

Undertaking a “Fiduciary Duty”: Crucial Legal & Professional Considerations for Architects

by Michael M. Edwards, Esq.

EXECUTIVE SUMMARY

Breach of fiduciary duty suits against design professionals are here to stay. A plaintiff who can allege a case on this theory derives a substantial advantage, which is both psychological and tactical, although nothing may ultimately come of it at trial. Whether or not a suit based upon breach of fiduciary duty, as opposed to one typically filed under professional malpractice and/or breach of contract labels, has any particular value depends upon the peculiar circumstances giving rise to the lawsuit. If all that applies is a garden variety malpractice case, and frivolous fiduciary duty claims, the theory has little value; however, if there is any hint of conflict of interest or fraudulent behavior, the breach of fiduciary duty claim can be very dangerous to the design professional.

The prudent design profession, before engaging in its next project, should consult with its counsel who, probably, would give it the following "generic" advice to avoid contracting into a fiduciary label:

- Avoid any warranties.
- Do not agree to use "best professional efforts," or anything suggesting the "highest" standard of care, i.e., stay with a promise to meet the "professional standard of care."

- When providing cost estimating services make clear that estimates are just that, and employ language to let the client understand that estimates are of limited value because of their susceptibility to variables and local interpretations by bidding contractors.
- Avoid language indicating client "reliance" on any contract provisions.
- Do not promise any particular "result" as flowing from professional services.
- Use, as much as possible, the relevant AIA standard form agreements (without major amendments), as the forms are designed, generally, to produce a fair contract which in the process protects the designer.

The professional should also take steps to avoid any potential or actual conflict of interest, or anything arguably approaching duplicitous conduct. Having to face litigation, or claims, is frightening enough, but giving a claimant any basis to turn a malpractice case into something far more challenging is extremely risky business for the design professional's health, safety, and welfare. It also substantially augments the scope and cost of litigation.

INTRODUCTION

The litigation world for design professionals¹ is an exceedingly difficult one in this ongoing recessionary period. While there is no surprise about lawsuits founded upon professional malpractice, or the breach of a professional services agreement being filed

against design professionals, there is reason to be concerned when a design professional is also sued for the breach of a fiduciary duty.

A "fiduciary duty" is, in legal terms, the highest duty of trust and confidence that one person² may owe to another. In one often cited New York Court of Appeals case,³ Justice Cardozo, the famous jurist who was elevated from the High Court of New York State to the United States Supreme Court described the basic fiduciary rules in a partnership lawsuit context as follows:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio [i.e., a careful observance] of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Common examples of fiduciary relationships include, among others, those of lawyer and client,⁴ accountant and client,⁵ husband and wife (in a community property state)⁶ and trustee and beneficiary.⁷ All of these relationships require the stronger, and generally more expert, party to behave in stellar fashion vis-a-vis the weaker, and

usually less skilled, one.

The opposite of a fiduciary relationship is one where the parties are said to be dealing at "arms length."⁸ For example, a typical debtor/creditor relationship,⁹ or certain contractual dealings between a manufacturer of goods and their vendor¹⁰ are all non-fiduciary in scope. Generally, the transactional setting where each party to the bargain is demonstrably (and understandably) looking out for its own interests will not be a fiduciary one.¹¹

In general, it is not typical that one would think of a design professional's relationship with its client as a "fiduciary" one, but as we explain below, such a relationship has been found to exist by some courts, although a key inquiry is *how and when* such a relationship may be regarded as "fiduciary." It appears to be fact specific as to the design professional's relationship with its client, per the reviewed case law.

In the next part of our discussion, we review a number of cases, both published and unpublished,¹² that address this significant problem for design professionals who are charged by a claimant with a fiduciary duty and violation of that duty.

FIDUCIARY DUTY CASE AUTHORITY

We are going to address a number of the cases we have researched on the breach of fiduciary duty question relating to a design professional/client relationship. We have found a large number of cases, but we address only those cases we think most salient to the topic being discussed. There are certainly more cases than you will see discussed below on this subject, nonetheless, in our view, the following are the best of the cases on the topic.

You will see that the architect/client cases predominate in number over those involving engineers,¹³ because, (a) architects are more likely to contract directly with a project owner than an engineer, (b) architects would appear to have a broader range of project duties than an engineer, i.e., observation activities, substantial reporting functions (as a result of observation duties), (c) a greater likelihood of being required to coordinate the work/services of various disciplines, (d) there are many types of professional engineers, each of whom will have a highly specialized role with respect to any given project and (e) architects are generally far more involved in the design/observation/construction process than engineers.

Once again, note that some of the cases are unpublished which means they are of less utility for purposes of pleadings and other legal filings depending on your specific state law. In California, unpublished cases generally cannot be cited in legal papers.

Consider the following decisions:

(a) *Palmer v. Brown*¹⁴: The Court stated very clearly that an architect owed its client a fiduciary duty; however, the point appears to have been that such duty would exist because the architect, the owner's agent, was "conflicted" because he was also receiving payment from the project contractor without the owner's knowledge or consent.

(b) *Carson v. Sala Architects, Inc.*¹⁵: Sala Architects was hired to design a single family home and the trial judge found a breach of a fiduciary duty. The appellate court did not agree that the architect was a fiduciary, as a matter of law, and it reversed on that point. The key question, upon

remand, was whether or not, on a factual level, the defendant had improperly and incorrectly held out its employee as a licensed architect.

(c) *E-Med, Inc. v. Mainstreet & Planners, Inc.*¹⁶: The architect was sued for failure to properly advise the owner concerning the design of single-family detached residences, and for failure to investigate better housing options for the client. Among the theories advanced was breach of fiduciary duty, but the court upheld the jury verdict that no breach of fiduciary duty occurred for the architect's alleged failure to advise the plaintiff of alternative developmental options for the project. The decision does not rule out a fiduciary duty for an architect, but the jury verdict finding no breach was upheld on appeal.

(d) *Their v. Kenyon*¹⁷: Among the allegations against the architect were failures to advise the plaintiffs about project problems, and failures in representing the owners in their dealings with contractors. A motion to strike a breach of fiduciary duty theory was rejected by the court because the allegations included a contention that the architect had a financial relationship with a contractor, of which the client was not notified, and also because of the architect's superior knowledge, and experience.

(e) *Universal Contracting Corp. v. Aug*¹⁸: The case did not involve a design professional, but certain language is of interest where the Court spoke of there being "negligent misrepresentation claims where a fiduciary or a fiduciary-like situation has existed between the information provider

and the plaintiff, *such as cases involving accountants, appraisers, architects and bankers.*" (Emphasis added.)

(f) *Routh v. Prustch*¹⁹. Here, the breach of fiduciary duty allegation against the architect was stricken because the court found no allegation of "fraud, self-dealing, or conflict of interest." The court characterized the architect's duty as a breach of contract/professional negligence one, "which the plaintiff is attempting to enlarge into a case involving fiduciary duties without the requisite loyalty and trust that such a relationship requires."

(g) *Cinque v. Schieferstein*²⁰: Summary judgment was granted to the architect in a breach of fiduciary duty case for lack of proof of a fiduciary duty "separate from and extraneous to the party's contractually defined relationship...or even that there was a fiduciary relationship..."

(h) *Winsted Land Development v. Design Collaborative Architects, P.C.*²¹: Although the architect's duties were extensive, the trial court did not find the architect's superior knowledge sufficient to give rise to any fiduciary relationship; rather, there was only a business relationship, and not one that involved sufficient loyalty or trust "which characterizes a fiduciary relationship." While the court did find the design professional liable for malpractice, breach of contract, and negligent misrepresentation, no fiduciary duty was found. The court also observed that in Connecticut, breaches of fiduciary duty were most commonly found where "fraud, self-dealing, or conflicts of interest were present..."

(i) *Getzschman, A.I.A v. Miller Chemical Co., Inc.*²²: The Nebraska Supreme Court ruled that the cross-suit against the architect for breach of fiduciary duty was unfounded because the relationship was governed by the architectural services contract which incorporated the architect's professional standard of care. The owner's breach of fiduciary duty claim apparently related to the architect's failure to design a structure within the owner's budget.

U) *Strauss Veal Feeds, Inc. v. Mead & Hunt, Inc.*³: The architect was under contract to provide design and coordination services for a veal feed processing facility. Plaintiff alleged the architect had a duty to investigate and warn the client of potential waste disposal problems given the architect's alleged status as fiduciary; however, the Court found that the architect's duties were based upon its contract with the owner. In that regard, the court found the architect had a duty to "exercise professional skill and reasonable care in preparing plans and specifications according to its contract." This was so even though the architect "professed to be a specialist in designs for the dairy industry..."

(k) *Holy Cross Parish v. Huethel*⁴: The court found that a fraud suit was properly pled against the architect, given that there was fiduciary relationship between the architect and the client, and because the architect allegedly failed to disclose defects "that he knew or should have known as a result of his general supervision of the construction site." The

allegations related to inadequate construction administration, and misrepresentations about certain site conditions.

(l) *Vike/1 Investors Pacific, Inc. v. Kip Hampden, Ltd.*²⁵: Soils engineer's contractual duties for owner were not of the type that the court believed could be "fiduciary"; there was little "substantive law" discussion of fiduciary duty, just an expressed belief that the contract between the parties did not evince anything of a fiduciary character. The court did note the lack of direct contact with the owner, and the owner's retention of a number of other project engineers.

(m) *Adams v. Whitman*²⁶: The engineer's contract with the owner for design of a septic system and supervision of installation did not cause the court to find viable the allegations of fiduciary duty against the engineer. The only "fiduciary duty" the court found was one between a principal of defendant and his company, but the client could not use that duty to establish one between the engineer and it self.

(n) *Abdella v. Foth & Van Dyke And Associates, Inc.*²⁷: Lack of privity of contract between the engineer and the project owner defeated the notion of any possible fiduciary duty; defendant was held to owe no duty whatsoever to plaintiff.

(o) *Illinois Power Co., v. Duke Engineering & SeNices, Inc.*²⁸: In pure dictum on the fiduciary duty point, the judge determined that because of his view that Illinois law did not recognize that an engineer owed a fiduciary duty to its client (unlike other professionals, i.e., doctors, lawyers,

and real estate brokers), it was proper for an engineer to contractually limit its liability to a client.

The above cases, taken together, may be best summarized as follows:

- 1) There is no bright line rule as to whether or not a design professional does, or does not, owe a fiduciary duty to a client
The specific facts alleged by the plaintiff are critical;
- 2) The more skilled or specialized the design professional is, and the more extensive its duties are, the more likely that a fiduciary relationship exists between design professional and client;
- 3) If a design professional, clearly determined to be the "agent" of the client, is also "managing" the contractor in some fashion, the greater the probability of a fiduciary duty in the event of the design professional's failure to fully report to the client;
- 4) If it can be alleged and shown the design professional harmed the client because of a conflict of interest type of situation, the greater the chance a breach of fiduciary duty may be pled/found;
- 5) If a "fraud" claim is alleged, the greater the prospect that a breach of fiduciary theory may survive;
- 6) If the design professional under contract has allegedly committed design malpractice, the less chance the client may successfully advance a breach of fiduciary duty claim in its lawsuit; and,

- 7) Contract terms are crucial in a number of the decided cases, with the courts finding that the contracts' terms and conditions may definitely establish the parties' legal relationship.
- 8) Courts appear to not accept the idea that an engineer is a fiduciary, although we cannot rule out the possibility that in an extreme case a fiduciary relationship might not exist.

IMPLICATIONS OF BREACH OF FIDUCIARY DUTY SUITS

Recognizing that design professionals may face breach of fiduciary duty suits, the question becomes one of what it means in terms of risk management. That is, what are the insurance, liability, and related implications of such a suit?

1. Insurance Coverage Issues

One of the problems for a design professional is that the typical errors and omissions grant of coverage will only cover its "negligent acts, errors or omissions." Also, intentional acts may be specifically excluded by the policy, and there is a possibility that some policies may also foreclose coverage for "violations of law." Of course, most errors and omissions policies are manuscript in form; so each insurer will likely have its own language and approach to the coverage issues.

The design professional, if sued for breach of fiduciary duty, will most probably also be sued on other legal theories, e.g., professional malpractice and breach of its contract, the latter theory frequently involving an allegation of a breach of the professional standard of care, i.e., the aforesaid malpractice.²⁹ This is extremely important because under the law of most jurisdictions, if any of the theories advanced

against the policyholder is potentially covered, a complete defense will be due under the policy of insurance.³⁰

The defense duty is applicable because some of the allegations are "potentially covered," but there are jurisdictions, such as California, that go so far as to preclude an insurer from indemnifying for a so-called "willful act," i.e., an intentional one, even though a defense may be due the insured for all causes of action.³¹ That is, if the trier of fact determines that "intentional" misconduct on the part of the insured is the basis for its liability, the design professional can be denied any right to indemnity,³² but its defense costs may still be the insurer's responsibility.

On a related issue, if a breach of fiduciary duty is willful, there is a chance, in more than one-half of the states, that punitive damages may be available.³³ Punitive damages are often not insurable, and even if they are, some policies have specific exclusions which permit the carrier to avoid paying such awards.

A breach of fiduciary duty may involve intentional misconduct, as in the case of actively fraudulent behavior underpinning the breach, but that is not necessarily the case. One who breaches a fiduciary duty may engage in conduct that involves a conflict of interest that is not the product of willful behavior.³⁴ It is, of course, another matter entirely where a conflict amounts to professional malpractice; that is likely a question for an expert witness, and beyond the scope of this paper.

If the trier of fact finds a fiduciary duty which is also characterized as a negligent act, error or omission, then insurance coverage will apply. In any event, suffice it to say that in many jurisdictions whatever "label" the plaintiff may put on its suit allegations (whether breach of contract or breach of fiduciary duty or something else) such label will

likely not control the question of potential insurance coverage, as coverage in most jurisdictions depends upon the substance of the facts pled.³⁵

2. Litigation Considerations

The reason for a plaintiff to sue a design professional for breach of fiduciary duty may be a completely valid one, i.e., an honest and good faith belief that the design professional owed it a fiduciary duty, and breached that duty, with resulting damages. On the other hand, such a position, taking into account the numerous decided cases discussed above, would seem improbable in relation to a standard design professional services agreement and how those services are typically performed by the professional; yet, breach of fiduciary duty allegations seem to be on the rise in litigation. So what is their practical effect in an action against a design professional?

(a) Inflaming A Jury

It is entirely possible a jury, on initially hearing about a breach of fiduciary duty, could be inclined to think that a design professional who might have behaved in such an unlawful or untrustworthy fashion is a bad person/firm. When the jury pool is examined by counsel for the design professional, the fiduciary duty issue should be brought up by the design professional's lawyer, in *voir dire*, or when the judge asks a series of initial questions of the prospective jury to be sure they can provide a fair hearing for the parties.³⁶ The danger is that the more the jury learns about the breach of fiduciary duty concept, both before and during the course of the evidentiary and argument phases of the trial, the greater the likelihood it may work against a design professional charged with such misconduct. The work done depends on many factors: attorney issue

emphasis, witness credibility and likeability, nature of jury instructions, nature of alleged harm to the plaintiff, just to name a few.

The possibility of undue prejudice against the design professional is a serious matter. Of course, there is never any objective way to measure the quantum of harm done by the fact that breach of fiduciary duty is alleged or argued. Who can say whether or not the jury will keep an open mind and be fair, having heard the ugly charging allegations and the plaintiff's lawyer's opening statement, not to mention what a fiduciary is by definition? Given that it may not take a large amount of evidence to permit a finding of breach of fiduciary duty (if the theory actually goes to the jury), the prejudice factor is of major concern for counsel's trial preparation (which is a topic beyond the scope of this presentation).³⁷

(b) Forcing An Excessive Settlement?

As the above discussion suggests, the very fact that a party is sued for breach of fiduciary duty carries with it potentially damning consequences. That, of course, will put substantial pressure on the insured design professional, and its counsel, to negotiate an arguably excessive settlement, but one within the policy limits.

(c) Policy Limit's Demand Situation?

An insurer may well face a demand within the policy limits that might be perceived as relating, principally, to a non-covered claim, but the insured design professional may disagree on allocation. If the insurer declines to settle, and a judgment against the insured comes in above the available policy limits, the carrier would potentially wind up having to pay the entire judgment and perhaps even the insured's economic damages resulting from the rejection of the settlement offer.³⁸

The breach of fiduciary duty allegations thus carry with them a possibility that an insured, and perhaps its carrier, would be willing to pay much to settle a case, given the risk of a very substantial judgment, and the potentially negative consequences of rejecting of an offer to settle.

(d) Further Considerations

The above discussion of settlement prospects for the most part is limited to that situation where the breach of fiduciary duty and the professional malpractice allegations both involve the same set and quantity of damages sought by the plaintiff. In the alternative, it is also possible that the nature of the lawsuit against the design professional may be sufficiently complex that professional malpractice damages are distinct from those for breach of fiduciary duty, i.e., part of the suit is clearly "potentially covered," while part of it may not be, but still a defense is due the insured, in most states, for the entirety of the action.³⁹

The situation could also be one where the insurer is willing to settle the entirety of the case, including a sum for a not-potentially-covered claim,⁴⁰ but it reserves the right to proceed back against the insured in a separate action for declaratory relief as to the allegedly non-covered portion of the settlement.⁴¹

(e) Cost of Defense Issue

Another point which is possibly related to these issues is a situation where the limit of the errors and omissions policy may not be sufficient for indemnity purposes, and the policy has an "expense within limits" feature as is commonly the case with these policies. In any event, the breach of fiduciary duty theory could be so expensive to defend, over and above the malpractice defense part of the claim, that the insured is at

special risk because of the expanded type of defense that is required.⁴² In such a scenario like this, an early settlement may be indicated in a "high exposure" case, taking into account that the defense costs will substantially invade the indemnity limit likely available after a proper defense.

We believe that all of the above points operate equally insofar as architects and engineers are concerned; however, it would appear that engineers, by the nature of their professional undertakings, are less susceptible to suits containing fiduciary duty claims. Still, one can imagine that on a large project where the engineer is under contract to the owner and the engineer has a far reaching range of professional duties, it too could face the same types of breach of fiduciary duty allegations that architects encounter in the decided cases. Moreover, the suggestions made above on how design professionals can guard against possible suits for breach of a fiduciary duty should apply with equal force to all design professionals.

CONCLUSIONS AND RECOMMENDATIONS

When a design professional is charged with a breach of fiduciary duty, it faces heightened litigation expenses, a risk of being taken beyond its errors and omissions insurance protection, the potential for a punitive damages award and community reputation issues. In all probability, the designer's problems are a result of not adhering to relatively simple contract drafting precautions. The designer's signing whatever draft written agreement the client presents, without carefully evaluating and possibly modifying it, is fraught with legal peril.

The architect or engineer in virtually all professional undertakings is only obligated to satisfy its typical professional standard of care, not a higher duty.

A designer who is categorized, legally speaking, as a "fiduciary," probably does so because it failed, on some level, to protect itself from a client's contractual overreaching. Don't be a victim of the "fiduciary" label. Pay attention at the contracting stage, and protect yourself on paper, and seek and obtain legal advice on your contracts.

ENDNOTES

¹ As used herein the term "Design Professional" refers to architects, engineers, geologists, surveyors and other professionals who are involved in some phase of the project design/construction administration process.

² As used herein, the term "person" involves either an individual or some recognized business entity such as a corporation, limited liability company or partnership.

³ *Meinhard v. Salmon*, 249 N.Y. 458, 164, N.E. 545, 549 (N.Y. 1928).

⁴ *Benasra v. Mitchell Silverberg & Knupp, LLP*, 123 Cal.App.4¹_h 1179, 1187-1188, 20 Cal.Rptr.3d 621 (2004).

⁵ *Wolf v. Superior Court*, 107 Cal.App.4¹_h 25, 27, 130 Cal.Rptr.2d 860 (2003).

⁶ *In Re Marriage of Walker*, 138 Cal App.4¹_h 1408, 1418, 42 Cal.Rptr.3d 325 (2006).

⁷ *Chatard v. Oveross*, 179 Cal.App.4¹_h 1098, 1105, 101 Cal.Rptr.3d 883 (2009).

⁸ *Wolf v. Superior Court*, 107 Cal.App.4¹_h 25, 27, 130 Cal.Rptr.2d 860 (2003).

⁹ *Downey v. Humphreys*, 102 Cal.App.2d 232, 332, 227 P.2d 484 (1951).

¹⁰ *Rickel v. Schwinn Bicycle Co.*, 144 Cal.App.3d 648, 654, 192 Cal.Rptr. 732 (1983).

¹¹ *Meinhard v. Salmon*, 249 N.Y. 458, 164, N.E. 545, 549 (N.Y. 1928).

¹² The published decision is one which carries with it precedential effect in a jurisdiction, but if a case is unpublished, neither lawyers nor judges may be able to cite it as precedent in their legal papers, whether in pleadings or motions.

¹³ We include virtually all of the engineer fiduciary duty cases we located, while we have only selected what we consider the most illustrative of the architect/client ones.

¹⁴ 127 Cal.App.2d 44, 273 P.2d 306 (1954).

¹⁵ 732 N.W. 2d 324 (Minn. App. 2007).

¹⁶ 2007 WL 1536803 (Cal. App. 2007).

¹⁷ 2006 WL 265301 (Conn. Super 2006).

¹⁸ 2004 WL 3015325 (Ohio App. 2004).

¹⁹ 2004 WL 2165906 (Conn. Super. 2004).

²⁰ 292 A.D. 2d 197, 738 N.Y.S. 2d (2002).

²¹ 1999 WL 639942 (Conn. Super. 1999).

²² 232 Neb. 885, 443 NW 2d 260 (1989).

²³ 538 N.E. 2d 299 (Ind. App. 1989).

²⁴ 308 N.W. 2d 575 (S.D. 1981).

1946 P.2d 589, 597 (Colo. App. 1997)

¹⁶ 2007 Mass. Super. LEXIS 332.

²⁷ 100 Wis. 2d 747, 303 N.W. 2d 885 (Wis. App. 1981).

²⁸ WL 2002 U.S. OIST. LEXIS 5497 (N.D. 2002).

²⁹ For tactical reasons, as discussed later herein, the plaintiffs' lawyer will try to advance as many potentially viable theories as possible so that a recovery may be advanced on more than a single theory of liability; legally speaking, there may well be "strength in numbers" in such a trial strategy.

³⁰ *Scottsdale Ins. Co. v. MV Transportation*, 36 Cal. 4th 643, 654-655, 31 Cal.Rptr.3d 147, 115 P.3d 460 (2005).

³¹ Cal. Ins. Code section 533 reads as follows: "An insurer is not liable for a loss caused by the willful act of the insured, but he is not exonerated by the negligence of the insured."

³² *J.C. Penney Casualty Ins. Co. v. M.K.*, 52 Cal. 3d 1009, 1021-1025, 278 Cal. Rptr. 64, 804 P.2d 689 (1991).

³³ In California, for example, if the misconduct is found malicious, fraudulent or oppressive, punitive damages (in addition to compensatory damages) may lie for purposes of punishing the wrongdoer. Cal. Civ. Code, Section 3294, and *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 708, 201, Cal.Rptr. 528 (1984).

³⁰⁴ *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County*, 85 Cal.App.4th 1042, 1050, 102 Cal.Rptr.2d 673 (2000).

³⁵ *Vandenberg v. Superior Court*, 21 Cal.4th 815, 838-840, 88 Cal.Rptr.2d 366, 982 P.2d 299 (1999).

³⁶ This is the process known as "voir dire." *Donovan v. Poway Unified School District*, 167 Cal.App.4th 567, 622-624, 84 Cal.Rptr.3d 285 (2008).

³⁷ In most states all that is required to uphold a civil jury's verdict is "substantial evidence" of each element of proof. *Foggy v. Ralph F. Clarke & Associates, Inc.* 192 Cal. App.3d 1204, 1215, 238 Cal.Rptr.130 (1987). This is hardly a large burden for a plaintiff to satisfy in a jury trial, assuming the jury has been properly instructed.

³⁸ *Crisci v. Security Ins. Co. of New Haven*, 66 Cal.2d 425, 430, 58 Cal.Rptr.13, 426 P.2d 173 (1967) (discussing an insurer's breach of the implied covenant of good faith and fair dealing).

³⁹ *Buss v. Superior Court*, 16 Cal. 4th 35, 48-49, 65 Cal. Rptr.2d 366, 939 P.2d 766 (1997).

⁴⁰ See, *Johansen v. California State Auto. Assn. Inter-Ins. Bureau*, 15 Cal. 3d 9, 16, 123 Cal.Rptr.288, 538 P.2d 744 (1975)

⁴¹ *Blue Ridge Ins. Co. v. Jacobson*, 25 Cal.4th 489, 106, Cal.Rptr.2d 535, 22 P.3d 313 (2001).

² One could envision expanded case discovery where there are allegations of conflict of interest or alleged nondisclosure as the underpinning for the breach of fiduciary duty claim.