting cultivated a relationship of trust with the plaintiff over a period of years, held himself out as an expert on investments, and was aware that the inexperienced and unsophisticated plaintiff "took his advice uncritically and unquestioningly."⁵¹

In *Aliza, Inc. v. Zaremba*,⁵² the court held there was a genuine issue of material fact regarding whether the accountant had a fiduciary relationship with a client where the accountant had provided extensive business advisory services over a course of seven years, in addition to accounting and tax services. In this case, the accountant recommended that the client utilize the services of his son (who also worked for the accounting firm) who had a side business of administering 1031 like-property exchanges. The son misappropriated the client's funds.

An accountant is not a fiduciary where he or she merely acts as a sales person for an investment or accountant for the seller, with the purchaser not relying upon the accountant for investment advice.⁵³ In addition, there is no fiduciary relationship if the purchaser does not place trust in the accountant with regard to the transaction, but instead relies upon the advice of his or her attorney or other advisor.⁵⁴ In *Gutfreund v. Christoph*,⁵⁵ the court noted that the agreement signed by the plaintiff-investors tended to undercut the argument that they

49. *Id.* at 791. *Cf.* *Russell v. Campbell*, 725 S.W.2d 739 (Tex. Ct. App. 1987) (involving accountant who, among other things, was relied upon for investment advice), *writ of error refused* (Apr. 15, 1987).

50. *Burdett v. Miller*, 957 F.2d 1375 (7th Cir. 1992).

51. *Id.* at 1381. *See also* *Frank Cooke, Inc. v. Hurwitz*, 10 Mass. App. Ct. 99, 406 N.E.2d 678 (1980); *Midland Nat'l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404 (Minn. 1980); *Dominguez v. Brackey Enters., Inc.*, 756 S.W.2d 788 (Tex. App. 1988) *writ denied* (Feb. 15, 1989).

52. *Aliza, Inc. v. Zaremba*, 152 Wash. App. 1061, 2009 WL 3724076 (Nov. 9, 2009) (reversing summary judgment for accountant).

53. *See* *Gutfreund v. Christoph*, 658 F. Supp. 1378 (N.D. Ill. 1987) (accountant prepared financial projections which were used to sell the limited partnership interests); *Midland Nat'l Bank*, 299 N.W.2d at 413 (accountant acted in role "of a salesman selling an investment interest to a willing buyer"); *Harrold v. Dowd*, 149 N.C. App. 777, 561 S.E.2d 914 (2002) (no fiduciary duty where accountants advised with respect to merger).

54. *Midland Nat'l Bank*, 299 N.W.2d at 413 (affirming directed verdict for accountant).

55. *Gutfreund v. Christoph*, 658 F. Supp. 1378 (N.D. Ill. 1987).

relied for advice upon the accountant who prepared financial projections for the seller. That agreement stated that the investor

had consulted with and been guided by his personal investment advisor, attorney and/or accountant named below . . . with respect to and concerning the advisability of the purchase of the Partnership Interests . . . (or if the space therefor is left blank, the undersigned warrants that he/she is capable of evaluating an investment in the Partnership Interest without the assistance of such an advisor) and has secured independent tax advice with respect to the investment contemplated . . . on which he/she is solely relying.⁵⁶

In sum, while an accountant may be a fiduciary where he or she renders personal financial, investment, or tax advice, the argument that an accountant is a fiduciary in a particular case is undercut where there is evidence that the client placed trust in and actually relied upon the advice of an individual other than the accountant regarding the matter in question.

[B] Manages Client Assets or Business

An accountant is a fiduciary where money or property belonging to a client is entrusted to the accountant⁵⁷ or where substantial control over a portion of the client's business is surrendered to the accountant.⁵⁸ In *Cafritz v. Corporation Audit Co.*,⁵⁹ the general manager of the firm employed to keep the books of, deposit checks on behalf of, and do the income tax returns for an individual and several of his corporations caused a number of checks belonging to the client to be paid for his benefit or that of his controlled corporation. The court found that the accounting firm and its general manager had a fiduciary relationship with the plaintiff-client because of the checks entrusted to them.⁶⁰ The court held that the burden was on the fiduciary to prove that he had properly disposed of the amount for which he was accountable.⁶¹ Since the defendants did not disclose what disposition

56. *Id.* at 1395.

57. *Cafritz v. Corp. Audit Co.*, 60 F. Supp. 627, 631 (D.D.C. 1945), *aff'd in part, rev'd in part*, 156 F.2d 839 (D.C. Cir. 1946) (judgment against accountant affirmed).

58. *Stanton v. Tarantino*, 637 F. Supp. 1051, 1066 (E.D. Pa. 1986) (plaintiffs failed to meet burden of proof).

59. *Cafritz*, 60 F. Supp. 627 (D.C. 1945), *aff'd in part, rev'd in part*, 156 F.2d 839 (D.C. Cir. 1946) (judgment against accountant affirmed).

60. *Id.* at 634.

61. *Id.* at 631. *See also* RESTATEMENT (SECOND) OF AGENCY § 382 cmt. e (1958).

had been made of the proceeds of the checks, the court entered judgment for the entire amount of the checks.⁶²

In some circumstances, an accounting firm may be held liable for the unauthorized actions of a member or employee of the firm who is entrusted with the assets of a client. In *Croisant v. Watrud*,⁶³ the plaintiff made arrangements with an accountant to collect various funds on her behalf and to make certain disbursements from the funds were collected. The accountant made unauthorized payments to the plaintiff's husband and also made an unauthorized payment to himself.⁶⁴ The accountant's firm had been initially retained for the purpose of obtaining tax advice and preparing tax returns. The trial court held that the trust assumed by the accountant was an independent employment separate and distinct from the activities of the accounting partnership.⁶⁵

On appeal the trial court was reversed. The court held that although there was no evidence that the accountant had express or implied authority to perform the services on behalf of the partnership, he had inherent agency power to perform the services if a third person reasonably believed that the services were undertaken as part of the partnership business.⁶⁶ The court held that the facts of the case established the reasonableness of the plaintiff's belief. These facts included, among other things, the payment of \$800 per month to the partnership for the various services of the accountant. According to the court, if the collections and disbursements had truly been an independent activity, separate compensation of the accountant would have been proper.⁶⁷ In sum, the court found that the accounting firm owed a fiduciary duty to the plaintiff and was required to account for her funds.⁶⁸

Where the client hires advisors other than the accountant to manage its investments, the accountant is not a fiduciary even if his or her engagement requires the accountant to physically inspect investment securities or to confirm them by direct correspondence

62. *Id.* at 634 (with interest and costs of the suit).

63. *Croisant v. Watrud*, 248 Or. 234, 432 P.2d 799 (1967).

64. *Id.* at 800.

65. *Id.* at 801.

66. *Id.* at 803.

67. *Id.* at 801, 804.

68. *Id.* at 804. Compare *Croisant, with Raclaw v. Fay, Conmy & Co.*, 282 Ill. App. 3d 764, 668 N.E.2d 114 (reversing judgment against accounting firm; attorney allowed to use firm's office did not have apparent authority to solicit investments on the firm's behalf; no evidence firm engaged in business of marketing investments), *appeal denied*, 168 Ill. 2d 588, 675 N.E.2d 640 (1996).

with their custodians.⁶⁹ The fiduciaries in such a case are the advisors hired to manage the investments and not the accountant.

[C] ERISA Fiduciary

Under the Employee Retirement Income Security Act of 1974 (ERISA), a person who is a fiduciary with respect to an employee benefit plan is liable to the plan for any breach of the duties imposed upon fiduciaries by the Act.⁷⁰ The action may be brought by the Secretary of Labor, or by a plan participant, beneficiary, or fiduciary.⁷¹

Under ERISA, a person is a fiduciary with respect to an employee benefit plan to the extent:

- (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such a plan.⁷²

An accountant who does no more than perform the normal role of an accountant or of a fund auditor⁷³ is not an ERISA fiduciary.⁷⁴ Indeed, the role of an independent auditor is “fundamentally at odds with any notion that such an accountant would be a plan fiduciary.”⁷⁵

Where, however, an accountant renders individualized investment advice to an employee benefit plan on a regular basis, the accountant

69. *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 224 Ill. App. 3d 559, 586 N.E.2d 600, 604–05, 621 (1991) (engagement for unaudited financial statements; client hired investment specialists and advisors to manage its investments; trial court did not err in directing a verdict for accountants on breach of fiduciary duty claim), *aff'd*, 159 Ill. 2d 137, 636 N.E.2d 503, *cert. denied*, 513 U.S. 947 (1994).

70. 29 U.S.C. § 1109(a).

71. *Id.* § 1132(a)(2).

72. *Id.* § 1002(21)(A).

73. *See id.* § 1023(a)(3)(A) (role of the fund auditor).

74. *See* ERISA Interpretive Bulletin 75-5, 29 C.F.R. § 2509.75-5 (1993) (accountants performing their usual professional functions not ordinarily considered fiduciaries); *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988) (accountant who reviewed books of and prepared financial statements for plan was not an ERISA fiduciary); *Pension Plan of Pub. Serv. Co. v. KPMG Peat Marwick*, 815 F. Supp. 52, 54–55 (D.N.H. 1993) (dismissing breach of ERISA fiduciary duty claim; no allegation that defendant performed in any capacity other than independent outside auditor).

75. *Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1150 (3d Cir. 1989).

may be found to be an ERISA fiduciary.⁷⁶ In addition, where an accountant goes beyond the normal role of an accountant and assumes management or administrative responsibilities involving the exercise of discretion, the accountant may be a fiduciary. For example, an accountant who has authority to pass upon the validity of claims or to implement plan policy with respect to investments or benefits may be an ERISA fiduciary.⁷⁷ It has also been held that an accountant who performed a valuation of an asset with the knowledge that the valuation would be relied upon by an ERISA plan's trustees in making investment decisions may have fiduciary liability under ERISA.⁷⁸ Generally, though, an accountant who has no power to make decisions about plan policies, practices, and procedures, but merely performs ministerial duties, is not an ERISA fiduciary.⁷⁹

§ 7:1.5 Duties of a Fiduciary

An accountant who is a fiduciary is subject to a number of duties. These include a duty of loyalty, a duty to disclose relevant facts and to render accounts, a duty of due care, and a duty to maintain client confidences.

[A] Duty of Loyalty

Where an accountant is a fiduciary he or she owes a duty of loyalty to the other party to the relationship regarding matters within the scope of the relationship. In general, the duty of loyalty requires the fiduciary to act solely for the benefit of the person to whom the duty is owed with respect to all matters within the scope of the fiduciary

76. See 29 C.F.R. § 2510.3-21(c) (Definition of "Fiduciary") (setting out when a party will be deemed to be rendering investment advice). Compare *Sheldon Co. Profit Sharing Plan & Tr. v. Smith*, 828 F. Supp. 1262, 1281–83 (W.D. Mich. 1993) (granting partial summary judgment against accounting firm that served as investment manager for plan; embezzlement by partner of firm was a breach of ERISA fiduciary duties by firm), with *Brown v. Roth*, 729 F. Supp. 391, 396–98 (D.N.J. 1990) (plaintiff failed to carry burden of coming forward with facts to show that accountant provided individualized investment advice to fund; summary judgment granted for defendants on ERISA claims).

77. Cf. *Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1150 (3d Cir. 1989) (auditors of fund had no discretionary authority or responsibility in its administration).

78. *Petrilli v. Gow*, 957 F. Supp. 366, 372 (D. Conn. 1997).

79. *Anoka Orthopaedic Assocs., P.A. v. Lechner*, 910 F.2d 514, 517 (8th Cir. 1990) (performance of ministerial functions including reports required by government agencies did not qualify defendants as ERISA fiduciaries). See generally 29 C.F.R. § 2509.75-8.

relationship.⁸⁰ The duty of loyalty is often viewed as “the essence of the fiduciary relationship” and, under this view, the duty requires the fiduciary “to subordinate her own interests to those of the beneficiary.”⁸¹

A wide variety of actions by a fiduciary may constitute breaches of the duty of loyalty. These include (1) receiving a secret profit on a transaction within the scope of the fiduciary relationship;⁸² (2) secretly acting for the account of the fiduciary as to a matter within the scope of the fiduciary relationship,⁸³ for example, by using a “straw person” to deal on behalf of the fiduciary;⁸⁴ (3) secretly acting for an adverse party in a matter within the scope of the fiduciary relationship;⁸⁵ (4) competing as to a matter within the scope of the fiduciary relationship;⁸⁶ or (5) acting on behalf of a party whose interests conflict with those of the person to whom the fiduciary duties are owed.⁸⁷ In sum, many potential breaches of loyalty by accountants involve conflicts of interest; for example, self-dealing by an accountant or receipt by an accountant of a commission or a fee from a third party in return for recommending an investment or service to the client.

An accountant who is a fiduciary may act on his own account or for the account of another as to a matter within the scope of the fiduciary relationship with the informed consent of the party to whom the duty of loyalty is owed.⁸⁸ However, the accountant-fiduciary still has a

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80. See RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006); RESTATEMENT (SECOND) OF AGENCY § 387 (1958); GEORGE BOGERT, TRUSTS § 95 (6th ed. West 1987).
81. Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1084 (1991) (citations omitted).
82. See RESTATEMENT (THIRD) OF AGENCY § 8.02 (Material Benefit Arising Out of Position) (2006); RESTATEMENT (SECOND) OF AGENCY § 388 (Duty to Account for Profits Arising out of Employment) (1958).
83. See RESTATEMENT (THIRD) OF AGENCY § 8.02 (Acting as or on Behalf of an Adverse Party) (2006); RESTATEMENT (SECOND) OF AGENCY § 389 (Acting as Adverse Party without Principal's Consent) (1958); RESTATEMENT OF RESTITUTION §§ 192 (Purchase by Fiduciary Individually of Property Entrusted to Him as Fiduciary) and 193 (Sale of Fiduciary's Individual Property to Himself as Fiduciary) (1937).
84. RESTATEMENT (SECOND) OF AGENCY § 389 cmt. a (1958).
85. RESTATEMENT (THIRD) OF AGENCY § 8.02 (Acting as or on Behalf of an Adverse Party) (2006); RESTATEMENT (SECOND) OF AGENCY § 391 (Acting for Adverse Party without Principal's Consent) (1958).
86. RESTATEMENT (THIRD) OF AGENCY § 8.04 (Competition) (2006); RESTATEMENT (SECOND) OF AGENCY § 393 (Competition as to Subject Matter of Agency) (1958); RESTATEMENT OF RESTITUTION § 199 (1937).
87. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 394 (Acting for One with Conflicting Interests) (1958).
88. See RESTATEMENT (THIRD) OF AGENCY § 8.06 (Principal's Consent) (2006); RESTATEMENT (SECOND) OF AGENCY §§ 390 (Acting as Adverse Party with Principal's Consent) & 392 (Acting for Adverse Party with Principal's Consent) (1958).

duty to deal fairly with the party.⁸⁹ For example, where the accountant-fiduciary enters into a transaction with a party to whom a fiduciary duty is owed, he or she must disclose all relevant facts to the party and, even then, may enter into a deal only on fair terms.⁹⁰ In addition, the burden is on the accountant-fiduciary to prove both the fairness of the transaction and the disclosure of all material facts.⁹¹

An accountant who is an ERISA fiduciary may not:

- (1) deal with the assets of the plan in his own interest or for his own account,
- (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
- (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.⁹²

[B] Duty to Disclose Relevant Facts and Render Accounts

Where an accountant is a fiduciary he or she has a duty to disclose all relevant facts as to matters within the scope of the fiduciary relationship.⁹³ Thus, in *Allen Realty Corporation v. Holbert*,⁹⁴ the court held that a complaint which alleged that an accountant employed to assist in the liquidation of real estate failed to inform the plaintiff of several offers to purchase certain parcels stated a cause of action for breach of fiduciary duty. In another case, an accountant was found to have breached his fiduciary duty by deliberately giving misleading investment advice.⁹⁵

89. See *id.* § 390 cmt. c; § 392 cmt. a.

90. See RESTATEMENT (SECOND) OF CONTRACTS § 173 (When Abuse of a Fiduciary Relation Makes a Contract Voidable) (1981); GEORGE BOGERT, TRUSTS § 96 (Trustee's Duty in Transactions with Beneficiary) (6th ed. West 1987).

91. *Squyres v. Christian*, 242 S.W.2d 786, 790–91 (Tex. Civ. App. 1951).

92. 29 U.S.C. § 1106.

93. See, e.g., RESTATEMENT (THIRD) OF AGENCY § 8.11 (Duty to Provide Information) (2006); RESTATEMENT (SECOND) OF AGENCY § 381 (Duty to Give Information) (1958).

94. *Allen Realty Corp. v. Holbert*, 227 Va. 441, 318 S.E.2d 592, 595–96 (1984) (reversing trial court judgment sustaining demurrers and dismissing action).

95. *Burdett v. Miller*, 957 F.2d 1375, 1381–82 (7th Cir. 1992) (district court did not commit clear error in finding breach of fiduciary duty).

An accountant who is a fiduciary because he or she has been entrusted with money or property of another is under a duty to keep and render accounts to the other party.⁹⁶ The duty requires the accountant-fiduciary to keep “an accurate record of the persons involved, of the dates and amounts of things received, and of payments made.”⁹⁷ In addition, once the accountant-fiduciary has admitted the receipt of a certain sum or it is shown that he or she has received a certain sum, the burden is on the accountant to prove that he or she has properly disposed of it.⁹⁸

[C] Duty of Due Care

Where an accountant is a fiduciary he or she owes a duty of due care to the other party to the relationship.⁹⁹ Thus, an accountant who is a fiduciary because another relies upon him or her for financial or investment advice must exercise care in making recommendations to the other person.¹⁰⁰ Or, an accountant who is a fiduciary because another has entrusted his or her assets to the accountant must exercise care in the management of the assets. This duty of care might require, for example, the accountant to invest funds promptly or to change or recommend a change in investments where warranted by a change in circumstances.¹⁰¹

An accountant who is a fiduciary may be held to a professional standard of care instead of a standard of ordinary care. For example, an accountant who renders personal financial or investment advice is required to exercise the degree of skill and knowledge commonly possessed by financial or investment advisors.¹⁰² In addition, an

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96. See RESTATEMENT (THIRD) OF AGENCY § 8.12 (2006); RESTATEMENT (SECOND) OF AGENCY § 382 (Duty to Keep and Render Accounts) (1958).
 97. *Id.* § 382 cmt. a. See *Claire Murray, Inc. v. Reed*, 139 N.H. 437, 656 A.2d 822, 823–24 (1995) (petition for an accounting; accountant-fiduciary had a duty to account to client for disbursements).
 98. *Cafritz v. Corp. Audit Co.*, 60 F. Supp. 627, 631, 634 (D.D.C. 1945), *aff'd in part, rev'd in part*, 156 F.2d 839 (D.C. Cir. 1946) (judgment against accountant affirmed); RESTATEMENT (SECOND) OF AGENCY § 382 cmt. e (1958).
 99. RESTATEMENT (THIRD) OF AGENCY § 8.08 (Duties of Care, Competence, and Diligence) (2006); Restatement (SECOND) OF AGENCY § 379 (Duty of Care and Skill) (1958).
 100. *Cf. Dominguez v. Brackey Enters.*, 756 S.W.2d 788 (Tex. Ct. App. 1988) (although decision not based upon breach of duty of care, facts suggest inadequate care exercised by accountant), *writ denied* (Feb. 15, 1989).
 101. *Cf.* RESTATEMENT (SECOND) OF AGENCY § 425 (Agent to Make Investments) (1958).
 102. See RESTATEMENT (SECOND) OF TORTS § 299 A (1965). See also RESTATEMENT (SECOND) OF AGENCY § 379(1); *id.* cmt. c (1958). *Cf. Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293, 295–96 (8th Cir. 1989) (accounting firm acting as management consultants held to professional standard of care).

accountant who represents that he or she possesses superior skill or knowledge beyond that common to the profession is required to exercise in a reasonable manner the superior skills and knowledge claimed in the representation.¹⁰³

An accountant who is a fiduciary under ERISA must discharge his or her duties with respect to a plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."¹⁰⁴

While a fiduciary is required to exercise care in recommending investments, he or she is not a guarantor of the investment. Often an investment is subject to market and economic forces which cannot be foreseen. An accountant is not liable for losses caused by events which cannot reasonably be foreseen.¹⁰⁵

Most breach of fiduciary duty claims against accountants do not involve claims of lack of due care. This is a function of the existence of potential causes of action for negligence (or professional malpractice)¹⁰⁶ and, in a few states, for breach of an implied contractual obligation of compliance with professional standards.¹⁰⁷ Moreover, a court may dismiss a claim of breach of fiduciary duty if it concludes that the claim is duplicative of a negligence or professional malpractice claim.¹⁰⁸

[D] Duty to Maintain Client Confidences

Where an accountant is a fiduciary, he or she has a fiduciary duty to maintain client confidences. In *Green v. Harry Savin, P.A.*,¹⁰⁹ a doctor and his professional association sued their accountants and financial advisors for allegedly releasing without authorization confidential information to the doctor's wife. The information was used by the wife and her attorney in the trial of a marriage dissolution action. The

103. RESTATEMENT (SECOND) OF TORTS § 299 A cmt. d (1965).

104. 29 U.S.C. § 1104(a)(1)(C).

105. *Cf. Midland Nat'l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 412–13 (Minn. 1980) (it would be unreasonable for jury to find that accountant should have foreseen catastrophic fall in market price of cattle several years after he recommended investment).

106. *See generally* chapter 4.

107. *See generally* chapter 3.

108. *See, e.g., Bd. of Trs. of IBEW Local 43 Elec. Contractors Health & Welfare, Annuity & Pension Funds v. D'Arcangelo & Co., LLP*, 124 A.D.3d 1358, 1 N.Y.S.3d 659, 661–62 (App. Div. 2015) (dismissing breach of fiduciary claim as duplicative since it alleged same wrongdoing as professional malpractice claim and did not seek different damages).

109. *Green v. Harry Savin, P.A.*, 455 So. 2d 494 (Fla. Dist. Ct. App. 1984) (per curiam).

court reversed a trial court order granting summary judgment for the accountants on a cause of action for unauthorized release of confidential information, although it inexplicably affirmed a summary judgment on a cause of action for breach of fiduciary duty.¹¹⁰

Since it is a breach of fiduciary duty for an accountant to disclose client confidences, it is not surprising that it is also a breach of duty for the accountant to use for his or her personal advantage information obtained in confidence from the client.¹¹¹ For example, it is a breach of fiduciary duty for an accountant to sell confidential information obtained from a client, and the accountant is the constructive trustee of any money received from the sale.¹¹² The duty not to use confidential information extends beyond the termination of the fiduciary relationship.¹¹³ For example, an accountant employed by a client as a management consultant may not use confidential information obtained during the relationship to begin a competing business after the termination of the relationship.¹¹⁴

§ 7:2 Elements of Claim

A party who sues an accountant for breach of fiduciary duty must be prepared to show that (1) a fiduciary relationship existed between the party and the accountant; (2) the accountant breached a fiduciary duty owed to the party; and (3) the breach of duty entitles the party to a remedy.¹¹⁵

§ 7:2.1 Existence of a Fiduciary Relationship

An accountant is not automatically a fiduciary.¹¹⁶ Therefore, a party alleging that an accountant is a fiduciary bears the burden of

110. *Id.* at 495.

111. RESTATEMENT (THIRD) OF AGENCY § 8.05 (Use of Principal's Property; Use of Confidential Information) (2006); Restatement (SECOND) OF AGENCY § 395 (Using or Disclosing Confidential Information) (1958); RESTATEMENT OF RESTITUTION § 200 (Using Confidential Information) (1937).

112. *See* RESTATEMENT OF RESTITUTION § 200 cmt. b (1937).

113. RESTATEMENT (THIRD) OF AGENCY § 8.05 cmt. c (2006); RESTATEMENT (SECOND) OF AGENCY § 396(b) (Using Confidential Information after Termination of Agency) (1958); RESTATEMENT OF RESTITUTION § 200 cmt. a (1937).

114. *Cf.* Shwayder Chem. Metallurgy Corp. v. Baum, 45 Mich. App. 220, 206 N.W.2d 484 (1973) (accountant hired first as consultant and later as business manager of plaintiff).

115. *See* Fred Loya Ins. Agency, Inc. v. Cohen, 446 S.W.3d 913, 919 (Tex. App. 2014) (setting out elements of a breach of fiduciary duty claim), *review denied* (Sept. 11, 2015). A plaintiff may be entitled to a remedy either because of injury to him or her or a benefit to the fiduciary as a result of the breach of fiduciary duty.

116. *Stainton v. Tarantino*, 637 F. Supp. 1051, 1066 (E.D. Pa. 1986).

proving the existence of a fiduciary relationship.¹¹⁷ To meet this burden a client must show that he or she justifiably placed confidence in the accountant to act in the best interests of the client. Evidence that the client relied upon personal financial or investment advice from the accountant or that the client entrusted his or her assets or management of a portion of his or her business to the accountant is generally necessary.

To establish the existence of a fiduciary relationship, the client may testify as to the services rendered to him or her by the accountant, and as to the trust he or she placed in the accountant.¹¹⁸ The plaintiff's case may be bolstered by testimony indicating the reasons for his or her reliance on the accountant, for example, the plaintiff's lack of education, the expertise of the accountant in the matter, or the existence of a long-term relationship or a close personal friendship between the parties.¹¹⁹ The testimony of the accountant may be used to establish the nature of his or her practice (for example, that he or she gives financial and investment advice to clients) and to establish the nature of the services rendered to the plaintiff.¹²⁰ An admission by the accountant that his or her clients rely upon him or her for financial, tax, or investment advice is very helpful to the plaintiff in establishing the existence of a fiduciary relationship.

An accountant who is alleged to be a fiduciary will want to show that the plaintiff did not rely upon or place confidence in the accountant with regard to the matter in question or, alternatively, that such reliance was unjustified. For example, this might be established by showing (1) that the plaintiff was not a client of the accountant and, thus, had no relationship with him or her;¹²¹ (2) that the client relied upon his or her attorney or some other party for

117. *Id.*

118. *See, e.g., Dominguez v. Brackey Enters.*, 756 S.W.2d 788, 791 (Tex. Ct. App. 1988) (client testified as to his trust in accountant and fact that he did not take action without accountant's approval), *writ denied* (Feb. 15, 1989).

119. *See, e.g., Dominguez*, 756 S.W.2d at 791 (evidence existed of both business relationship and social relationship), *writ denied* (Feb. 15, 1989); *Russell v. Campbell*, 725 S.W.2d 739, 748 (Tex. Ct. App. 1987) (preoccupation with other businesses, lack of education, and expertise of accountant), *writ of error refused* (Apr. 15, 1987).

120. *See, e.g., Dominguez*, 756 S.W.2d at 790 (accountant testified that his duties as a certified public accountant included, among other things, advice on investments to avoid or defer taxes and advice to clients on how to operate their businesses), *writ denied* (Feb. 15, 1989).

121. *See Shofstall v. Allied Van Lines*, 455 F. Supp. 351, 360 (N.D. Ill. 1978); *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 416 (Tex. Ct. App. 1986) (no relationship at all existed between plaintiff and defendant-accountants), *writ of error refused* (Apr. 8, 1987).

advice in the matter;¹²² (3) that the contract between the parties expressly disclaims reliance by the client and makes clear that the parties are dealing at arm's length, for example, by warranting that a party consulted and was guided by an investment advisor or attorney specifically named in the document;¹²³ (4) that the acts of the accountant were purely ministerial, with the decisions being made by the client or a representative of the client without reliance upon the advice of the accountant; or (5) that the client often did not follow the advice of the accountant in matters of the type in question.

Where a claim is made that an accountant is an ERISA fiduciary, the plaintiff must show that the accountant's duties went beyond the normal duties of an accountant and that those duties were not merely ministerial in nature. In brief, the plaintiff must show that the accountant performed management or administrative functions involving discretionary authority for the pension plan or that the accountant rendered investment advice to the plan. The accountant, on the other hand, will want to show that he or she merely performed professional functions normally associated with the accounting profession or that his or her actions on behalf of the plan were merely ministerial and did not involve discretionary authority.

§ 7:2.2 Breach of a Fiduciary Duty

The party alleging that an accountant breached a fiduciary duty owed to that party must prove a breach of duty. This may be shown by evidence that the accountant (1) failed to act solely for the benefit of the party as to a matter within the scope of the fiduciary relationship; (2) failed to disclose all relevant facts as to a matter within the scope of the fiduciary relationship; (3) failed to exercise the required level of care as to a matter within the scope of the relationship;¹²⁴ or (4) failed to maintain client confidences.

Where it is shown that the accountant-fiduciary entered into a transaction with the client that falls within the duty of loyalty, the accountant has the burden of showing the fairness of the transaction and disclosure of relevant facts.¹²⁵ In addition, where it is shown or admitted that funds or other assets were entrusted to the accountant-fiduciary, the accountant must account for their disposition.¹²⁶

122. See, e.g., *Midland Nat'l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980).

123. See, e.g., *Gutfreund v. Christoph*, 658 F. Supp. 1378, 1395 (N.D. Ill. 1987).

124. See generally chapter 4 on negligence liability.

125. *Estate of Townes v. Townes*, 867 S.W.2d 414, 417 (Tex. Ct. App. 1993).

126. See *Claire Murray, Inc. v. Reed*, 656 A.2d 822 (N.H. 1995) (petition for accounting brought against accountant issued checks totaling \$11,100).

As discussed above, many actions which are breaches of the duty of loyalty if taken without the knowledge and consent of the client are not actionable where the client has consented with knowledge of the facts. For example, with informed consent of the client an accountant-fiduciary may receive a profit as to a matter within the scope of the fiduciary relationship, may act as an adverse party in a matter within the scope of the agency relationship, or may act for a party whose interests conflict with the interests of the party to whom the fiduciary duties are owed. Thus, assuming that the accountant otherwise deals fairly with the client, proof that a client knew of and consented to a particular course of action will often be fatal to a claim that the accountant breached his or her fiduciary duties.

Where it is alleged that an accountant has breached his or her fiduciary duty of due care, the plaintiff must show both (1) the level of care and skill required to be exercised by the accountant and (2) the manner in which the accountant's conduct failed to meet that level of care and skill. Where the accountant is required to meet a professional standard, the plaintiff will generally be required to introduce expert testimony regarding the applicable professional standards and the accountant's failure to meet such standards.¹²⁷ Conversely, the accountant will want to establish compliance with the required level of care, including any applicable professional standards.

The issues involved in a breach of fiduciary duty claim will not always be beyond the common knowledge and understanding of a layperson,¹²⁸ for example, where a fiduciary receives a bribe with respect to a transaction within the scope of the fiduciary relationship. If the plaintiff claims multiple breaches of fiduciary duty, a court "should carefully analyze the need for expert testimony on a claim-by-claim, element-by-element basis"¹²⁹ rather than adopt a "blanket approach."¹³⁰

In cases involving an alleged failure of an accountant to disclose relevant facts, the focus will be on the facts within the knowledge of the accountant, the extent to which these facts were disclosed to the client, and the relevance and materiality of those facts which are

127. *Cf.* *Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293, 296–97 (8th Cir. 1989) (common law negligence claim; expert witnesses of plaintiff and defendant constituted sufficient evidence from which jury could find that defendant did not meet the required standard of care).

128. *Cf.* *White v. Jeppson*, 325 P.3d 888, 893–94 (Utah Ct. App. 2014) (action by investors against financial advisors for breach of fiduciary duties; no expert testimony required as to claim that financial advisors lied about having invested in an REIT and having received "big checks" from the investment).

129. *Id.* at 893.

130. *Id.*

shown not to have been disclosed. In cases involving an alleged failure of an accountant to maintain client confidences, the focus will be on the disclosures made to the accountant by the client, the extent to which these disclosures were in fact confidential, and the extent to which the accountant improperly disclosed or used any information shown to be confidential.

§ 7:2.3 Damages Resulting from Breach

A fiduciary who breaches his or her fiduciary duty to another is subject to tort liability to the other for any harm caused by the breach of duty.¹³¹ In addition, in an appropriate case the fiduciary may be liable for punitive damages and/or prejudgment interest.

[A] Compensatory Damages

Compensatory damages are damages which are awarded to a party as compensation for harm sustained by the party.¹³² The purpose of compensatory damages is to place a party “in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.”¹³³ Compensatory damages may be either general damages or special (consequential) damages. General damages are damages for a harm which occurs so commonly from a breach of the fiduciary duty which is the basis of the lawsuit that existence of the damages should be anticipated by the party against whom the claim is made.¹³⁴ Since the statement of facts suggests the existence of the general damages, it is not necessary to specifically allege general damages.¹³⁵ Special or consequential damages are “compensatory damages for a harm other than one for which general damages are given.”¹³⁶ Items of special damages must be specifically stated in the complaint¹³⁷ so that the party against whom the claim is made has “reasonable notice of the nature and extent of the claim.”¹³⁸ Most pecuniary harms for which damages are sought from an accountant in a breach of fiduciary duty case will constitute special damages.

Under the principles discussed above, an accountant is liable for compensatory damages where he or she breaches his or her fiduciary duty to a client and the breach is the proximate cause of damages to the client. For example, an accountant who is a fiduciary because he

131. RESTATEMENT (SECOND) OF TORTS § 874; *id.* cmt. b (1979).

132. *Id.* § 903.

133. *Id.* § 903 cmt. a.

134. *Id.* § 904(1).

135. *Id.* § 904(1); *id.* cmt. a.

136. *Id.* § 904(2).

137. *See, e.g.*, FED. R. CIV. P. 9(g).

138. RESTATEMENT (SECOND) OF TORTS § 904 cmt. a (1979).

renders investment advice to a client is liable for investment losses of the client caused by the failure of the accountant to exercise care in making recommendations or by the failure of the accountant to disclose relevant facts about the investment to the client.¹³⁹ Or, where an accountant is employed to assist in the liquidation of a client's real estate and fails to reveal an offer to purchase the real estate, the accountant is liable for the amount by which the proceeds of the sale would have been increased by acceptance of the offer.¹⁴⁰ Similarly, an accountant who is a fiduciary under ERISA is "personally liable to make good to such plan any losses to the plan resulting from" a breach of a duty imposed by ERISA.¹⁴¹

Several limitations apply to the recovery of compensatory damages. Generally, the plaintiff is required to prove the amount of damages with as much certainty as is reasonably possible under the circumstances.¹⁴² In addition, the plaintiff may not recover damages for any harm which could have been avoided after the wrongful act through reasonable effort or expenditure of money.¹⁴³

Where an accountant is found liable under two separate theories for a single injury, the client is only entitled to one compensatory award. For example, where an accountant engaged in management consulting is found to have breached his or her fiduciary duty and to have acted negligently, the jury may not award compensatory damages under the two separate theories for the same injury.¹⁴⁴

139. *Cf. Dominguez v. Brackey Enters.*, 756 S.W.2d 788 (Tex. Ct. App. 1988) (jury found against accountant and others on breach of fiduciary duty claim and other claims; \$53,000 actual damages awarded), *writ denied* (Feb. 15, 1989).

140. *Cf. Allen Realty Corp. v. Holbert*, 227 Va. 441, 318 S.E.2d 592 (1984) (reversing trial court judgment dismissing action against accountant and accounting firm).

141. 29 U.S.C. § 1109(a). This section creates liability to a benefit plan. To enforce the right, an action must be brought under 29 U.S.C. § 1132(a)(2). The Supreme Court has held that recovery under this section for breach of fiduciary duty must inure to the benefit of the employee benefit plan and not to the benefit of an individual beneficiary of the plan. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). However, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the Court held that an individual beneficiary of a plan may bring an action under 29 U.S.C. § 1132(a)(3) for individual equitable relief for breach of fiduciary duty. Three justices dissented, arguing that the Court's holding was in conflict with the reasoning of the *Russell* case. *See id.*, 516 U.S. at 516–25 (Thomas, J., dissenting).

142. RESTATEMENT (SECOND) OF TORTS § 912 (1979).

143. *Id.* § 918(1).

144. *See Diversified Graphics, Ltd. v. Groves*, 868 F.2d 293, 295, 297 (8th Cir. 1989) (duplicative awards under negligence and breach of fiduciary duty theories; award of damages for breach of fiduciary duties vacated).

[B] Punitive Damages

Punitive damages are awarded to punish a party for outrageous conduct and to deter that party and other parties from similar future conduct.¹⁴⁵ In an appropriate case, punitive damages may be awarded against a party for breach of fiduciary duty.¹⁴⁶

Punitive damages may be awarded against a fiduciary because of his or her outrageous conduct, evil motive, or reckless indifference to the rights of others.¹⁴⁷ “Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence.”¹⁴⁸ In assessing punitive damages against a fiduciary the trier of fact may consider a number of factors, including (1) the character of the fiduciary’s conduct; (2) the nature and extent of the harm caused by the conduct; and (3) the fiduciary’s wealth.¹⁴⁹

In most states, the plaintiff must prove by “clear and convincing” evidence that the defendant engaged in behavior permitting an award of punitive damages.¹⁵⁰ In addition, a growing number of states have established statutory caps on punitive damages.¹⁵¹ The statutory cap

145. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

146. *See, e.g.*, *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 510 (Tex. 1980); *Dominguez v. Brackey Enters.*, 756 S.W.2d 788, 789 (Tex. Ct. App. 1988) (jury awarded \$5,000 in exemplary damages against accountant who was found to have breached his fiduciary duty), *writ denied* (Feb. 15, 1989).

147. RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

148. *Id.* § 908 cmt. b.

149. *See id.* § 908 cmts. b, c, e.

150. *See, e.g.*, ALA. CODE § 6-11-20(a); ALASKA STAT. § 09.17.020(b); ARK. CODE ANN. § 16-55-207; CAL. CIV. CODE § 3294(a); FLA. STAT. ANN. §§ 768.72(2) & 768.725; GA. CODE ANN. § 51-12-5.1(b); IDAHO CODE § 6-1604(1); ILL. COMP. STAT. § 5/2-1115.05(B); KAN. STAT. ANN. § 60-3702(c); MINN. STAT. ANN. § 549.20(1)(a); MISS. CODE ANN. § 11-1-65(1)(a); MONT. CODE ANN. § 27-1-221(5); NEV. REV. STAT. ANN. § 42.005(1); N.J. STAT. ANN. § 2A:15-5.12(a); N.C. GEN. STAT. ANN. § 1D-15(b); OKLA. STAT. ANN. tit. 23, § 9.1; OR. REV. STAT. § 31.730(1); S.C. CODE ANN. § 15-33-135; TEX. CIV. PRAC. & REM. CODE § 41.003(a); UTAH CODE ANN. § 78B-8-201(1)(a); *Fine Line, Inc. v. Blake*, 677 A.2d 1061, 1065 (Me. 1996); *Scott v. Jenkins*, 345 Md. 21, 690 A.2d 1000, 1003–04 (Md. 1997). The U.S. Supreme Court has stated that a clear and convincing standard of proof is not constitutionally required. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) (dicta).

151. *See, e.g.*, ALA. CODE § 6-11-21 (shall not exceed greater of three times the compensatory damages or \$500,000; shall not exceed \$50,000 or 10% of net worth where defendant is a small business); COLO. REV. STAT. ANN. § 13-21-102(1)(a) (shall not exceed amount of actual damages); FLA. STAT. ANN. § 768.73 (may not exceed greater of three times compensatory damages or \$500,000); GA. CODE ANN. § 51-12-5.1(g) (generally limited to maximum of \$250,000); IND. CODE ANN. § 34-51-3-4 (greater of three times compensatory or \$50,000); KAN. STAT. ANN. § 60-3702(e) (generally,

may, however, be inapplicable in specified situations.¹⁵² Several cases have challenged the constitutionality of caps on punitive damages, with varying results.¹⁵³

A number of states have enacted statutory provisions requiring a portion of any punitive damage award to be paid to the state.¹⁵⁴

limit is lesser of annual gross income of defendant or \$5,000,000); MISS. CODE ANN. § 11-1-65(3) (ceiling dependent upon net worth of defendant); NEV. REV. STAT. § 42.005(1) (three times the amount of compensatory damages if compensatory damages are \$100,000 or more; \$300,000 if compensatory damages are less than \$100,000); N.J. STAT. ANN. § 2A:15-5.14(b) (greater of five times compensatory damages or \$350,000); N.C. GEN. STAT. ANN. § 1D-25(b) (shall not exceed greater of three times compensatory damages or \$250,000); N.D. CENT. CODE § 32-03.2-11(4) (may not exceed greater of two times compensatory damages or \$250,000); OKLA. STAT. ANN. tit. 23, § 9.1 (cap depends upon reprehensibility of conduct); TEX. CIV. PRAC. & REM. CODE § 41.008 (shall not exceed two times compensatory damages, plus an amount equal to non-economic damages, not to exceed \$750,000, or \$200,000) VA. CODE ANN. § 8.01-38.1 (not to exceed \$350,000). Where the statutory cap is a specified dollar amount, questions of interpretation may arise. *See, e.g.,* Bagley v. Shortt, 261 Ga. 762, 410 S.E.2d 738, 739 (Ga. 1991) (holding that cap of \$250,000 in a "case" means that \$250,000 is the maximum amount of money that finder of fact may award to any one plaintiff regardless of the number of defendants and the number of theories of recovery).

152. *See, e.g.,* COLO. REV. STAT. § 13-21-102(3) (permitting court to increase award of punitive damages to an amount not exceeding three times actual damages if defendant engages in specified conduct during the pendency of the case); FLA. STAT. ANN. § 768.73(b) (no cap where defendant had specific intent to injure claimant and did injure claimant); GA. CODE ANN. § 51-12-5.1(f) (no limit where defendant acted or failed to act with "specific intent to cause harm"); KAN. STAT. ANN. § 60-3702(f) (if profitability of misconduct exceeds statutory cap, court may award an amount equal to one-and-one-half times the amount of the defendant's gain or expect gain from the misconduct); NEV. REV. STAT. § 42.005(2) (cap inapplicable in five situations not relevant to accountant liability cases); TEX. CIV. PRAC. & REM. CODE § 41.008(c) (cap not applicable where conduct is one of a number of specified felonies).

153. *Compare* Wackenhut Applied Techs. Ctr., Inc. v. Sygnetron Prot. Sys., Inc., 979 F.2d 980 (4th Cir. 1992) (holding Virginia provision does not violate due process provisions of Virginia or United States Constitutions), *with* Bayer CropScience LP v. Schafer, 385 S.W.3d 822 (Ark. 2011) (holding that Arkansas cap on punitive damages violated Arkansas Constitution).

154. *See, e.g.,* IND. CODE ANN. § 34-51-3-6(c)(2) (75% to treasurer of state for deposit into violent crime victims' compensation fund); IOWA CODE ANN. § 668a.1(2)(b) (if conduct not directed specifically at claimant, an amount not to exceed 25%, after payment of costs and fees, to claimant; remainder civil reparations trust fund); MO. ANN. STAT. § 537.675(3) (50%, after attorneys' fees and expenses, to state); OR. REV. STAT. § 31.735 (60% to one state fund and 10% to another); UTAH CODE ANN. § 78B-8-201(3)(a) (50%

Several cases have raised constitutional challenges to such provisions, in most cases without success.¹⁵⁵

A few states do not permit the recovery of punitive damages.¹⁵⁶

Many states have special procedural rules applicable to punitive damages. For example, the statutes in a number of states require mandatory bifurcation of the determinations of liability and punitive damages.¹⁵⁷ In some states, the initial pleading may not demand punitive damages. Rather, a subsequent motion must be made (and granted) to amend the complaint to request punitive damages.¹⁵⁸ Consequently, the statutes and rules of the relevant jurisdiction must be consulted in every case.

There is a division of authority as to when punitive damages may be awarded against a principal, or employer, for the acts of an agent, or employee.¹⁵⁹ One view is that punitive damages may be awarded

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- of amount in excess of 50,000, after deduction of allowable attorney's fees and costs, to state treasurer). The Alabama statute, however, provides that "[n]o portion of a punitive damage award shall be allocated to the state or any agency or department of the state." ALA. CODE § 6-11-21(l).
155. See *Gordon v. State*, 608 So. 2d 800 (Fla. 1992) (finding Florida statute constitutional), *cert. denied sub nom. Gordon v. Florida*, 507 U.S. 1005 (1993); *Cheatham v. Pohle*, 789 N.E.d 467 (Ind. 2003) (rejecting challenges to Indiana statute under federal and state constitutions); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612 (Iowa 1991) (finding no unconstitutional taking of property as a result of distribution under Iowa statute); *Fust v. Attorney Gen.*, 947 S.W.2d 424 (Mo. 1997) (finding Missouri statute constitutional); *DeMendoza v. Huffman*, 334 Or. 425, 51 P.3d 1232 (2002) (answering certified question; Oregon split-recovery provision does not violate Oregon Constitution). *But see Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991) (finding former provision of Colorado statute resulted in unconstitutional taking of property); *Smith v. Price Dev. Co.*, 125 P.3d 945 (Utah 2005) (holding earlier version of Utah split-recovery provision to be unconstitutional taking).
156. See N.H. REV. STAT. ANN. § 507:16 ("No punitive damages shall be awarded in any action, unless otherwise provided by statute."). See also *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684, 688 (1960) ("It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained.").
157. See, e.g., GA. CODE ANN. § 51-12-5.1(d); KAN. STAT. ANN. § 60-3702(a)-(b); MINN. STAT. ANN. § 549.20(4) (if requested by any of the parties); MISS. CODE ANN. § 11-1-65(1)(b)-(c); MO. REV. STAT. § 510.263(1) (if requested by any party); MONT. CODE ANN. § 27-1-221(7); NEV. REV. STAT. § 42.005(3); N.J. STAT. ANN. § 2A:15-5.13 (if requested by any defendant); N.C. GEN. STAT. ANN. § 1D-25(a); N.D. CENT. CODE § 32-03.2-11(2) (if either party elects); OKLA. STAT. ANN. tit. 23, § 9.1(B)-(D).
158. See, e.g., MINN. STAT. ANN. § 549.191; OR. REV. STAT. § 31.725.
159. See generally RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e (2006) (discussing the two competing views).

against a principal for the act of its agent within the scope of the agency whenever punitive damages may be assessed against the agent.¹⁶⁰ The other view is that punitive damages may be awarded against the principal only where a managerial agent of the principal somehow participates in, authorizes, or ratifies the tortious conduct of the agent.¹⁶¹

It is uncertain whether punitive damages may be awarded against a fiduciary in an action brought under ERISA on behalf of an employee benefit plan.¹⁶²

Although the U.S. Supreme Court has held that the Excessive Fines Clause of the Eighth Amendment does not apply to a punitive damages award between private parties in a civil suit,¹⁶³ it has held that the Due Process Clause prohibits the imposition of grossly excessive punitive damages against a tortfeasor¹⁶⁴ or the arbitrary determination

160. See, e.g., *W. Coach Corp. v. Vaughn*, 9 Ariz. App. 336, 452 P.2d 117, 119–20 (1969); *Stroud v. Denny's Rest.*, 271 Or. 430, 532 P.2d 790 (1975).

161. See RESTATEMENT (SECOND) OF AGENCY § 217 C (1958); RESTATEMENT (SECOND) OF TORTS § 909 (1979); *Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 988, 666 P.2d 711, 716 (1983), *modified by* KAN. STAT. ANN. § 60-3702(d) (no award of punitive damages against principal or employer unless conduct authorized or ratified by person expressly empowered to do so, or organization authorized or ratified the conduct); *and Purvis v. Pratto, Inc.*, 595 S.W.2d 103, 104 (Tex. 1980).

162. In *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), the Supreme Court held that a plan beneficiary may not recover punitive damages against a plan fiduciary. *Id.* at 139–44. However, the Court expressly left open the question of whether the plan or fund itself may recover punitive damages in an action against a plan fiduciary. *Id.* at 144 n.12. It is the authors' view that punitive damages should not be recoverable in such a case. *But see* Cal. Dig. Defined Benefit Pension Fund v. Union Bank, 705 F. Supp. 489, 490–91 (C.D. Cal. 1989) (allowing plan to recover punitive damages is consistent with the purposes of ERISA). *Compare* *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 287 (2d Cir. 1992) (action brought on behalf of all participants in/beneficiaries of pension and welfare funds; punitive damages not available), *and* *Sommers Drug Stores Co. Emp. Profitsharing Tr. v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1462–65 (5th Cir. 1986) (in action by employee benefit plan, district court erred in permitting jury to award punitive damages), *cert. denied*, 479 U.S. 1034, 1089 (1987).

163. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909, 2914 (1989). The decision leaves open the question of whether the Excessive Fines Clause applies where the state receives a portion of the award. *Id.* (“Whatever the outer confines of the Clause’s reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”).

164. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1519–20 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (finding that award of \$2 million in punitive damages was grossly excessive; compensatory damages were \$4,000).

of the amount of an award of punitive damages.¹⁶⁵ In *BMW of North America, Inc. v. Gore*,¹⁶⁶ the U.S. Supreme Court provided guideposts for the determination of whether an award of punitive damages is grossly excessive. The guideposts are (1) “the degree of reprehensibility of the defendant’s conduct”;¹⁶⁷ (2) the ratio of the punitive damages to the actual harm inflicted on the plaintiff;¹⁶⁸ and (3) the “civil or criminal penalties that could be imposed for comparable misconduct.”¹⁶⁹ While the Court has steadfastly refused to establish a bright-line ratio which a punitive damage award may not exceed,¹⁷⁰ it has stated that “[s]ingle digit multipliers are more likely to comport with due process” than awards with much higher multipliers.¹⁷¹

In a more recent decision on punitive damages, the Supreme Court held that the Due Process Clause forbids a state from using a punitive damages award to punish a defendant for injuries inflicted on non-parties (“strangers to the litigation”).¹⁷² According to the Court, “to

165. See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 1685–86 (2001) (holding that courts of appeals should apply de novo standard of review, rather than abuse of discretion standard, when reviewing district court determinations regarding the constitutionality of punitive damage awards; since level of punitive damages is not really a “finding of fact,” no Seventh Amendment concerns are implicated by de novo review); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331, 2341–42 (1994) (holding that provisions of Oregon Constitution prohibiting judicial review of the amount of punitive damages awarded by a jury “unless the court can affirmatively say there is no evidence to support the verdict” violates the Due Process Clause of the Fourteenth Amendment). In *Honda Motor*, the Court stated:

Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger.

166. *BMW of N. Am. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996).

167. *Id.*, 116 S. Ct. at 1599–1601.

168. *Id.* at 1601–03.

169. *Id.* at 1603–04.

170. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1524 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 1602 (1996).

171. *State Farm Mut. Auto. Ins.*, 123 S. Ct. at 1524.

172. *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057 (2007). In an earlier decision, the Court stated that, in determining the reprehensibility of a defendant’s conduct, “[a] State cannot punish a defendant for conduct that may have been lawful where it occurred Nor, as a general

permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation."¹⁷³ However, the Court stated: "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible" ¹⁷⁴ However, the Court cautioned, "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."¹⁷⁵ Thus, "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one."¹⁷⁶

[C] Prejudgment Interest

Where an accountant is held liable for breach of fiduciary duties, he or she may also be liable for prejudgment interest on the amount awarded to the plaintiff. Most courts will award prejudgment interest in several situations. First, prejudgment interest will be awarded on a liquidated claim or a claim the amount of which is readily ascertainable.¹⁷⁷ Second, prejudgment interest will be given on an award of restitution.¹⁷⁸ In the fiduciary context, the prejudgment interest on a restitutionary recovery operates to deprive the fiduciary of all possible benefit from his or her breach of fiduciary duty. A court may award prejudgment interest on a restitutionary award against an ERISA fiduciary for breach of a fiduciary duty owed to an employee benefit plan.¹⁷⁹

The traditional view is that prejudgment interest will not be awarded on a pecuniary claim that is unliquidated or, in other words, the amount of which can "not be ascertained or computed, even in

rule, does a State have a legitimate interest in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1522 (2003).

173. *Philip Morris USA*, 127 S. Ct. at 1063.

174. *Id.* at 1064.

175. *Id.* at 1064. In dissent, Justice Stevens stated: "This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhance the reprehensibility of the defendant's conduct, the jury is, by definition, punishing the defendant—directly—for third-party harm." *Id.* at 1067.

176. *Id.* at 1064.

177. DAN DOBBS, REMEDIES § 3.5 at 166–67 (West 1973).

178. See RESTATEMENT OF RESTITUTION § 156 (1937); DAN DOBBS, REMEDIES § 3.5 at 166 and 169–70 (West 1973).

179. *Brink v. DaLesio*, 667 F.2d 420, 429 (4th Cir. 1982) (district court erred in not allowing prejudgment interest on amount wrongfully appropriated from employee benefit plan by defendants).

theory, without a trial.”¹⁸⁰ Under this view prejudgment interest is generally not available on an award of special damages, for example, for lost profits.¹⁸¹ The trend, however, is to permit an award of prejudgment interest on an unliquidated claim where “the payment of interest is required to avoid an injustice.”¹⁸² Under this view an award of prejudgment interest may be made on an unliquidated pecuniary claim where there is a long period of time between the harm and the judgment, although justice might not require the payment of prejudgment interest if the injured party “has discouraged settlement by making exorbitant demands or has delayed in filing suit.”¹⁸³

A court will not award prejudgment interest on a nonpecuniary claim, such as a claim for emotional distress or injury to reputation,¹⁸⁴ or on an award of punitive damages.¹⁸⁵

§ 7:2.4 Other Available Remedies

Other remedies for breach of fiduciary duty include the avoidance of a contract between the client and the accountant-fiduciary, a restitutionary recovery against the fiduciary through the imposition of a constructive trust, and, where the remedy at law is inadequate, injunctive relief.

[A] Avoidance of Contract

A client who enters into a contract with an accountant who is a fiduciary may avoid or rescind the contract unless the accountant proves that the contract is fair in light of the circumstances and that the accountant disclosed all relevant facts.¹⁸⁶ The law presumes that a fiduciary who benefits from a transaction with a client exercised undue influence,¹⁸⁷ and the client is not required to prove that the transaction is unfair in order to avoid it.¹⁸⁸

Where a client elects to avoid a contract with an accountant who is a fiduciary, the client is entitled to restitution of any benefit which he or she has conferred upon the accountant-fiduciary “by way of past

180. DAN DOBBS, REMEDIES § 3.5 at 165 (West 1973).

181. *Id.*

182. RESTATEMENT (SECOND) OF TORTS § 913(1)(b) (1979).

183. *See id.* § 913 cmt. a.

184. *See id.* § 913(2); *id.* cmt. c; DAN DOBBS, REMEDIES § 3.5 at 165 (West 1973).

185. RESTATEMENT (SECOND) OF TORTS § 913 cmt. d (1979).

186. *See* RESTATEMENT (SECOND) OF CONTRACTS § 173 (1981).

187. *Anderson v. Marquette Nat'l Bank*, 164 Ill. App. 3d 626, 518 N.E.2d 196, 200 (1987), *cert. denied*, 119 Ill. 2d 553, 522 N.E.2d 1240 (1988) (table).

188. *See* GEORGE BOGERT, TRUSTS § 96 at 349 (6th ed. West 1987).

performance or reliance.”¹⁸⁹ The client’s right to restitution is, however, subject to the condition that the client account for what he or she has received from the accountant-fiduciary.¹⁹⁰

[B] Restitutionary Recovery

Where an accountant breaches his or her fiduciary duty to a client, the client may be entitled to a restitutionary recovery against the accountant as an alternative to a recovery of compensatory damages.¹⁹¹ The constructive trust is a remedy used to prevent unjust enrichment of a fiduciary.¹⁹² Thus, it is often said that a fiduciary holds any profits that result from a breach of fiduciary duty in constructive trust for the party to whom the duty is owed.¹⁹³ Similarly, ERISA makes a fiduciary personally liable to an employee benefit plan for “any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary.”¹⁹⁴

A constructive trust may be enforced against a fiduciary where he or she acquires or retains property in violation of his or her fiduciary duties.¹⁹⁵ For example, an accountant-fiduciary holds in constructive trust for his or her client (1) property of the client which the accountant sells to himself in violation of his fiduciary duty;¹⁹⁶ (2) the purchase money received upon the sale to the client of property of the accountant in violation of the accountant’s fiduciary duty;¹⁹⁷ (3) property purchased for the accountant from a third person where it was the fiduciary duty of the accountant to purchase the property for the client;¹⁹⁸ (4) secret profits received by the accountant in connection with performance of his duties as a fiduciary;¹⁹⁹ (5) property acquired by the accountant in competition with the client in violation of the accountant’s fiduciary duties;²⁰⁰ and (6) property acquired by the accountant in violation of his or her fiduciary duties through the use of confidential information received from the client.²⁰¹ Where a fiduciary

189. RESTATEMENT (SECOND) OF CONTRACTS § 377 (1981).

190. RESTATEMENT OF RESTITUTION § 159; *id.* cmt. a (1937).

191. *Id.* § 138 (Violation of Fiduciary Duty); RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1979).

192. *See* DAN DOBBS, REMEDIES § 10.5 at 684 (West 1973).

193. *See* RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1979); DAN DOBBS, REMEDIES § 10.5 at 684 (1973).

194. 29 U.S.C. § 1109(a).

195. RESTATEMENT OF RESTITUTION § 190 (1937).

196. *Id.* § 192.

197. *Id.* § 193.

198. *Id.* § 194(1).

199. *Id.* § 197.

200. *Id.* § 199.

201. *Id.* § 200.

holding property under a constructive trust exchanges the property for other property, the beneficiary of the constructive trust is entitled to enforce either a constructive trust or an equitable lien on the property acquired in the exchange.²⁰²

The client is required (1) to restore to the accountant-fiduciary the amount the accountant paid the client for property purchased from the client in violation of his or her fiduciary duty²⁰³ or any property of the accountant sold to the client in violation of the accountant's fiduciary duties,²⁰⁴ or (2) to reimburse the accountant for what he or she paid a third person for property he or she should have purchased for the client.²⁰⁵ In sum, the client is not entitled to both a constructive trust and a forfeiture of property or money rightfully belonging to the accountant-fiduciary.

[C] Injunctive Relief

A client may obtain injunctive relief against an accountant who has breached his or her fiduciary duties if the remedy at law is shown to be inadequate.²⁰⁶ For example, where an accountant obtains confidential information during the course of a fiduciary relationship and uses the information in breach of his or her fiduciary duties, a court may enjoin further use of the information.²⁰⁷ An injunction can be a valuable remedy where a fiduciary competes with another in violation of his or her fiduciary duties to the other or where a fiduciary threatens to disclose confidential information.²⁰⁸

ERISA authorizes equitable relief against a fiduciary for breach of fiduciary duty where the court deems it appropriate.²⁰⁹

[D] ERISA Remedies

A wide range of potential remedies are available where an accountant who is a fiduciary under ERISA breaches his or her fiduciary duties to the employee benefit plan. In addition to compensatory

202. *See id.* § 190 cmt. c.

203. *Id.* § 192 cmt. i.

204. *Id.* § 193 cmt. d.

205. *Id.* § 194 cmt. b.

206. *See* DAN DOBBS, REMEDIES § 2.10 at 108 (West 1973). *See also* RESTATEMENT (SECOND) OF TORTS §§ 934 (Method of Testing Appropriateness) and 936 (Factors in Determining Appropriateness of Injunction) (1979).

207. *See, e.g.,* Shwayder Chem. Metallurgy Corp. v. Baum, 45 Mich. App. 220, 206 N.W.2d 484, 487 (1973).

208. *See* RESTATEMENT (SECOND) OF AGENCY § 399 cmt. f (1958).

209. 29 U.S.C. §§ 1109(a) & 1132(a)(2)–(3). *See generally* Cigna Corp. v. Amara, 563 U.S. 421, 131 S. Ct. 1866, 1878–80 (2011) (discussing the term “appropriate equitable relief,” as used in 29 U.S.C. § 1132(a)(3)).

damages, a restitutionary recovery, and injunctive relief, all discussed above, potential remedies include the following: (1) if the court deems it appropriate, the removal of the accountant as a fiduciary;²¹⁰ and (2) in the court's discretion, an allowance of reasonable attorney's fees and costs of action.²¹¹

§ 7:3 Affirmative Defense: Statute of Limitations

A claim against an accountant for breach of his or her fiduciary duty must be brought within the applicable statute of limitations, which varies from jurisdiction to jurisdiction.²¹² Thus, the expiration of the statute of limitations is an affirmative defense which may be raised by an accountant charged with a breach of fiduciary duty. As with other affirmative defenses, the defense of statute of limitations must be set forth affirmatively in the pleadings.²¹³

Some courts may apply the continuous representative doctrine to toll the statute of limitations on a breach of fiduciary duty claim

210. 29 U.S.C. § 1109(a).

211. *Id.* § 1132(g)(1).

212. In New York, there is no "single statute of limitations for fiduciary duty claims. Rather, the choice of the applicable limitations period depends upon the remedy that the plaintiff seeks." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 907 N.E.2d 268, 272, *reargument denied*, 12 N.Y.3d 889, 911 N.E.2d 855 (2009) (Mem.). Some cases apply the general tort limitations period to breach of fiduciary duty claims. *See Kansa Reinsurance Co. v. Cong. Mortg. Corp.*, 20 F.3d 1362, 1373 (5th Cir. 1994) (applying two-year limitation period under Texas law for torts). Others apply the residual limitation period applicable to actions for which no limitation period is otherwise prescribed. *See Singer v. Dungan*, 45 F.3d 823, 827 (4th Cir. 1995) (applying Virginia's catch-all one-year statute of limitations). Where the essence of the breach of fiduciary duty claim is professional negligence, a court may apply the statute of limitations for professional negligence. *See Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994) (suit against investment advisor for allegedly recommending inappropriate investments). The applicable statute of limitations may vary depending upon the remedy sought. For example, where the plaintiff seeks to impose a constructive trust, a court may apply the statute of limitations governing the underlying claim, for example, for recovery of real property. *See Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839, 844 (1978). Or, it may apply a trust statute of limitations. *See* 1 CALVIN W. CORMAN, *LIMITATION OF ACTIONS* § 4.5, at 277-78 (1991). Where the claim is for aiding and abetting the breach of fiduciary duty, a court might determine that the claim "is akin to fraud" and apply the statute of limitations for fraud. *See USACM Liquidating Tr. v. Deloitte & Touche, LLP*, 764 F. Supp. 2d 1210, 1230-31 (D. Nev. 2011) (applying Nevada law).

213. *See, e.g.*, FED. R. CIV. P. 8(c).

against an accountant.²¹⁴ In addition, since a fiduciary has a duty to disclose all relevant facts relating to matters within the scope of the fiduciary relationship, a failure to disclose such facts may toll the statute of limitations. In *Russell v. Campbell*,²¹⁵ an accountant who was a fiduciary engaged in self-dealing in violation of his fiduciary duties. The court held that the failure of the accountant to reveal material facts tolled the statute of limitations until the fiduciary relationship ended. According to the court, the plaintiffs trusted the accountant and relied upon his investment advice. Therefore, their failure to discover his wrongdoing was not the result of a lack of diligence on their part.²¹⁶ In general, the operation of the statute of limitations should only be postponed for as long as the client is justified, under the circumstances, in placing confidence in the accountant.²¹⁷

After the fiduciary relationship between an accountant and a client ends, any cause of action for breach of fiduciary duty accrues no later than the time at which the client discovers or through the exercise of reasonable diligence should have discovered the facts giving rise to the cause of action.²¹⁸ For example, where all documents pertaining to a transaction or series of transactions are turned over to the client or to his or her attorney after the termination of the fiduciary relationship, any cause of action based upon facts which are revealed in the documents should accrue no later than the time at which the documents are made available.²¹⁹ In addition, the knowledge of an agent of the client may be imputed to the client in an appropriate case for purposes of determining when the client knew of the alleged breach of fiduciary duty.²²⁰

214. See *Morrison v. Watkins*, 20 Kan. App. 2d 411, 889 P.2d 140, 148 (1995) (deciding that cause of action accrued when plaintiff discharged accountant).

215. *Russell v. Campbell*, 725 S.W.2d 739 (Tex. Ct. App. 1987), writ of error refused (Apr. 15, 1987).

216. *Id.* at 748.

217. See Annotation, *When Statute of Limitations Starts to Run Against Enforcement of Constructive Trust*, 55 A.L.R.2d 220, 255–58 (1957).

218. See *Frank Cooke, Inc. v. Hurwitz*, 10 Mass. App. Ct. 99, 406 N.E.2d 678, 684 (1980) (action commenced August 5, 1975; any fiduciary relationship with accountants ended no later than early 1969, at which time plaintiff's lawyers took all of the accountant's records pertaining to the loans in question).

219. *Id.*

220. See, e.g., *USACM Liquidating Tr. v. Deloitte & Touche*, 754 F.3d 645, 648 (9th Cir. 2014) (imputing knowledge where agents owned 83% of stock, held positions of CEO and president, and were only two directors; consequently, statute of limitations applicable to claims of aiding and abetting breaches of fiduciary duty not tolled by concealment). See generally the discussion of imputation of knowledge in section 4:3.2[C].

The statute of limitations for commencing an action against an ERISA fiduciary based upon a breach of a fiduciary duty imposed by ERISA is the earliest of:

- (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
- (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.²²¹

§ 7:4 Participation by an Accountant in Another Party's Breach of Fiduciary Duty

Even where an accountant is not a fiduciary, in some states the accountant may be liable if he or she participates in (or aids and abets) another's breach of fiduciary duty.²²² Under this theory, the accountant is liable if he or she knows that the conduct of another is a breach of fiduciary duty and gives substantial assistance to the person committing the breach.²²³ The accountant is not liable under this

221. 29 U.S.C. § 1113. *See generally* J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245 (1st Cir.), *cert. denied*, 519 U.S. 823 (1996), which analyzes this ERISA limitations provision.

222. *See* Clark v. Milam, 847 F. Supp. 409, 419–20 (S.D. W. Va. 1994) (denying auditors' motion to dismiss claim of aiding and abetting breach of a fiduciary duty; complaint stated claim upon which relief may be granted under West Virginia law), *aff'd*, 1998 WL 110160 (4th Cir. Mar. 13, 1998); Koken v. Steinberg, 825 A.2d 723, 732 (Pa. Commw. Ct. 2003) (complaint stated a claim against accounting firm for aiding and abetting company's officers in breaches of fiduciary duties), *appeal quashed*, 834 A.2d 1103 (Pa. 2003). *But see In re Munford, Inc.*, 98 F.3d 604, 612–13 (11th Cir. 1996) (concluding that Georgia courts would not recognize a case of action for aiding and abetting breach of fiduciary duty), *cert. denied*, 118 S. Ct. 738 (1998); *cf. In re Schlotzsky's, Inc.*, 351 B.R. 430, 439 (Bankr. W.D. Tex. 2006) (noting that while Texas does not recognize a claim for aiding and abetting breach of fiduciary duty, it does recognize a claim for "knowing participation in breach of fiduciary duty"). Pennsylvania law recognizes a cause of action against an accounting firm for aiding and abetting a breach of fiduciary duty. *Matlack Leasing, LLC v. Morison Cogen, LLP*, 2010 WL 114883, at *11–12 (E.D. Pa. Jan. 13, 2010).

223. *See* RESTATEMENT (SECOND) OF TORTS § 876 (1979); RESTATEMENT (SECOND) OF AGENCY § 312 (Intentionally Causing or Assisting Agent to Violate Duty) (1958); *Ackerman v. Nat'l Prop. Analysts, Inc.*, 887 F. Supp. 494, 508 (S.D.N.Y. 1992) (also noting requirement of a connection between plaintiff's injury and conduct of aider and abettor).

theory simply because he or she knew or should have known of the breach of duty by another and did not bring it to the attention of the party to whom the fiduciary duty is owed.²²⁴ Similarly, an accountant who unknowingly does an act which has the effect of furthering another's breach of fiduciary duty has not acted tortiously.²²⁵ In addition, the accountant is not liable where the acts of the fiduciary are not foreseeable or where the accountant's assistance is so small as to be insubstantial.²²⁶

The Minnesota Supreme Court, while recognizing the aiding and abetting theory of liability, held that the plaintiff must plead with particularity facts establishing each of the elements of the aiding and abetting in cases against a professional.²²⁷ In addition, the court interpreted the "substantial assistance" requirement to require "something more than the provision of routine professional services."²²⁸ It held that the plaintiffs failed to state a claim against accountants who were alleged to have performed routine accounting duties.²²⁹ In a case brought against the auditors of Madoff feeder funds, the Second Circuit agreed that substantial assistance means more than performing routine business services.²³⁰

ERISA expressly imposes liability upon an ERISA fiduciary for an employee benefit plan who knowingly participates in or undertakes to conceal another ERISA fiduciary's breach of duty, and upon an ERISA fiduciary who has knowledge of another ERISA fiduciary's breach of duty and does not take reasonable steps to remedy the breach.²³¹ It does not impose express liability upon a nonfiduciary who participates in an ERISA fiduciary's breach of duty. Prior to 1993, the majority of cases which considered the issue concluded that a nonfiduciary could be held liable for knowingly participating in an ERISA fiduciary's

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224. *Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1153 n.9 (3d Cir. 1989).
225. RESTATEMENT (SECOND) OF TORTS § 876 cmts. c and d (1979). In addition, constructive knowledge, or having reason to know of the fiduciary's breach of duty, is not sufficient. Actual knowledge is required. *Bullmore v. Ernst & Young Cayman Islands*, 45 A.D.3d 461, 846 N.Y.S.2d 145, 148 (App. Div. 2007) (trial court properly dismissed cause of action for aiding and abetting breach of fiduciary duty).
226. *See id.* § 876 cmts. d, e.
227. *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999).
228. *Id.* at 188–89.
229. *Id.* at 189 (among other things, accountants alleged to have prepared financial statements and provided tax advice).
230. *Meridian Horizon Fund, LP v. KPMG (Cayman)*, 487 F. App'x 636, 643 (2d Cir. 2012) (applying New York law; affirming dismissal of claims).
231. 29 U.S.C. § 1105(a).

breach of fiduciary duty.²³² However, several cases, focusing heavily on the language of ERISA, held that nonfiduciaries were not liable for knowing participation in a violation of ERISA duties.²³³ In 1993, the Supreme Court held in *Mertens v. Hewitt Associates* that ERISA does not authorize suits for money damages against nonfiduciaries who knowingly participate in an ERISA fiduciary's breach of fiduciary duty.²³⁴ The Court left open the question of whether equitable relief may be obtained against a nonfiduciary who participates in an ERISA fiduciary's breach of duty.²³⁵ In 2000, the Court held that ERISA authorizes a plan participant, beneficiary or fiduciary to bring a civil action for "appropriate equitable relief" against a nonfiduciary "party in interest" to certain transactions barred by ERISA.²³⁶ In an appropriate case, this equitable relief could include restitution of plan assets.²³⁷ However, a "boilerplate request for 'other legal and equitable relief' does not convert what is plainly a legal action for damages into one for equitable relief."²³⁸ Given the broad preemption provision in ERISA,²³⁹ it is unlikely that a common law remedy exists against a nonfiduciary who participates in an ERISA fiduciary's breach of fiduciary duty.²⁴⁰

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232. See, e.g., *Lowen v. Tower Asset Mgmt.*, 829 F.2d 1209, 1220 (2d Cir. 1987); *Thornton v. Evans*, 692 F.2d 1064, 1077-78 (7th Cir. 1983); *Pension Ben. Guar. Corp. v. Ross*, 733 F. Supp. 1005, 1006-08 (M.D.N.C. 1990); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 279-81 (2d Cir. 1992); *Donovan v. Daugherty*, 550 F. Supp. 390, 410-11 (S.D. Ala. 1982) (at least to the extent nonfiduciary is enriched); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-42 (W.D. Wis. 1979).
233. See, e.g., *Nieto v. Ecker*, 845 F.2d 868, 871-73 (9th Cir. 1988) (only fiduciaries liable for breach of ERISA fiduciary duties); *Framingham Union Hosp., Inc. v. Travelers Ins. Co.*, 744 F. Supp. 29, 31-33 (D. Mass. 1990) (no action against nonfiduciaries for knowing participation in an ERISA violation).
234. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 113 S. Ct. 2063, 2064 (1993). The Court left open the question of whether equitable relief may be obtained against a nonfiduciary who participates in an ERISA fiduciary's breach of duty. *Id.* at 2069.
235. *Id.* at 2063, 2069.
236. *Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000).
237. *Id.* at 253.
238. *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99, 106 (D.D.C. 2009) (dismissing claim for compensatory damages against law firm that was not ERISA fiduciary).
239. 29 U.S.C. § 1144(a).
240. *Mertens*, 113 S. Ct. at 2074 n.2 (White, J., dissenting); *Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F. Supp. 869, 879-80 (S.D.N.Y. 1997) (interpreting ERISA as preempting common law breach of fiduciary duty claims even against persons who are not ERISA fiduciaries). *But cf.*

An example of the potential application of the theory of participation in a breach of fiduciary duty is *Gillespie v. Seymour*.²⁴¹ This case was brought by the beneficiaries of a trust against the trustee and the trust's accountant. The trial court dismissed the accountants and the beneficiaries appealed. The appellate court affirmed the dismissal of the breach of fiduciary duty claims against the accountants, finding that the accountants were hired to perform independent accounting work and, thus, were not fiduciaries.²⁴² The court reversed the dismissal of the claims based upon the accountants' alleged conspiracy with the trustee to overcharge the trust and alleged participation in the trustee's overcharging of the trust for services rendered. The court determined that the facts stated in the complaint would be actionable if true.²⁴³

DeLaurentis v. Job Shop Tech. Serv., Inc., 912 F. Supp. 57, 63–64 (E.D.N.Y. 1996) (court assumes a federal common law remedy exists, but finds plaintiffs failed to adequately plead a claim). A number of cases have held that ERISA does not preempt various state law claims against professionals who are not ERISA fiduciaries. *See* Custer v. Sweeney, 89 F.3d 1156, 1166–67 (4th Cir. 1996) (holding ERISA does not preempt legal malpractice suit against attorney representing plan); Redall Indus. v. Wiegand, 876 F. Supp. 147, 151–53 (E.D. Mich. 1995) (ERISA does not preempt state breach of contract, malpractice, and misrepresentation claims against professionals including accountants); Bourns, Inc. v. KPMG Peat Marwick, 876 F. Supp. 1116, 1121–22 (C.D. Cal. 1994) (ERISA does not preempt state law claims for breach of contract and malpractice against auditor of company and pension plan); Carl Colteryahn Dairy, Inc. v. W. Pa. Teamsters & Emp'rs Pension Fund, 785 F. Supp. 536, 543 (W.D. Pa. 1992) (ERISA does not preempt state law claims for fraudulent misrepresentation and negligence against accountants); Harmon City, Inc. v. Nielsen & Senior, 907 P.2d 1162, 1167–71 (Utah 1995) (concluding ERISA does not preempt state law malpractice claim against attorneys). *Cf. also* Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan Enters., Inc., 793 F.2d 1456 (5th Cir. 1986) (ERISA did not preempt benefit plan's state law breach of fiduciary duty claim because basis of claim was independent fiduciary relationship created by state law), *cert. denied*, 479 U.S. 1034, 1089 (1987). *But cf.* Miller v. Ret. Funding Corp., 953 F. Supp. 180, 183–85 (W.D. Mich. 1996) (granting motion for summary judgment; ERISA preempts state law claims against investment advisors based on negligence, breach of contract, fraud and misrepresentation).

241. *Gillespie v. Seymour*, 14 Kan. App. 2d 563, 796 P.2d 1060 (1990), *aff'd in part, rev'd in part*, 250 Kan. 123, 823 P.2d 782 (1991).

242. *Id.* at 1063–64.

243. *Id.* at 1066–67. On remand, a judgment was entered against the accountants. On appeal, this judgment was reversed. *Gillespie v. Seymour*, 876 P.2d 193 (Kan. Ct. App. 1994), *review denied* (Sept. 9, 1994). The court found that the elements of a civil conspiracy were not present under the facts found by the trial court. *Id.*, 876 P.2d at 201–05.

An accountant who participates in another party's breach of fiduciary duty is liable for (1) any damages caused by his or her conduct²⁴⁴ or (2) restitution of any benefit he or she has received from his or her participation in the breach of duty.²⁴⁵ In addition, in an appropriate case the accountant may be enjoined from continuing his or her unlawful conduct.²⁴⁶

§ 7:5 Apportionment and Contribution

The wrongful conduct of a third person may contribute to the plaintiff's injury where an accountant breaches his or her fiduciary duty to a client or participates in another person's breach of fiduciary duty. Where the conduct of the accountant and the other party causes a harm which is capable of apportionment, the accountant is liable only for the proportion of the total harm for which he or she is responsible.²⁴⁷

However, where the conduct of the accountant and the conduct of the other party cause a single and indivisible harm, the accountant is liable to the injured party for the entire harm.²⁴⁸ An accountant who is held liable for an indivisible harm might be able to obtain contribution from the other wrongdoer.²⁴⁹ However, there is no right to contribution for a breach of fiduciary duty in a number of the states that have adopted the Uniform Contribution Among Tortfeasors Act.²⁵⁰

244. RESTATEMENT (SECOND) OF TORTS § 974 cmt. c (1979); RESTATEMENT (SECOND) OF AGENCY § 312 cmt. d (1958).

245. RESTATEMENT OF RESTITUTION § 138(2) (1937); RESTATEMENT (SECOND) OF AGENCY § 312 cmt. d (1958).

246. See RESTATEMENT (SECOND) OF TORTS §§ 934 (Method of Testing Appropriateness) and 936 (Factors in Determining Appropriateness of Injunction) (1979).

247. See *id.* § 881.

248. See *id.* § 875.

249. See *id.* § 886A; RESTATEMENT (SECOND) OF TRUSTS § 258 (1959) (unless breach of trust committed in bad faith).

250. See U.C.T.F.A. § 1(g), 12 U.L.A. 202 (2008); ARIZ. REV. STAT. ANN. § 12-2501(F)(2) (not applicable "to breaches of trust or of other fiduciary obligation"); COLO. REV. STAT. ANN. § 13-50.5-102(7) (same); FLA. STAT. ANN. 768.31(2)(g) (same); NEV. REV. STAT. ANN. § 17.305 (same); N.C. GEN. STAT. § 1B-1(g) (same); OKLA. STAT. ANN. tit.12, § 832(G) (same); S.C. CODE ANN. § 15-38-20(G) (same); TENN. CODE ANN. § 29-11-102(g) (same); *Buchbinder v. Register*, 634 F.2d 327, 330 (6th Cir. 1980) (U.C.T.F.A. not applicable to suit against accounting firm which allegedly aided and abetted executor's breaches of fiduciary duty); *In re DeLorean Motor Co.*, 65 B.R. 767, 774 (Bankr. E.D. Mich. 1986) (corporate officer sought contribution from corporation's accountant for alleged breach of fiduciary duty; no right to contribution under either U.C.T.F.A. or common law).

The Second Circuit has concluded that an ERISA fiduciary may seek contribution from another ERISA fiduciary even though the statute does not expressly provide for contribution.²⁵¹ The court stated: "There is no reason why a single fiduciary who is only partially responsible for a loss should bear its full brunt."²⁵² It reasoned that contribution was an equitable means of apportioning wrongdoing between ERISA fiduciaries.²⁵³ However, the Eighth Circuit has held that there is no right of contribution among ERISA co-fiduciaries.²⁵⁴

251. *Chemung Canal Tr. Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 18 (2d Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992).

252. *Id.* at 16.

253. *Id.*

254. *Travelers Cas. & Sur. Co. of Am. v. IADA Serv., Inc.*, 497 F.3d 862, 865–67 (8th Cir. 2007).

