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Restatement of the Law, Third, Agency

Case Citations

Chapter 8 - Duties of Agent and Principal to Each Other

Topic 1 - Agent's Duties to Principal

Title A - General Fiduciary Principle

Restat 3d of Agency, § 8.01

§ 8.01 General Fiduciary Principle

An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This section states the basic principle that when taking action within the scope of an agency relation-ship, an agent's duty as a fiduciary is to act loyally for the principal's benefit. Comment *b* discusses general aspects of the principle, including its relationship to the more specific duties that an agent owes to a principal. Comment c discusses how the scope of an agency relationship serves as a boundary or limit on the applicability of the principle. Comment *d* examines the remedies available to a principal when an agent breaches a fiduciary duty.

Sections 8.02, 8.03, 8.04, and 8.05 state an agent's specific duties of loyalty. Section 8.06 governs a principal's consent to conduct by an agent that would otherwise constitute a breach of the agent's duty of loyalty.

b. In general. The relationship between a principal and an agent is a fiduciary relationship. See § 1.01. An agent assents to act subject to the principal's control and on the principal's behalf. The general fiduciary principle stated in this section is an overarching standard that unifies the more specific rules of loyalty stated in §§ 8.02 to 8.05. Although an agent's interests are often concurrent with those of the principal, the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship. A principal may choose to structure the basis on which an agent will be compensated so that the agent's interests are concurrent with those of the principal.

The fiduciary principle supplements manifestations that a principal makes to an agent, making it unnecessary for the principal to graft explicit qualifications and prohibitions onto the principal's statements of authorization to the agent.

Illustrations:

1. P engages A to manage P's business of dealing in property. P furnishes A with a power of attorney that states that A "shall have power to do and perform for me any and all acts that I might do and perform myself if personally present concerning any property, real or personal, in which I might own any interest of any type, including but not limited to the signing and delivery of any and all deeds, deeds of trust, promissory notes, leases and other instruments that I might personally sign and deliver." P makes no other relevant manifestation to A. A executes a deed that conveys Blackacre, owned by P, to A for no consideration. At P's election, A's conveyance of Blackacre is ineffective. A's conveyance of Blackacre to A is inconsistent with A's duty to act loyally for P's benefit.

2. Same facts as Illustration 1, except that A conveys Black-acre to T. Same result. By conveying Blackacre to T without consideration, A has not acted loyally for P's benefit.

A principal may, of course, manifest assent to a transaction effected by an agent that constitutes a gift of the principal's property or another unselfish action on the part of the principal. The agent's duty to the principal obliges the agent to act in accord with a reasonable interpretation of the principal's manifestation, even when the agent believes that doing so is not in the principal's best interests. See § 2.02, Comment *f.* For treatment of the authority of an agent under a durable power of attorney to make gifts, see *Restatement Third, Property (Wills and Other Donative Transfers) § 8.1*, Comment *l.*

The general fiduciary principle complements and facilitates an agent's compliance with duties of performance that the agent owes to the principal. An agent has a duty to the principal to use care in acting on the principal's behalf. See § 8.08. An agent also has a duty to use reasonable efforts to provide material information to the principal. See § 8.11. An agent's failure to provide material information to the principal may facilitate the agent's breach of the agent's duties of loyalty to the principal.

Illustration:

3. P, who owns Blackacre, lists it for sale with A. T makes an offer to A to buy Blackacre for $ 110,000. Unaware of T's offer, and unbeknownst to T, P informs A that P is willing to sell Blackacre for $ 100,000. A accepts T's offer on P's behalf, remits $ 100,000 to P, and pockets the extra $ 10,000. A is subject to liability to P. T's willingness to pay $ 110,000 for Blackacre is material information that A has a duty to furnish to P as stated in § 8.11. A's retention of $ 10,000 is also a breach of A's duty to act loyally for P's benefit; A's duty, as stated in § 8.02, not to acquire a material benefit from a third party in connection with transactions undertaken on P's behalf; and A's duties as stated in §§ 8.05 and 8.12 in connection with P's property.

Because it disallows the pursuit of self-interest as a motivating force in actions the agent determines to take on the principal's behalf, compliance with the general fiduciary standard reduces the likelihood that an agent will not comply with the agent's duties of performance. Moreover, as stated in § 8.09, an agent has a duty to take action that affects the principal's legal relations only within the scope of the agent's actual authority and to comply with reasonable instructions provided by the principal. The general fiduciary principle facilitates a principal's ability to exercise control over an agent because it provides a benchmark standard against which the agent must interpret manifestations by the principal, either the principal's initial statement of authority to the agent or interim instructions that the principal subsequently provides to the agent. An agent is not free to exploit gaps in the principal's manifestations by taking action that is self-interested or otherwise fails to serve interests of the principal that the agent knows or should know. See § 1.01, Comment *e.*

Unless the principal consents, the general fiduciary principle, as elaborated by the more specific duties of loyalty stated in §§ 8.02 to 8.05, also requires that an agent refrain from using the agent's position or the principal's property to benefit the agent or a third party. On the principal's consent, see § 8.06. This protects the principal from the vulnerability that any relationship of agency creates by exposing the principal's property or interests more generally to the risk of self-interested action by the agent.

The fiduciary character of an agent's position does not depend on whether the agent has access to or otherwise exercises control over property of the principal. Nor does it depend on whether the principal has furnished the agent with precise instructions as opposed to authorizing the agent to exercise substantial discretion in determining what actions to take. Even precisely worded instructions require interpretation by the agent, see § 2.02, Comments *f* and *g,* and the fiduciary character of an agent's position furnishes a crucial benchmark for the agent's interpretation of instructions received from the principal and thereby facilitates the principal's ability to exercise control over the agent. See § 1.01, Comment *e.* Moreover, once having furnished instructions to an agent, the principal may wish to alter them before the agent takes action; the principal may wish to do so upon learning that the agent proposes to engage in conduct that would, unless the principal consents, contravene the agent's fiduciary duties to the principal. Separately, an agent who has received precise instructions from a principal breaches the agent's fiduciary duty to the principal by using the information conveyed by those instructions in a manner to which the principal does not consent, for example by "front-running" or trading on the agent's own account in advance of executing an order to trade received from the principal. If the market is thin, the agent's trade may affect the price received by the principal. If the magnitude of the principal's order will affect

the market price, the agent's front-running makes use of the fact, known to the agent, of the principal's order without the principal's consent.

Doctrines that are distinct from an agent's fiduciary duties may also constrain the agent's right to take action. When an agent's agreement with a principal confers discretion on the agent to take action in the agent's sole discretion, the agent has a duty to exercise the discretion in good faith. For example, a provision in a consignment agreement between an owner of property and an auctioneer that confers discretion on the auctioneer to rescind a sale of consigned property if it believes the sale may subject it to liability requires that the auctioneer exercise its discretion to rescind on the basis of an honest belief about the possibility of liability. The fact that the agreement confers discretion and contemplates that the auctioneer will use it to protect its own interests does not insulate its exercise of the discretion from any standard governing its conduct.

Illustrations:

4. P owns a pastel purportedly created by Georges Braque. Wishing to sell the pastel, P consigns it for sale to A, an auctioneer. The consignment agreement between P and A states that A shall have "complete discretion as to seeking the views of any experts" about the work's authenticity and that A may "accept the return and rescind the sale of any property if A in its sole judgment determines that the offering for sale of any property has subjected or may subject A to any liability." The consignment agreement also provides that it is made subject to A's standard conditions of sale and limited warranty given to buyers, which state that A "warrants for a period of six years from the date of sale that any article which is unqualifiedly stated to be the work of a named author is authentic and not counterfeit. The buyer's sole remedy shall be rescission." After A advertises P's pastel as a work by Georges Braque, T is the highest bidder at auction and pays A $ 600,000 for the pastel. Shortly thereafter, T tells A that T now harbors doubts about the pastel's authenticity and, unpersuaded by A's assurances, demands that A provide T with the opinion of an independent expert. To investigate, A contacts E, a Braque expert, who tells A that E does not believe the pastel to be by Braque. A then contacts T, discloses E's assessment, and T rescinds the transaction. A has not breached A's duties to P. By contacting E in response to T's demand, A acted consistently with the terms of A's consignment agreement with P.

5. Same facts as Illustration 4, except that after T voices doubts to A about the pastel's authenticity, A does not contact E or another Braque expert. Instead, A determines whether to rescind the sale on the basis of flipping a coin. A did not exercise its discretion to rescind in good faith. A can satisfy its good-faith obligation only by making an honest attempt to make an informed decision whether to rescind.

6. Same facts as Illustration 4, except that A in fact does not believe that it will be subject to liability as a result of its sale of P's pastel to T. This is because T tells A only that T would like to rescind the sale because prices in the art market have declined precipitously and does not question the pastel's authenticity. Wishing only to please T, a major customer at A's auctions, A rescinds the sale. A has not exercised its discretion to rescind in good faith. A's agreement with P requires that A rescind a sale only when A has an honest belief that the sale may subject A to liability.

An agent's breach of the agent's fiduciary obligation subjects the agent to liability to the principal. An agent's liability stems from principles of restitution and unjust enrichment, from the agent's duty to account to the principal, and from tort law. The agent's breach subjects the agent to liability to account to the principal. In general, an agent has the burden of explaining to the principal all transactions that the agent has undertaken on the principal's behalf. The agent bears this burden because evidence of dealings and of assets received is more likely to be accessible by the agent than the principal. Tort law subjects the agent to liability to the principal for harm resulting from the breach. See *Restatement Second, Torts § 874*. A third party who, knowing that the agent's conduct constitutes a breach of duty, provides substantial assistance to the agent is also subject to liability to the principal. See id. § 876(b). For discussion of remedies available to the principal, see Comment *d.*

c. Scope of duty. Fiduciary obligation, although a general concept, is not monolithic in its operation. In particular, an agent's fiduciary duties to the principal vary depending on the parties' agreement and the scope of the parties' relationship. The scope of an agency relationship can be analyzed by identifying the parties to the relationship, examining whether particular interactions are as principal and agent, and specifying the duration of the relationship.

All who assent to act on behalf of another person and subject to that person's control are common-law agents as defined in § 1.01 and are subject to the general fiduciary principle stated in this section. Thus, the fiduciary principle is applicable to gratuitous agents as well as to agents who expect compensation for their services, and to employees as well as to nonemployee professionals, intermediaries, and others who act as agents. Cases that limit the fiduciary duty owed by employees generally involve postemployment disputes engendered by a former employee's subsequent competition with the former employer and do not support the limitation of an employee's fiduciary duty to exclude, for example, liability for self-dealing or unconsented-to use of the employer's property during the employment relationship. For further discussion, see § 8.04, Comment *b.*

A subagent owes fiduciary duties to the principal as well as to the appointing agent. See § 3.15(1), which defines "subagency," and § 3.15, Comment *d,* for discussion of the legal consequences of subagency. As a consequence, an insurance agent's employees stand in a fiduciary relationship to the insurance company that they represent in selling insurance; a securities broker's employees stand in a fiduciary relationship to customers on whose behalf they execute orders to buy and sell securities.

In an agency relationship, an agent's fiduciary obligation is owed to the principal. When a principal is an organizational entity, an agent has a fiduciary obligation to the entity. Law distinctive to that form of entity may also subject the agent to fiduciary duties to constituents of the entity, such as shareholders in a corporation. Under contemporary partnership legislation, a partner in a general partnership explicitly owes fiduciary duties of loyalty and care "to the partnership and the other partners...." Unif. Partnership Act (1997) § 404(a).

An agent's fiduciary duty to a principal is generally coterminous with the duration of the agency relationship. However, an agent may be subject to post-termination duties applicable to the agent's use of property of the principal and confidential information provided by the principal or otherwise acquired in the course of the agency relationship. See §§ 8.05 and 8.12. Although an agent's fiduciary duty to the principal generally begins with the formation of the relationship, in specific circumstances a prospective agent may have a duty to deal fairly with a prospective principal, as if the prospective agent were dealing with a principal as an adverse party with the principal's consent under § 8.06(1). See § 8.06, Comment *d(1)* for discussion. Prior to the commencement of an agent's fiduciary relationship with a principal, and following termination of the relationship, the prospective or erstwhile agent is not subject to an agent's fiduciary duties in dealings with the principal.

Illustrations:

7. P, who owns an apartment in New York City, determines that it is too small to meet P's needs and lists it for sale with A. When listing the apartment with A, P tells A that it could be enlarged by combining it with the adjacent apartment but that T, who owns the adjacent apartment, is unwilling to sell. A makes several attempts to sell P's apartment but is unsuccessful. A then tells P that A is interested in purchasing P's apartment for A's own use. A and P enter into a contract for the purchase of P's apartment by A. The contract provides that A does not act as P's agent and will receive no commission on the transaction. Some months later, but prior to closing of P's sale of P's apartment to A, A learns that T is willing to sell the adjacent apartment to A. A enters into a contract to purchase T's apartment. A is not subject to liability to P. A's agency relationship with P terminated when A contracted to buy P's apartment. The fact that T's apartment had previously eluded P's attempts to buy it does not subject A to an ongoing fiduciary duty to P.

8. Same facts as Illustration 7, except that A contacts T before telling P that A is interested in purchasing P's apartment. T tells A that T is now willing to sell. By contracting to buy P's apartment but withholding from P the information that T is willing to sell T's apartment, A has breached A's fiduciary duty to P. A has failed to disclose to P all facts that would affect P's judgment. See §§ 8.06(1)(a)(ii) and 8.11. A has also wrongfully taken a business opportunity that should be offered to P. See § 8.02, Comment *d.*

That a relationship of agency exists does not foreclose the possibility that it may be preceded or followed by another type of legal relationship between the same parties, nor does it foreclose the possibility that another type of legal relationship may exist contemporaneously between the same parties or that the character of a relationship may evolve over time. In Illustration 7, the nature of the relationship between A and P metamorphosed into a relationship other than one of agency when P contracted to sell P's property to A. A did not act as P's agent in any respect in the purchase, and A

and P had no ongoing agency relationship. Moreover, the facts of Illustration 7 do not suggest that A failed to fulfill the duties imposed on A by § 8.06(1) as an agent who also acts as an adverse party.

Contemporaneously with a relationship of agency, a principal and an agent may have additional legal relationships that do not subject either to a fiduciary duty to the other. For example, an agent may have a right to assert a lien over property of the principal to secure the amount of compensation due the agent from the principal. A securities broker may create a separate creditor-debtor relationship with a client who opens a margin account with the broker.

Just as fiduciary obligation is not monolithic in how it operates, it is not absolute in what it demands of agents. First, an agent's fiduciary relationship to the principal does not shelter either person from the applicability of general legal rules. In particular, an agent's fiduciary relationship to the principal does not privilege conduct by the agent that is otherwise tortious or criminal although done with actual authority nor does their fiduciary relationship privilege a principal who demands such conduct. See §§ 7.01 and 7.04. Second, an agent may in some circumstances be privileged to engage in conduct that may be adverse to a principal's interests or that may in some other respect depart from the principal's wishes. For example, although an agent is subject to a duty to refrain from acting as or on behalf of a competitor of the principal during the agency relationship, see § 8.04, the agent is not generally subject to a duty to disclose to the principal that the agent plans to engage in competition once the agency relationship has ended, see id., Comment *c.* Moreover, there is a balance between, on the one hand, a principal's interest in controlling information and, on the other hand, an agent's interest in releasing information. Although an agent is subject to duties to the principal that may prohibit the agent's communication to third parties of information that the principal has confidentially provided to the agent, see § 8.05(2), the agent may reveal information to a third party with an interest superior to that of a principal. Thus, as a general matter, an agent may reveal to law-enforcement authorities that the principal is committing or is about to commit a crime. See § 8.05, Comment *c.* In both instances, general social interests circumscribe the agent's duties to the principal. An agent may be subject to duties of confidentiality to a principal that limit the agent's duty to reveal information to third parties. On the duties of lawyers in handling and using confidential client information, see *Restatement Third, The Law Governing Lawyers §§ 61*-67.

A relationship of agency is not the sole basis on which a person may become subject to a fiduciary duty to another person. Other types of relationships also trigger the imposition of fiduciary obligation within the scope of the relationship on the basis of the status assumed by the person subject to the obligation. For example, a person who holds title to property as a trustee is also, like an agent, subject to a fiduciary duty on the basis of how the law characterizes the person's status or relationship with the trust's beneficiary. See *Restatement Third, Trusts § 2* (defining "trust"). Moreover, a court may also determine that one person's relationship with another warrants the imposition of fiduciary obligation to some degree on the basis that one party to the relationship has in fact reposed trust and confidence in the other and has done so consistently with the other's invitation. Although it is beyond the scope of this Restatement whether particular circumstances should be characterized as creating such a relationship of trust and confidence, the fact that a relationship is not one of agency as defined in § 1.01 does not foreclose the possibility that the relationship is one of trust and confidence.

d. Remedies for breach of fiduciary duty

(1). Remedies for breach of fiduciary duty--in general. An agent's breach of fiduciary duty may create several distinct bases on which the principal may recover monetary relief or receive another remedy. Under appropriate circumstances, an agent's breach or threatened breach of fiduciary duty is a basis on which the principal may receive specific nonmonetary relief through an injunction. An agent's breach of fiduciary obligation may also furnish a basis on which the principal may avoid or rescind a contract entered into with the agent or a third party.

An agent's breach also creates distinct bases on which the principal may recover monetary relief. An agent's breach subjects the agent to liability for loss that the breach causes the principal. See *Restatement Second, Torts § 874.* A breach of fiduciary duty may also subject the agent to liability for punitive damages when the circumstances satisfy generally applicable standards for their imposition. For general standards applicable to awards of punitive damages, see *Restatement Second, Torts § 908(2).* In these respects, the consequences of a breach of fiduciary duty do not differ from those of other torts that an agent may commit against a principal.

The law of restitution and unjust enrichment also creates a basis for an agent's liability to a principal when the agent breaches a fiduciary duty, even though the principal cannot establish that the agent's breach caused loss to the principal. If through the breach the agent has realized a material benefit, the agent has a duty to account to the principal for the benefit, its value, or its proceeds. The agent is subject to liability to deliver the benefit, its proceeds, or its value to the principal. See § 8.02, Comment *e.* An agent must also account to the principal for the value of the agent's use of prop-

erty of the principal when the use violates the agent's duty to the principal, although the principal cannot establish that the use was harmful. See § 8.05, Comment *b.* If an agent's breach of duty is in connection with a transaction as or on behalf of an adverse party, an alternate remedy that may be available to the principal is avoiding the transaction. See § 8.03, Comment *d.*

Because it constitutes a material breach of the contract by the agent, an agent's breach of fiduciary duty may also privilege the principal to terminate the principal's relationship with the agent in advance of a time set for termination in any contract between them.

An agent may also be ordered to account for the agent's actions in handling the principal's property. The burden is on the agent to establish that assets of the principal have been properly applied or disposed of. See § 8.12, Comments *c* and *d.*

(2). Remedies for breach of fiduciary duty--forfeiture of commissions and other compensation. An agent's breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent's disloyalty. The availability of forfeiture is not limited to its use as a defense to an agent's claim for compensation.

Forfeiture may be the only available remedy when it is difficult to prove that harm to a principal resulted from the agent's breach or when the agent realizes no profit through the breach. In many cases, forfeiture enables a remedy to be determined at a much lower cost to litigants. Forfeiture may also have a valuable deterrent effect because its availability signals agents that some adverse consequence will follow a breach of fiduciary duty.

Although forfeiture is generally available as a remedy for breach of fiduciary duty, cases are divided on how absolute a measure to apply. Some cases require forfeiture of all compensation paid or payable over the period of disloyalty, while others permit apportionment over a series of tasks or specified items of work when only some are tainted by the agent's disloyal conduct. The better rule permits the court to consider the specifics of the agent's work and the nature of the agent's breach of duty and to evaluate whether the agent's breach of fiduciary duty tainted all of the agent's work or was confined to discrete transactions for which the agent was entitled to apportioned compensation. For the general principle permitting denial of restitution to a party in default whose default involved fraud or inequitable conduct, see Restatement Third, Restitution and Unjust Enrichment § 36(d) (Tentative Draft No. 3, 2004). For the application of the principle to compensation otherwise due a lawyer, see *Restatement Third, The Law Governing Lawyers § 37.*

Illustration:

> 9. P Bank employs A, an advisor and facilitator, and assigns A to work on a series of transactions. P Bank agrees to compensate A by paying A an annual salary plus an amount to be determined by P Bank on the basis of P Bank's annual profitability. Without P Bank's knowledge or consent, during A's last year and a half working for P Bank, A accepts for A's personal account investment opportunities from three clients with whom A worked on transactions on P Bank's account. A also does work on a fourth transaction in which A accepts no such opportunity for A's own account. All of A's compensation for the year and a half may be forfeited to P Bank. A's agreement with P Bank did not allocate A's compensation on a transaction-specific basis. A is also subject to liability to P Bank for profits made by A, or property that A obtained, through A's receipt of material benefits from third parties. See § 8.02.

Some cases permit an agent to establish that the agent's work on balance was of benefit to the principal or require the principal to establish that on balance it was damaged by the agent's breach. The better rule does not condition the availability of forfeiture as a remedy on whether a principal can establish damage. The requirement that a principal establish damage is inconsistent with a basic premise of remedies available for breach of fiduciary duty, which is that a principal need not establish harm resulting from an agent's breach to require the agent to account. See Comments *b* and *d(1).* The requirement may also tempt an agent to undertake conduct that breaches the agent's fiduciary duty in the hope that no harm will befall the principal or that, if it does, the principal will be unable to establish it or unable or unwilling to expend the necessary resources required to litigate the question.

Likewise, the better rule does not allow an agent to offset amounts otherwise forfeitable to the principal by showing benefits gained by the principal through the agent's work. The benefits generated by a disloyal agent may be difficult to quantify, especially when incentives created by the agent's disloyalty reshape how the agent performs assigned work.

REPORTERS NOTES: REPORTER'S NOTES

a. Relationship to Restatement Second, Agency. This section is the counterpart to Restatement Second, Agency §§ 387, 456, and 469 and the Introductory Note to Chapter 13, Topic 1. Restatement Second, Agency, covers remedies available to a principal for an agent's breach of duty in §§ 399-409.

Restatement Second, Agency § 387 states that "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." In this Restatement, § 8.06 addresses on a comprehensive basis the circumstances under which a principal may consent to conduct by an agent that would otherwise constitute a breach of the agent's fiduciary duty. This Restatement also formulates the agent's duty as one to act "loyally" for the principal's benefit. This terminology is intended to clarify that an agent's loyal service to the principal may, concurrently, be beneficial to the agent.

b. In general. A structurally comparable body of doctrine in trust law is characterized as a "mix of sub-rules ... and overarching standards" in Robert H. Sitkoff, An Agency Costs Theory of Trust Law, *89 Cornell L. Rev. 621, 683 (2004)* ("[t]he effectiveness of the trust law fiduciary obligation as a check on agency costs is enhanced by use of a mix of sub-rules, which are made possible by the relative homogeneity of managerial context for donative trusts, and overarching standards," noting that "[a] similar sub-rule phenomenon exists within the law of agency," id. n.323). For further discussion of the sub-rule phenomenon, see Robert H. Sitkoff, Trust Law, Corporate Law, and Capital Market Efficiency, *28 J. Corp. L. 565, 577-578 (2003).* On the relationship between duties of loyalty and of duties of performance, see Matthew Congalen, The Nature and Function of Fiduciary Loyalty, *121 L.Q. Rev. 452 (2005).*

On a principal's vulnerability, see Tamar Frankel, Fiduciary Duties, in 2 New Palgrave Dictionary of Economics and the Law 127, 129 (Peter Newman ed., 1998) ("[t]he duty of loyalty addresses the risk of abuse of entrusted power to which entrustors are exposed. . . . The duty requires fiduciaries to be honest: refrain from converting entrusted power to unauthorized uses. The enforcement of the duty of loyalty is implemented by preventive duties that dampen temptation, especially when fiduciaries deal with entrusted property over long periods."); Gregory S. Alexander, A Cognitive Theory of Fiduciary Relationships, *85 Cornell L. Rev. 767, 777 (2000)* (developing thesis that courts analyze claims of breach of fiduciary obligation using a distinctive role-schema associated with vertical character of relationship in which beneficiary is vulnerable to fiduciary; while judges "are more apt to use data-driven methods to decide ordinary contractual disputes, [they] tend to rely on a particular knowledge structure associated with the fiduciary role when dealing with claims of fiduciary misfeasance"). See also Andrew Burrows, We Do This at Common Law But That in Equity, 22 Oxford J.L. Studies 1, 8-9 (2002) (characterizing fiduciary duty as "a duty to look after another's interests [t]hat ... depending on the context, may be strict or may be one to use reasonable care"; given this characterization, "it becomes plain that what may not be a wrong when committed by a non-fiduciary may be a wrong when committed by a fiduciary" and that a separate category of "equitable wrongs" is unnecessary); William A. Gregory, The Fiduciary Duty of Care: A Perversion of Words, *38 Akron L. Rev. 181 (2005)* (critiquing cases that conflate duties of care and loyalty).

Vulnerability may arise as a consequence of "a purely conventional understanding that one party is permitted, as a matter of law, to trust the other in the managing of certain affairs." See Compagnie de Reassurance d' *Ile de France v. New England Reassurance Co., 944 F.Supp. 986, 996 (D.Mass.1996).* In contrast, some relationships are subject to "an inherent vulnerability, as in the case of a layman who trusts a doctor," see id. *Compagnie de Reassurance* characterizes the relationship between a reinsured and a reinsurer under proportional treaty reinsurance as one of "profound vulnerability" because the reinsurer becomes the "'silent partner'" of the reinsured: every risk that the reinsured chooses to cede imposes risk on the reinsurer, the reinsured has all discretion, and the reinsurer must follow the reinsured in indemnifying it for all payments made to insureds in good faith. Id. Thus, the standard of utmost good faith (or *uberrimae fidei),* like fiduciary duty, stems from vulnerability. Id.

Illustration 2 is based on *Estate of Hardy, 910 So. 2d 1052 (Miss.2005).* Many other cases reach the same results as Illustrations 1 and 2 applying the general principle stated in this section. See, e.g., *Sevigny v. New South Fed. Savs. & Loan Ass'n, 586 So. 2d 884, 886 (Ala.1991)* (one who accepts power of attorney "implicitly covenants to use the powers conferred on her for the sole benefit of the one conferring that power, consistent with the purposes of the agency relationship"; addition of agent's name to principal's on certificate of deposit inconsistent with agent's fiduciary obligation to principal although power of attorney granted extensive powers to agent); *Schock v. Nash, 732 A.2d 217, 225-226 (Del.1999)* ("[a]n attorney-in-fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney-in-fact engaging in an interested transaction after full disclosure"; power did not set forth any authority of holder to make gratuitous transfers of grantor's property); *Crosby v. Luehrs, 669 N.W.2d 635, 645-648 (Neb.2003)* (holder of durable power of attorney, who was also beneficiary under principal's will, stood to gain through transfers of money from principal's payable-on-death ("POD") accounts into new accounts when beneficiary of POD accounts was not beneficiary under will; transfers breached agent's fiduciary duty to

principal when power of attorney did not expressly authorize transfers and transfers were not made for principal's benefit); *Estate of Naumoff, 754 N.Y.S.2d 70, 71 (App.Div.2003)* (no competent evidence that principal "specifically authorized" holder of power to make gifts of principal's property to holder of power or her family); *Estate of Lennon, 29 P.3d 1258, 1267 (Wash. App.2001)* (power of attorney did not authorize holder to make gifts; no evidence principal specifically directed holder to write checks to effect gifts); *Praefke v. American Enter. Life Ins. Co., 655 N.W.2d 456 (Wis. App.2002)* (holder of durable power of attorney breached fiduciary duty by changing beneficiary designation on annuity contract to name only herself; power did not expressly authorize self-gifting). An agent's self-transfer provides inquiry notice to a third party who extends credit on the basis of the transferred property. See *Houck v. Feller Living Trust, 79 P.3d 1140, 1143 (Or.App.2003).*

For the point that an agent's duty of loyal action requires the agent to act as directed by the principal, resolving conflicts with the agent's self-interest in the principal's favor, see *Government of Rwanda v. Johnson, 409 F.3d 368, 372 (D.C.Cir.2005)* (attorney who accepted nation's funds for lobbying services owed nation a fiduciary duty to "put [its] interests before his own"; lawyer breached duty by permitting ambassador to use nation's funds in quest for asylum following receipt of order from new government directing ambassador to leave United States); *IPSCO Steel, Inc. v. Blaine Constr. Corp., 371 F.3d 141, 148 (3d Cir.2004)* (construction project manager had duty to protect owner's best interests by effectuating its manifested wish to settle project-related litigation with insurers, including insurer that issued "wasting" policy affording coverage for project manager's own defense costs; although project manager had self-interest in maintaining available funds under policy to continue paying for its future defense costs, manager's duty of loyalty required it to resolve conflicts in principal's favor).

Illustration 3 is based on an incident recounted in Warren A. Seavey & Donald B. King, A Harvard Law School Professor: Warren A. Seavey's Life and the World of Legal Education 58 (2005). Professor Seavey reports that in 1926, "I had decided ... that we needed a somewhat more roomy house" in Lincoln, Nebraska, where he served as Dean of the university's law school. Attracted by a house "with a number of unique features ... I made an offer to the real estate man handling the deal and [seller] told him what she would take, which, unknown to us, was $ 500 less than I had offered. With the ethics of the usual real estate dealer, he took the $ 500 difference." Professor Seavey reports that the real-estate dealer "was chagrined ... and angered when I told him that he had forfeited his commission and owed $ 500 to [seller] and $ 500 to me. He was willing to settle for $ 500 for both and out of consideration for his family I didn't sue, as that would have ruined him." It is not evident from this account on what basis the "real estate man," if acting as the seller's agent, would have additionally been subject to liability to the purchaser. One possibility is that the agent misrepresented the seller's reservation price to the purchaser, Professor Seavey. Alternatively, perhaps the "real estate man" represented both parties.

For the point that the general fiduciary principle is applicable to all relationships of agency and imposes prohibitions on an agent, see *Fischer v. Machado, 58 Cal.Rptr.2d 213, 215 (Cal.App.1996)* ("'[t]he existence of the fiduciary relation modifies all agency agreements and creates rules which do not apply to contracts in which one party is not an agent for the other,'" quoting *Haurat v. Superior Court, 50 Cal.Rptr. 520, 523 (Cal. App.1966)* (sales agent for farmers subject to liability for conversion of sales proceeds when agent commingled proceeds with its general accounts)). For a more controversial application of this point, see *In re Daisy Sys. Corp., 97 F.3d 1171, 1178-1179 (9th Cir.1996)* (investment bank that agreed to advise and "act on behalf of" debtor in connection with its attempt to acquire another company may owe fiduciary duty to client, "depend[ing] in large part on the particular facts involved ... questions of agency and confidentiality are two factual questions that must be resolved before it can be established whether any fiduciary duties were owed" to client by investment bank; complaint alleged that bank, without informing client, ceased efforts to seek financing on its behalf when bank learned client was making own attempts to secure financing, and banker later did not inform client that bank had approved bridge loan, leading client to announce offer without disclosing financing for it). Following remand, the jury in *Daisy Systems* found that the bank owed its client a fiduciary duty but did not breach it. See M. Breen Haire, The Fiduciary Responsibilities of Investment Bankers in Change-of-Control Transactions: In re Daisy Systems Corp., *74 N.Y.U. L. Rev. 277 (1999).*

On front-running as a breach of fiduciary obligation, see *Brandeis Brokers Ltd. v. Black, [2001] 2 Lloyd's Rep. 359* (Comm. Ct.) (broker in metals futures front-ran orders received from clients by making purchases on exchange after receiving client's order, then later allocating purchase to itself or to client at its election with knowledge of subsequent movements in market). Restatement Second, Agency § 389, Comment c, observes that the rationale for the prohibition against self-dealing by an agent "exists to prevent a conflict of opposing interests in the mind of agents whose duty it is to act solely for the benefit of their principals. . . . ordinarily, an agent appointed to buy or to sell at a fixed price violates

his duty to the principal if, without the principal's acquiescence, he buys from or sells the specified article to himself at the specified price, even though it is impossible to obtain more or as much."

Assertions that an agent is subject to fiduciary duty only if the agent acts with discretion should be read carefully in light of the context in which the assertion is made. For example, in *Pohl v. National Benefits Consultants, Inc., 956 F.2d 126, 129 (7th Cir.1992),* the court stated that "[t]he reason for [fiduciary] duty is clearest when the agent has a broad discretion the exercise of which the principal cannot feasibly supervise, so that the principal is at the agent's mercy. The agent might be the lawyer and the principal his client; or the agent might be an investment adviser and the principal an orphaned child. If the agent has no discretion and the principal has a normal capacity for self-protection, ordinary contract principles should generally suffice." Read literally, the court's statement conflicts with long-established agency doctrine and, moreover, may appear to suggest that sophisticated principals should be denied a full range of remedies when their agents breach fiduciary duties. Read in context, it is evident that the court neither restricts its usage of the term "agent" to relationships of common-law agency nor focuses on the legal consequences of such relationships. The issue in *Pohl* was whether a remedy for breach of fiduciary duty was available under *29 U.S.C. § 1109*(a) against an administrator of an employee benefit plan subject to ERISA when the administrator's function was purely ministerial. The court held that the plan administrator was not a fiduciary for ERISA purposes because under *29 U.S.C. § 1002*(21)(A) discretionary power is essential to fiduciary status.

Illustrations 4, 5, and 6 are based on *Greenwood v. Koven, 880 F.Supp. 186, 197, 200 (S.D.N.Y.1995)* (decision whether to rescind made by coin-toss given as hypothetical instance of action taken in bad faith; issue simply whether auction house "honestly believed it might be subject to liability when it rescinded the sale"). Accord, *Mickle v. Christie's, Inc., 207 F.Supp.2d 237 (S.D.N.Y.2002)* (consignment agreement additionally permitted auction house to rescind when necessary to protect its own interests). See also *Cristallina S.A. v. Christie, Manson & Woods, 502 N.Y.S.2d 165 (App.Div.1986)* (auction house acts as agent for consignor, to whom it owes duty of undivided loyalty; auction house could be liable to consignor on basis of alleged presale misrepresentations about value of items to be auctioned made to both consignee and public).

When a party to a contract fails to act in good faith, a court may characterize that failure as constituting a breach of fiduciary obligations also owed by the party as an agent. See *Monumental Life Ins. Co. v. Nationwide Ret. Solutions, Inc., 242 F.Supp.2d 438, 449-450 (W.D.Ky. 2003)* (reasonable jury could find that insurer's general agent, by restructuring commission arrangements that reduced its sales force's incentives to sell insurer's products, "violated its basic fiduciary duties as well as its contractual duties" to insurer).

For an extreme illustration of the biasing effect that an agent's self-interest may have on whether the agent fulfills duties of performance, see McCann v. Switzerland Ins. Australia Ltd. *[2000] 203 C.L.R. 579.* In *McCann,* a partner in a law firm opened a bank account in the firm's name without his partners' knowledge. He used the account to deposit money received from a client, having induced the client to provide funds for investment in a financial instrument that proved to be spurious. The partner and his allies contemplated receiving commissions on the amounts invested from the instrument's seller; the partner's need for funds was exacerbated by prior defalcations from clients' funds. Once the client provided the funds, the partner turned them over to an account at another bank controlled by the seller of the instrument but without receiving either the promised instrument or other security in return. Thus, the partner "'parted with control of the funds in circumstances in which he knew (or must have known) that he was placing them at a real and considerable risk of loss,'" *id. at 586.* In the High Court's assessment, "[w]hat was involved was not merely a negligent payment away of monies entrusted to him by a client. What was involved was a misapplication of such moneys, in disregard of the client's interests, and in pursuit of his own, conflicting, interests." (per Gleeson, C.J.). *Id. at 587.* A majority of the High Court held that the partner's conduct constituted a "dishonest or fraudulent act or omission" by a partner for purposes of an exclusion from the law firm's policy of professional indemnity insurance. The court interpreted the policy's exclusionary language against a background in which "[s]olicitors and other fiduciary agents who fraudulently misapply moneys of their clients often expect, or hope, that no loss will ultimately result to the client. If loss results, that places them at risk of exposure . . . a common case of fraudulent misappropriation is one involving use of a client's money in a solicitor's private speculative venture, with the intent of restoring the money upon the success of the venture. Liability resulting from such conduct might be expected to be in the contemplation of the parties to policies of the kind presently in question ... [although] the solicitor would rarely intend that loss should result." *Id. at 588-589.* See also *Al-Abood v. El-Shamari, 217 F.3d 225, 234 (4th Cir.2000)* (applying Virginia law; self-dealing by holder of power of attorney creates presumption of fraud that is applicable although fiduciary alleges absence of intentional wrongdoing).

An agent's self-interest in a transaction recommended to a client may systematically bias the quality of the recommendation. Some structures of self-interest may have a stronger biasing effect than others. See *O'Malley v. Boris, 2002 WL 453928,* at *6 (Del. Ch.2002) (less reason to trust broker's recommendation of switch in sweep-account fund when broker discloses that fund gave substantial equity stake to broker in exchange for recommendation, than to trust recommendation when broker discloses that it will benefit if customer makes switch to fund in which broker holds stake). On the role of fiduciary duty in effectuating a principal's exercise of control over an agent, see Hugh Collins, Regulating Contracts 238 (1999) (legal system's imposition of compulsory fiduciary duties on agents, which permit principal to recover any secret profit made by agent, supports principal's powers of supervision over agent, itself backed up by principal's right to terminate agency relationship "on discovery or suspicion of facts suggesting inadequate effort or self-interested action on the part of the agent").

For recent authority that an agent acts without actual authority and in breach of the agent's fiduciary duty by entering into a transaction that the agent knows to be highly disadvantageous to the principal, seeking to benefit the agent or a third party, see *Hopkins v. T. L. Dallas Group Ltd., [2004] 2004 WL 1372275 P91* (Ch).

c. Scope of duty. For the point that fiduciary obligation does not operate in a monolithic fashion, see *Brandeis Brokers Ltd. v. Black, [2001] 2 Lloyd's Rep. 359, 367* (Comm. Ct.) ("[f]iduciaries are not all required, like the victims of Procrustes, to lie on a bed of the same length"; terms of agreement between metal-futures broker and its clients did not entitle broker to frontrun clients' orders by making purchases on exchange after receiving client's order, then later allocate its purchases either to itself or to client at its election, knowing subsequent movements in market).

For the point that the scope of an agency relationship determines the extent of an agent's fiduciary duties, see, e.g., *Thompson v. Federico, 324 F.Supp.2d 1152, 1167-1168 (D.Or. 2004)* (although account holder and stockbroker had principal-agent relationship, broker did not breach any fiduciary duty to holder when account agreement imposed proscriptions on stockbroker's exercise of discretion); *Cusano v. Klein, 280 F.Supp.2d 1035 (C.D.Cal.2003),* aff'd, *2005 WL 3046418 (9th Cir.2005)* (rock band's fiduciary duty to former member limited to scope of power of attorney that former member executed, which gave band--organized as a partnership--authority to execute documents that member failed or refused to execute; band's contractual obligation to collect and account for royalties did not create fiduciary duty to former member, and band's act of rendering payments would not implicate its power to execute documents on behalf of former member); *Long Trusts v. Griffin, 144 S.W.3d 99, 111 (Tex. App.2004)* (operator of gas wells did not breach fiduciary duty to investors in wells when operator acted as agent for investors in marketing their share of wells' production in absence of evidence of breach of any duty related to marketing).

On the fiduciary duties of subagents, see *United States v. Schwab, 88 F.Supp.2d 1275, 1286-1287 (D.Wyo.2000)* (fiduciary duty of subagent to principal is same as that of appointing agent; subagent selling insurance stands in fiduciary relationship to insurer and has "duty to disclose material information . . . that would be relevant to the insurers' decisions to issue insurance policies to life insurance policy applicants").

Cases limiting the fiduciary duty of employees in disputes over postemployment competition include Physician Specialists in *Anesthesia, P.C. v. Wildmon, 521 S.E.2d 358 (Ga.App. 1999)* (nonphysicians, who were former practice managers, did not owe fiduciary duties to medical-practice group and were not its agents because evidence did not show they had power to bind group to contracts with third parties or that confidential relationship existed; court does not address claim that former managers, while still employed, revealed confidential information to competing medical group); *Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 600 (Iowa 1999)* (former sales manager of auto dealership who went to work for competing dealership liable for conversion of incentive payments made by sellers of used cars and for punitive damages in amount equal to 43 times amount converted but not subject to liability for breach of duty of loyalty; employer did not attempt to establish that employee owed it a fiduciary duty and duty of loyalty "is generally confined to instances of direct competition, misappropriation of profits, property, or business opportunities, trade secrets and other confidences, and deliberately performing acts for the benefit of one employer which are adverse to another employer . . . . Inconsequential or indirect assistance or competition that is indirect or minimal is actionable only if the employee renders substantial assistance to the competitor."); *Dalton v. Camp, 548 S.E.2d 704, 708 (N.C. 2001)* (former production manager for division of publisher, an at-will employee, had "responsibilities ... not unlike those of employees in other businesses and can hardly be construed as uniquely positioning him to exercise dominion over [employer] ... absent a finding that the employer ... was somehow subjugated to the improper influences or domination of his employee ... we cannot conclude that a fiduciary relationship existed between the two"; no basis to recognize independent tort claim for breach of duty of loyalty).

In *Dalton,* the employee quit two weeks after establishing a competitive publishing company. The complaint appears not to have contained specific allegations of conduct that contravened the production manager's duty of loyalty, apart from "conspiracy to appropriate customers," *id. at 706.* The court does not discuss whether the manager owed duties as an agent and whether his conduct breached those duties. See Bret L. Grebe, Fidelity at the Workplace: The Two-faced Nature of the Duty of Loyalty Under Dalton v. Camp, *80 N.C. L. Rev. 1815, 1826 (2002)* (noting that practical effect of decision will be to force employers "to safeguard themselves from employee disloyalty in express contractual agreements"). The court's opinion explicitly calls into question whether North Carolina law was correctly stated in *Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F.Supp. 1224, 1229 (M.D.N.C. 1996)* (holding that complaint stated claim for breach of fiduciary duty of loyalty against television reporters who obtained supermarket jobs and secretly videotaped food-handling practices). *Dalton* holds *Food Lion* states North Carolina law incorrectly to the extent *Food Lion* "can be read to sanction an independent action for breach of duty of loyalty." *548 S.E.2d at 709.* An employee's disloyalty is relevant only in the context of a defense in a wrongful-termination action, and in any event does not extend to food-counter clerks in a grocery store, id.

Other recent cases involving other contexts characterize all employees as agents. See, e.g., *Eckard Brandes, Inc. v. Riley, 338 F.3d 1082, 1086 (9th Cir.2003),* cert. denied, *541 U.S. 1009 (2004)* (applying Hawaii law; employees who engaged in conduct tantamount to soliciting employer's customer for their planned competitive venture breached fiduciary duty to employer, despite employees' claim that "they were only low-level employees"; nothing in Restatement Second, Agency, "indicates that ordinary employees have no duty of loyalty"); *Green v. H & R Block, Inc., 735 A.2d 1039, 1051 (Md.1999)* (dictum that "all masters are principals and all servants are agents"; tax-preparation service that filed tax returns for clients on whose behalf it also arranged tax-refund loans with third-party lenders was clients' agent, having conceded that it served as their agent to file tax returns and submit loan applications to lenders); *Cameco, Inc. v. Gedicke, 724 A.2d 783 (N.J. 1999)* (employee may breach fiduciary duty through undisclosed assistance to business competitor of employer); see also *Prince, Yeates & Geldzahler v. Young, 94 P.3d 179, 184-185 (Utah 2004)* (lawyers subject to fiduciary duty to "not compete with their employer, which we define as any law firm or legal services provider who may employ them in a legal capacity, without the employer's prior knowledge and agreement").

Judicial reluctance to impose absolute duties of loyalty on employees may also reflect sensitivity to a particular context. In *Johnson v. Brewer & Pritchard, 73 S.W.3d 193 (Tex. 2002),* a law firm's associate referred a friend and his family to another law firm following a helicopter crash, in contravention of his law firm's policy forbidding associate referrals to other lawyers without compensation. The associate realized no pecuniary benefit through the referral. Moreover, the associate's law firm had "little or no experience with personal injury claims and had never taken to trial a claim involving catastrophic personal injuries." *Id. at 203.* The court held that the contractual duty assumed by the associate did not give rise to a fiduciary duty. Id. The court also declined to "set forth a broad rule governing all employees who might divert a business opportunity from their employer without receiving any compensation or benefit in return," noting that when a law firm's client asks an associate for a frank evaluation of whether lawyers at another firm might be better suited to handle a particular matter, "[t]he associate should not be faced with breaching a fiduciary duty to the firm that employs her by giving an answer that leads the client to another firm." Id. On professional rules that restrict fee-splitting and referral fees among lawyers not in the same law firm, see *Restatement Third, The Law Governing Lawyers § 47.*

For the point that an agent does not generally owe the principal a fiduciary duty prior to the commencement of their agency relationship, see *Gann v. Williams Bros. Realty, Inc., 283 Cal.Rptr. 128 (Cal.App.1991)* (no agency relationship arose between broker and real-estate developer when parties' agreement provided that listing of property with broker was conditional on developer taking title to property; broker did not breach duty not to compete with principal by negotiating with another party for purchase of same property). If an agent and a customer deal on a transaction-by-transaction basis, once the agent accomplishes the purpose of each separate retention, it owes no ongoing fiduciary duty to the customer. See *American Envtl., Inc. v. 3-J Co., 583 N.E.2d 649, 655 (Ill.App. 1991)* (transaction-by-transaction relationship with client typical of brokers and auctioneers). However, a broker who assumes effective control over a nondiscretionary account owes the customer the fiduciary duties owed to a customer with a discretionary account. See *Davis v. Keyes, 859 F. Supp. 290, 294 (E.D.Mich.1994).*

Illustration 7 is based on *Dubbs v. Stribling & Assocs., 752 N.E.2d 850 (N.Y.2001)* (affirming dismissal of complaint and holding that agency relationship terminates, and fiduciary relationship is severed, upon execution of purchase contract between broker and owner). Accord, *Clinkenbeard v. Central Southwest Oil Corp., 526 F.2d 649 (5th Cir.1976); Hardy v. Davis, 164 A.2d 281 (Md.1960); First Trust Co. v. McKenna, 614 P.2d 1027 (Mont.1980); Sylvester v. Beck, 178 A.2d 755 (Pa.1962); Jones v. Allen, 294 S.W.2d 259 (Tex.Civ.App.1956);* see also *Foster & Gridley v.*

Winner, 740 A.2d 1283, 1286-1287 (Vt.1999) (even if agent's duty continued through to end of real-estate closing, agent's duty of loyalty does not survive termination of relationship, which occurred when property in question was sold).

On circumstances in which a fiduciary duty may exist prior to formation of an agency relationship, see *Martin v. Heinold Commodities, Inc., 643 N.E.2d 734, 741 (Ill.1994)* (commodities broker had fiduciary duty to explain nature of commission and fee structure given complex nature of transaction and inaccessibility to customer of information from other sources; in general, although prospective agent does not owe fiduciary duty to prospective principal in discussing compensation and other terms of agency, duty may exist when creation of relationship involves peculiar trust and confidence reposed in prospective agent by prospective principal and reliance by the principal on fair dealing by the agent). See also *Maksym v. Loesch, 937 F.2d 1237, 1243-1244 (7th Cir.1991)* (lawyer did not breach fiduciary duty to client by failing to disclose terms of standard written retainer agreement; lawyer might have duty to explain terms that were "unusually favorable" to the lawyer or "unusually opaque"). The absence of such a duty does not mean that a prospective agent will not be subject to liability to the principal if it induces assent to an agreement through fraudulent misrepresentations. See *Smehlik v. Athletes & Artists, Inc., 861 F.Supp. 1162 (W.D.N.Y. 1994)* (applying New York law; professional hockey player adequately pleaded agent's undisclosed intention not to perform consistently with representations made to player). On agreements made subsequent to the creation of an agency relationship, see, e.g., *A.G. Edwards & Sons, Inc. v. Hilligoss, 597 N.E.2d 1 (Ind.App. 1991)* (brokerage agreement containing arbitration clause revocable for fraud; brokerage manager fraudulently induced client to sign and client could rely on manager's statements about contents of agreement without making inquiry due to existence of agency relationship).

On evolution in the character of a relationship over time, see, e.g., *Davis v. Keyes, 859 F.Supp. 290, 294 (E.D.Mich.1994)* (broker who assumes effective control over customer's nondiscretionary account becomes subject to fiduciary duty of broker managing a discretionary account); *Beckstrom v. Parnell, 730 So. 2d 942, 950-952 (La.App.1998)* (evidence supports trial court's finding of breach of fiduciary duty by broker in transactions executed for customer with nondiscretionary account; broker knew or should have known of long-time customer's impairment due to alcohol usage and age and that trades were unsuitable due to high transactions costs and low returns; although customer had once been sophisticated and knowledgeable, pivotal issue is customer's "capabilities as an investor at the time that the investment decisions" in question were made); *Hampton Tree Farms, Inc. v. Jewett, 974 P.2d 738, 746 (Or.App. 1999)* (during extended course of dealings, creditor assumed role of agent in finding a buyer for debtor's business and effecting the sale; "there was no point ... at which his role as an agent for [debtor] ended and he resumed an arms-length relationship with it.").

For the point that an agent may have rights that the agent is free to exercise, and duties to which the agent is subject, distinct from the agent's fiduciary duty to the principal, see, e.g., *Petri v. Gatlin, 997 F.Supp. 956, 981 (N.D.Ill.1997)* (claims not implicating defendant's responsibilities as an intermediary did not constitute breaches of fiduciary duty in relationship in which defendant both sold natural gas to commercial customers as well as performing agency function of handling customers' relationships with gas-distribution companies); *Bigda v. Fischbach Corp., 898 F. Supp. 1004, 1017 (S.D.N.Y.1995)*, aff'd, *101 F.3d 108 (2d Cir.1996)* (corporate officer did not violate fiduciary duty to corporation by concealing fact that he was contemplating suit against corporation for breach of rights created by his employment contract); *Walston & Co. v. Miller, 410 P.2d 658 (Ariz. 1966)* (broker who provides funds to client to complete transactions through margin account becomes client's creditor and holds securities in account as pledgee; broker is not acting as agent by providing funds to client); *First Am. Disc. Corp. v. Jacobs, 756 N.E.2d 273, 281-282 (Ill. App.2001)* (broker did not breach fiduciary duty to futures traders by liquidating margin account as permitted by account agreement and by applicable federal regulations when account became under-margined); *Travel Comm., Inc. v. Pan Am. World Airways, Inc., 603 A.2d 1301 (Md.App.1992)* (travel agent's contractual duty to pay interest for late payments to airline reflected debtor-creditor relationship, not agent's status as a fiduciary; agency's failure to make interest payments does not warrant imposition of personal liability on its individual owners, separate from their liability as individual guarantors of agency's obligations); *Pilgram v. Missouri Real Estate Comm'n, 835 S.W.2d 545, 547 (Mo. App.1992)* (real-estate broker who signed sellers' names without their permission on document submitted to MLS to report sale of property and further broker's eligibility for Million Dollar Sales Club did not breach fiduciary duty to sellers because broker's signature did not harm sellers and was part of reporting information "completely separate and apart from any duties which she had to the [sellers] in relation to the sale of their house," although court states it does not condone practice of signing others' names without their knowledge or consent); *Sprouse v. Jager, 806 P.2d 219 (Utah App.1991)* (broker's agreement with vendor of real estate granted broker a security interest in property to secure payment of commission).

On relationships of trust and confidence, see, e.g., *Chou v. University of Chicago, 254 F.3d 1347, 1362-1363 (Fed.Cir.2001)* (applying Illinois law; allegation that departmental chairman assured graduate student he would protect and give her proper credit for her research and inventions adequate to plead existence of fiduciary duty, given disparity between parties' roles and chairman's ability to make patenting decisions concerning student's inventions); *Arst v. Stifel, Nicolaus & Co., Inc., 86 F.3d 973, 979 (10th Cir.1996)* (under Kansas law, imposition of fiduciary duty requires showing that person "consciously assumed" duty; one unsolicited transaction in security, with no prior transactions or ongoing account, does not justify imposition of ongoing fiduciary duty on broker); *Fox v. Encounters Int'l, 318 F.Supp.2d 279, 288 (D.Md.2002)* (client of marriage bureau pleaded facts sufficient to generate issue of fact on existence of fiduciary duty; client alleged bureau's operator promised to take care of her and induced belief operator would act in client's best interests); *McLendon v. Georgia Kaolin Co., 837 F.Supp. 1231 (M.D.Ga.1993)* (vendors of property allege that purchaser fraudulently concealed fact that property had valuable mineral deposit and secretly paid commission to relative of vendors who encouraged them to sell; triable issue of fact whether relative had confidential relationship with vendors under Ga. Code § 23-2-58, which states that "[a]ny relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc."); *Patsos v. First Albany Corp., 741 N.E.2d 841, 850 (Mass.2001)* (finding that stock broker assumed general fiduciary duty to client may be supported when client lacks investment acumen and other factors are present because naive client is more likely to repose special trust in broker; fact that broker represents self as especially expert, like social or personal ties between broker and client, also relevant); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck, 377 N.W.2d 605, 614 (Wis.1985)* (Abrahamson, J., concurring) (whether commodities broker occupies position of trust and confidence with customer who has nondiscretionary trading account is a question of fact that "depends on many circumstances, including the course of conduct between the broker and the customer, the customer's sophistication, the extent to which the broker undertakes to give advice and counsel, whether the customer in fact placed confidence in the broker, and whether the customer was justified in placing confidence in the broker"); *Lee v. LPP Mortgage Ltd., 74 P.3d 152, 161-163 (Wyo.2003)* (relationship of trust and confidence did not arise between lender and guarantor of loan; lender never purported to act with guarantor's interests in mind and guarantor's involvement was due solely to her son's loan application, not any prior relationship between lender and guarantor). In some circumstances, courts may impose a duty of fair dealing based on the fact that one person has reposed trust and confidence in another. See *Keenan v. D.H. Blair & Co., 838 F.Supp. 82, 89 (S.D.N.Y.1993)* (securities dealer owes duty of fair dealing to customers, which requires dealer to have a reasonable basis for recommending a security and to disclose facts known to or easily ascertainable by the dealer).

A clearing broker generally does not owe a fiduciary obligation to the client of an introducing broker because all its dealings are mediated by the introducing broker. See *Rozsa v. May Davis Group, Inc., 152 F.Supp.2d 526, 531-532 (S.D.N.Y. 2001)* (noting that clearing broker may have fiduciary duty to investor "in certain extenuating circumstances," for example if clearing broker actively creates fraudulent trading losses). See also *Petersen v. Securities Settlement Corp., 277 Cal. Rptr. 468, 474 (Cal.App.1991)* (clearing broker may be required to provide customer with information about nature of investment when clearing broker knows that introducing broker has failed to do so). Nor does an attenuated relationship between a broker and a pledgor of securities impose a fiduciary duty on the broker. See *Thermal Imaging, Inc. v. Sandgrain Sec., Inc., 158 F.Supp.2d 335, 343-344 (S.D.N.Y. 2001)* (broker owed no fiduciary duty to pledgor of securities, a "client of a client," when pledgee directed sale of pledged securities contrary to terms of pledge agreement; even if broker owed a duty with regard to pledged securities deposited in customer's account, its duty did not extend to pledgor, a party with whom broker was not in privity and whose claim was adverse to interests of broker's customer).

The specific duties owed by a person subject to a fiduciary duty stemming from a relationship of trust and confidence are not necessarily identical to the duties owed by other fiduciaries. See, e.g., *Buxton v. Buxton, 770 A.2d 152 (Md.2001)* (stepmother of mentally retarded adult, who breached fiduciary duty to stepson in property transactions, was not additionally subject to liability to stepson due to failure to invest rental income she should have received had property been properly rented; no evidence of an express trust or authorization to invest stepson's funds).

It is open to question how far (or whether) the "fiduciary" characterization should be expanded to encompass fact-based fiduciary status, for example when one party depends on or is vulnerable to another. One difficulty with such expansion is articulating the criteria that establish fact-based fiduciary status, distinct from expectations protected by contemporary contract and tort law. See Sarah Worthington, Equity 130 (2003) (arguing that the "essential flavour of the fiduciary imperative ... requires the fiduciary to *subjugate* his personal autonomy to the interests of the other: his role requires a more general denial of self-interest" than do duties imposed by contract and tort law; imposition of fidu-

ciary duty is warranted "only if the purpose of one party's role in the relationship *demands* such self-denial; if without it, the relationship would be unprotected."). See also Victor Brudney, Revisiting the Import of Shareholder Consent for Corporate Fiduciary Loyalty Obligations, *25 J. Corp. L. 209, 211 n.8 (2000)* (characterizing self-dealing and "all the other modes of self-serving dealing with the property over which the fiduciary has power" as "self-aggrandizing" transactions that "cover arrangements that differ among each other in the character and the visibility of the fiduciary's gain and the possible benefits or injury to the corporation or its stockholders....").

d. Remedies for breach of fiduciary duty

(1). Remedies for breach of fiduciary duty--in general. On the general theory of available remedies, see Douglas Laycock, Modern American Remedies 568 (3d ed. 2002).

In general, claims of breach of fiduciary obligation are assignable, even in jurisdictions in which claims of legal malpractice are not assignable. See *North Bend Senior Citizens Home, Inc. v. Cook, 623 N.W.2d 681, 688 (Neb.2001)* (relationship between grantor and grantee of durable power of attorney insufficiently similar to attorney-client relationship to justify extension of nonassignability rule, which is grounded in concern to preserve confidentiality of attorney-client communications). In most jurisdictions, claims of legal malpractice are not assignable. See Kevin Pennell, On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem, *82 Tex. L. Rev. 481, 482 (2003).*

A court may construct a remedy when an agent profits through a breach of fiduciary duty by imposing a constructive trust on the agent's profits. See Laycock at 595, citing *Ellison v. Alley, 842 S.W.2d 605, 608 (Tenn.1992)* (vendor entitled to profits wrongfully received by real-estate broker with whom vendor listed farm for sale; broker acquired option to purchase farm for $ 200,000, sold farm to another client for $ 380,000, retained $ 180,000 difference, and charged vendor a commission on sale). See also *Mischke v. Mischke, 530 N.W.2d 235, 241 (Neb.1995)* (transfers made by holder of durable power of attorney granted by one brother void; holder and other brothers to whom he transferred property accountable to brother's estate for all property originally transferred to them and for any profits made "on account of receiving the property or that a reasonably prudent person would have realized from use, or for income from the fair market value of the property, whichever is greater").

Restatement Second, Torts § 874 states that "[o]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." Representative instances of tort claims alleging breach of fiduciary duty include *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79 (3d Cir.2001)* (tort claim properly asserted separately from contract claim; party to joint venture created to produce steel ingots allegedly breached fiduciary duty by misappropriating trade secrets and confidential information and secretly making rebate claims for ingot sales to third parties); *Havoco of Am., Ltd. v. Sumitomo Corp., 971 F.2d 1332, 1337 (7th Cir.1992)* (tort claim; agent for sale of coal produced by plaintiff to Tennessee Valley Authority allegedly conspired with other parties to fraudulently induce plaintiff to assign TVA contract); *St. Paul Fire & Marine Ins. Co. v. Great Lakes Turnings, Ltd., 774 F.Supp. 485, 489 (N.D.Ill.1991)* (claim that insurance broker breached duty to insured); *May v. ERA Landmark Real Estate, 15 P.3d 1179 (Mont. 2000)* (lower court properly granted motion for summary judgment dismissing plaintiffs' claim for breach of fiduciary duty when claim was simply repetition of claim for professional negligence by real-estate broker in drafting and communicating offers). On demonstrable harm as an essential element in a tort action, see *News America Mktg. In-Store, Inc. v. Marquis, 862 A.2d 837, 843-846 (Conn. App.2004)* (costs of investigating potential wrongdoing by former vice president do not constitute actual damages sustained by principal).

Intentionally causing an agent to breach the agent's fiduciary duty to the principal is a well-established theory of liability. See, e.g., *Jackson Nat'l Life Ins. Co. v. Kennedy, 741 A.2d 377 (Del.Ch.1999)* (facts alleged by preferred stockholder in complaint sufficient to support claim that acquiror of corporate assets knowingly participated in breach of fiduciary duty by president of corporation; complaint alleged that acquiror knowingly provided financial incentives to president to induce him to breach obligation); *Hayes-Albion Corp. v. Kuberski, 364 N.W.2d 609 (Mich. 1984)* (third-party suppliers who joined plaintiffs chief engineer in forming competitive company while engineer shifted plaintiff's business to suppliers are subject to liability to plaintiff, as is engineer; suppliers knowingly participated in and profited from engineer's breach of duty). A third party who lacks notice of an agent's breach of fiduciary duty is not subject to liability. See *In re Shoe-Town, Inc. Stockholders Litig., 1990 WL 13475 (Del.Ch.1990)* (complaint must allege facts from which knowing participation in breach may reasonably be inferred; knowing participation of investment bank in directors' breach of fiduciary duty may be inferred in light of bank's early and active participation in structuring going-private transaction); *Eaton v. Eaton, 83 S.W.3d 131, 135-136 (Tenn. App.2001)* (if purchaser of land lacked notice

that seller's agent exceeded her authority or would misappropriate purchase proceeds, purchaser not subject to liability to seller; court declines to set aside sale).

The liability of a person who provides substantial assistance or encouragement to an agent in the agent's breach of fiduciary duty may be measured differently from the agent's liability because the tortfeasor who provides assistance or encouragement "is responsible only for harm caused or profits that he himself has made from the transaction, and he is not necessarily liable for the profits that the fiduciary has made nor for those that he should have made." *Restatement Second, Torts § 874*, Comment *c.* However, without establishing the actual harm caused by an agent's receipt of a bribe, a principal may recover from the payor the amount of the bribe paid to an agent. See *Franklin Med. Assocs. v. Newark Pub. Sch., 828 A.2d 966, 975* (N.J.Super.App.Div.) (2003) (principal may recover amount of bribe paid as reasonable measure of harm done). See also *Fyffes Group Ltd. v. Templeman, [2000] 2 Lloyd's Rep. 643* (Q.B.) (briber of an agent may be required to account to principal for benefit obtained through agent's corruption; principal entitled to damages to extent terms received by briber are more favorable than those to which an honest and prudent negotiator would have agreed); accord, Consul Dev. Pty. Ltd. v. DPC Estates Pty. Ltd. *(1975) 132 C.L.R. 373, 397* (Austl.). On available remedies, see Steven B. Elliott & Charles Mitchell, Remedies for Dishonest Assistance, *67 Mod. L. Rev. 16 (2004).* Other bases may also support a third party's liability, such as misuse of confidential information. See *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 485-486 (Ky.1991)* (material issues of fact made improper award of summary judgment to bank that made loan to corporate officer who formed competing firm; bank may have formed fiduciary relationship with corporation because confidential business plans were revealed to it, which it may have breached by agreeing to make loan to officer to form competing firm "with the knowledge that such formation could have an adverse effect" on original corporate client and by using information provided by original client in processing loan to officer).

On the basis for an agent's burden to account to the principal, see *In re Niles, 106 F.3d 1456, 1461-1462 (9th Cir.1997)* (common law generally places burden on fiduciary "to explain all transactions taken on the principal's behalf"; burden does more than shift burden to come forward with evidence because "once the principal has shown that funds have been entrusted to the fiduciary and not paid over or otherwise accounted for," fiduciary has burden to render an accounting; allocation of burden "reinforces the substantive policies behind fiduciary law by ensuring that fiduciaries will perform their obligations faithfully and with care"). See also *Bohlen-Uddeholm America Inc. v. Ellwood Group, Inc., 247 F.3d 79, 102 (3d Cir.2001)* ("[w]hile it makes perfect sense to place the burden on a fiduciary to explain business actions which benefitted itself over its beneficiary, the same logic does not hold for a breach of contract when there are dueling interpretations of the contract entered into at arms length by sophisticated corporations who are not in any kind of fiduciary relationship at the time the contract is formed"; fiduciary relationship that is created by a contract does not lead court to shift burden of proof on interpretation of contract).

A principal may recover damages based on the harm caused by an agent's breach of fiduciary duty although it is not possible to show that the agent profited through the breach. See *Zakibe v. Ahrens & McCarron, Inc., 28 S.W.3d 373, 382-383 (Mo.App.2000)* (former corporate officer subject to liability to corporation for harm caused by officer's dealings with company in which he was a shareholder, including at-cost sales and guarantee of company's indebtedness, although officer personally lost money through investment in company). See also *Munson v. Boettcher & Co., 832 P.2d 967 (Colo. App.1991),* aff'd, *854 P.2d 199 (Colo. 1993)* (investors' recovery of damages, when broker breached fiduciary duty in inducing investors to invest in limited partnerships, should not have been reduced by tax benefits received by investors); 105 *E. Second St. Assocs. v. Bobrow, 573 N.Y.S.2d 503, 504 (App.Div.1991)* (measure of damages for breach of fiduciary duty is "the amount of loss sustained, including lost opportunities for profit on the properties by reason of the faithless fiduciary's conduct," including impairment to vendability of property due to an illegal encumbrance; managing partner mortgaged partnership property without authority, inhibiting partnership from selling it). Consequential damages are recoverable if a breach of fiduciary duty is a substantial factor in causing an injury. See *Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir.1994)* (party may recover consequential damages for breach of fiduciary duty without proving that injury was foreseeable or anticipated). A benefit-of-the-bargain measure of damages is not generally available for claims of breach of fiduciary duty. See, e.g., *McLean v. Charles Ellis Realty, Inc., 76 P.3d 661, 666-667 (Or.App.2003).* By rescinding a contract, a principal does not lose a claim for damages against an agent when rescission alone does not restore the principal's position. See *Tarnowski v. Resop, 51 N.W.2d 801 (Minn.1952)* (principal's suit against third-party sellers to rescind sale induced by agent's misrepresentations did not bar claims against agent to recover losses incurred, including costs of litigation against sellers, as well as commission agent secretly received from sellers); *Gosai v. Abeers Realty & Dev. Mktg., Inc., 605 S.E.2d 5, 9 (N.C.App.2004)* (real-estate purchaser defrauded by broker who represented him in transaction; court rescinds transaction and awards monetary relief to purchaser equal to amount in interest paid to broker on note plus profit made by broker on transaction). On the available measures of damages when an agent defrauds the principal, see, e.g., Fragale v. Faulkner, *1 Cal.Rptr. 3d 616,*

623 (Cal.App.2003) (measure of damages not confined to out-of-pocket loss; benefit-of-the-bargain measure available to real-estate purchasers in action against agent who intentionally misrepresented condition of property).

Breach of fiduciary duty may also be the basis for professional sanctions against an agent. See, e.g., *State ex rel. Flores, 622 N.W.2d 632, 644 (Neb.2001)* (6-month suspension appropriate sanction in attorney disciplinary proceeding against lawyer who breached fiduciary duty as holder of durable power of attorney granted by lawyer's nonclient friend; having paid medical bills incurred by grantor from his own funds, agent used grantor's pension benefits to reimburse himself without authority to do so, jeopardizing grantor's residence in nursing home, which was prior recipient of pension benefits). In *Flores,* the court held that the lawyer's conduct "adversely reflect[ed] on his or her fitness to practice law" under Neb. DR 1-102. On grounds for lawyer discipline generally, see *Restatement Third, The Law Governing Lawyers § 5.*

For instances of punitive damages awarded on the basis of an agent's breach of fiduciary duty, see, e.g., *McDermott v. Party City Corp., 11 F.Supp.2d 612, 630 (E.D.Pa.1998)* (evidence supported jury's assessment of punitive damages against former store manager who, inter alia, used inventory in his own store, used owner's funds to pay employee to work in his store, leaving owners "'high and dry'" to his own benefit when he quit to run competing store full time); *Annesley v. Tricentrol Oil Trading, Inc., 841 S.W.2d 908, 910 (Tex.App. 1992),* abrogated on other grounds by *Van Allen v. Blackledge, 35 S.W.3d 61 (Tex.App.2000)* (evidence supported jury's award of punitive damages against former corporate officer who converted corporate asset by retaining ownership of seats on NY-MEX paid for by corporation and issued in his name because exchange's rules prohibited corporate ownership of trading seats when, following termination of officer's employment, he refused to transfer seats to corporation's newly designated representative; requisite malice may be inferred from officer's intentional act).

On recovery of an agent's profits, see, e.g., *C&B Sales & Serv., Inc. v. McDonald, 177 F.3d 384, 387 (5th Cir. 1999)* (corporation had burden of establishing revenues of business done by former president in breach of his fiduciary duty, while defendant bore burden of proving his costs; a "reasonable approximation" of gain, not great specificity, is required). An agent's duty to account may extend to profit made by third parties as a consequence of the agent's disloyalty. See *Gelfand v. Horizon Corp., 675 F.2d 1108, 1111-1112 (10th Cir.1982).*

On breach of fiduciary duty as a basis on which a principal may rightfully terminate an agent's contract, see, e.g., *Sadler-Cisar, Inc. v. Commercial Sales Network, Inc., 786 F. Supp. 1287, 1300 (N.D.Ohio 1991)* (principal properly terminated relationship with agent who, inter alia, improperly competed with principal and attempted to preclude principal from market); *Hadden v. Consolidated Edison Co., 382 N.E.2d 1136, 1138 (N.Y.1978)* (former corporate officer who took and concealed bribes and substantial secret gifts from construction firms doing business with corporation committed "such grave misconduct and dishonesty as to justify ... discharge"; employer did not waive right to terminate contract with officer when its failure to do so was induced by officer's failure to disclose material facts when his dealings were called into question). See also *Pollock v. Berlin-Wheeler, Inc., 112 S.W.3d 73, 80 (Mo.App.2003)* (agent's material breach could deprive agent of right to commissions earned following termination).

On the remedy of accounting, see *McClung v. Smith, 870 F.Supp. 1384, 1400-1401 (E.D.Va.1994),* aff'd in part and remanded on other grounds, *89 F.3d 829 (4th Cir.1996)* (accounting places burden of proof on agent).

(2). Remedies for breach of fiduciary duty--forfeiture of commissions and other compensation. For the point that forfeiture is not limited to defensive use when an agent sues to recover compensation, see *Burrow v. Arce, 997 S.W.2d 229, 244 (Tex. 1999).*

On forfeiture of commissions and other compensation, see, e.g., *Mabry v. Tom Stanger Co., 33 P.3d 1206, 1209 (Colo.App.2001)* (real-estate broker's breach of fiduciary duty to a seller "results in a forfeiture of the broker's entitlement to a commission, even if the seller has not suffered any demonstrable harm as a result of the breach and even if the breach does not amount to fraud or self-dealing or result in a profit to the broker"); *Zakibe, 28 S.W.3d at 385-386* (agent who breaches fiduciary duty "forfeits any right to compensation" and breach provides defense to action by agent against principal for compensation; plaintiffs breach forfeited his right to "all compensation, including bonuses and severance pay, to which he may have been entitled under ... contract after he began his wrongdoing."); *Ellison, 842 S.W.2d at 608* (broker who breached fiduciary duty to vendor by manipulating transaction to generate secret profit through resale for broker is not entitled to a commission on sale of vendor's property). If a defendant is not an agent and not otherwise subject to a fiduciary duty, the forfeiture remedy may become unavailable although the defendant breaches a duty owed to the plaintiff. See *Hoff & Leigh, Inc. v. Byler, 62 P.3d 1077, 1078 (Colo.App. 2002)* (nonagent real-estate-transaction broker is subject to obligations stated in statute but is not in a fiduciary relationship with either party to transaction; alt-

hough statute provides no remedy for breach of stated obligations, transaction broker not subject to forfeiture of commission when broker does not perform satisfactorily).

Some cases treat the "egregiousness" of an agent's breach as relevant. See *Cameco, Inc. v. Gedicke, 724 A.2d 783, 789-791 (N.J.1999)* ("egregiousness" of employee's conduct "may affect the employer's right to withhold or recoup the employee's compensation"; employee may forfeit right to compensation if employee directly competes with employer, assists employer's competitors or parties with interests adverse to employer's, or "participates in a plan to destroy the employer's business, or secretly deprives the employer of an economic opportunity"). See also *Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 202 (2d Cir.2003)* (under New York law, "misconduct by an employee that rises to the level of a breach of a duty of loyalty or good faith" may warrant forfeiture). *Phansalkar* notes that New York cases appear to articulate two separate standards for forfeiture: (1) a dictum in *Turner v. Konwenhoven, 2 N.E. 637, 639 (N.Y. 1885),* states that compensation due a disloyal employee is forfeited only when the "misconduct and unfaithfulness ... substantially violates the contract of service"; (2) *Murray v. Beard, 7 N.E. 553, 554 (N.Y. 1886),* states that if an agent "acts adversely to his employer in any part of the transaction ... it amounts to such a fraud upon the principal, as to forfeit any right to compensation for services." See also Roberts v. Lomanto, *5 Cal.Rptr.3d 866, 879 (Cal.App.2003)* (court unable to say as matter of law that real-estate broker's conduct warranted forfeiture of commission in absence of anything in record on motion for summary judgment to indicate whether broker's conduct was "deliberately deceptive or fraudulent"; broker agreed to purchase property from principal but did not disclose existence of agreement to assign purchase contract in exchange for $ 1.2 million assignment fee).

On different standards for forfeiture of an agent's compensation as a remedy, compare *Aramony v. United Way, 28 F.Supp.2d 147, 176 (S.D.N.Y. 1998),* aff'd in part and rev'd in part on other grounds, *191 F.3d 140 (2d Cir.1999)* (under New York law, agent forfeits any right to compensation for services performed during period of disloyalty; of no consequence that "an employee's services may have been, on balance, beneficial to the employer"); *Riggs Inv. Mgmt. Corp. v. Columbia Partners, L.L.C., 966 F.Supp. 1250 (D.D.C.1997)* (agent forfeits all compensation from time of disloyal action to agent's termination 6 months later); *Royal Carbo Corp. v. Flameguard, Inc., 645 N.Y.S.2d 18 (App.Div.1996)* (all compensation forfeited during period of disloyalty) with *Chem-Trend, Inc. v. Newport Indus., Inc., 279 F.3d 625, 630 (8th Cir.2002)* (applying Michigan law; no forfeiture unless principal establishes injury due to agent's breach of fiduciary duty); *Walsh v. Atlantic Research Assocs., 71 N.E.2d 580, 585 (Mass.1947)* (employer's right of recovery limited to part of compensation paid during period of disloyalty that exceeds employee's value to employer) and *Burg v. Miniature Precision Components, Inc., 330 N.W.2d 192 (Wis.1983)* (burden on employee resisting forfeiture to show that value of services to employer exceeded damage done by disloyalty). In Illinois, forfeiture is not automatic because determining the appropriate remedy for breach of fiduciary duty is within the court's equitable discretion. Recent Illinois authority also characterizes forfeiture as a form of punitive damages. See *In re Marriage of Pagano, 607 N.E.2d 1242, 1249-1250 (Ill.1992)* (noting that forfeiture may be justified as matter of public policy when breach is "egregious" and stating that "punitive damages are *permissible* where a duty based on a relationship of trust is violated, the fraud is gross, or malice or wilfulness are shown. . . .") (emphasis in original). See also *Bank of Tokyo-Mitsubishi, Ltd. v. Malhotra, 131 F.Supp.2d 959 (N.D.Ill.2000)* (bank employee who pleaded guilty to bank-fraud charge not required to disgorge entire half-million dollars paid by bank as compensation and fringe benefits during 9-year period of employment; applying *Pagano,* court limits forfeiture to $ 22,360 that employee received in bonuses; employee also subject to restitution order for $ 588,097 amount of fraudulent depredations); *Dowd & Dowd, Ltd. v. Gleason, 816 N.E.2d 754, 771 (Ill.App. 2004)* (trial court did not err in directing forfeiture of bonuses paid by law firm to departing partners who breached fiduciary duties in connection with departures from firm when basis for bonuses was work done in past plus inducement for future performance).

Illustration 9 is based on *Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184 (2d Cir.2003).*

On the availability of apportionment, compare *Murray v. Beard, 7 N.E. 553 (N.Y.1886)* and *Lamdin v. Broadway Surface Adver. Corp., 5 N.E.2d 66 (N.Y.1936)* (stating strict rule of forfeiture of all compensation) with *Musico v. Champion Credit Corp., 764 F.2d 102, 112-113 (2d Cir. 1985)* (applying New York law) (permitting forfeiture of only fees related to "specified items of work" when agent acted disloyally) and *Sequa Corp. v. GBJ Corp., 156 F.3d 136, 147 (2d Cir.1998)* (current state of New York law suggests that no further relaxation will be forthcoming, suggesting that *Musico* holds a "somewhat tenuous" status; no basis to introduce rule of proportionality of forfeited amount relative to harm to principal). *Phansalkar* notes that, following *Sequa,* "New York courts have given us no reason to retreat from or to expand, our holding in *Musico.*" *344 F.3d at 207.*

In some circumstances, permitting apportionment may have the effect of undermining an assumption on which the principal agreed to deal with the agent. For example, in *Rockefeller v. Grabow, 82 P.3d 450 (Idaho 2003),* a property

owner retained a real-estate developer to subdivide and develop property in exchange for a development fee. Separately, the owner retained the developer to market and sell subdivided lots on the property in exchange for sales commissions. After the developer substantially completed the subdividing and development work, he accepted a listing for sale of adjacent property whose owner claimed an easement against the property of the developer's initial client. The developer, aware that the second client's property would not be marketable unless that client succeeded in establishing the easement across the first client's property, did not disclose to the first client that a listing for the second client had been undertaken. Thereafter, the developer shared information about the first client's bargaining position in the easement dispute with the second client. The court held that the developer's breaches of fiduciary duty did not require forfeiture of the development fee due for work done on the first client's property because the development and subdivision work had been substantially completed prior to the developer's breaches of fiduciary duty in connection with the developer's representation of the second client. *Id. at 456.* However, this outcome ignores the likelihood that the owner's agreement to pay a development fee reflected the owner's projection of the value of the property once subdivided and developed, a value not achieved due to actions of the adjacent landowner aided by the developer.

On forfeiture as a remedy when an agent acts as a dual agent without the consent of both principals, see *Darby v. Furman Co., 513 S.E.2d 848 (S.C. 1999).* On forfeiture as a remedy for an agent's self-dealing, see *Zakibe v. Ahrens & McCarron, Inc., 28 S.W.3d 373, 386 (Mo.App.2000)* (forfeiture of rights to all compensation after commencement of wrongdoing; trial court did not err in treating breach of fiduciary duty as defense to claim for bonuses and severance pay due under contract).

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