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Scottie Pippen's Airball: On the Role of Fiduciary Duty Law in Illinois Professional Liability Cases, 48 J. Marshall L. Rev. 777 (2015)

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**SCOTTIE PIPPEN’S AIRBALL:
ON THE ROLE OF FIDUCIARY DUTY LAW
IN ILLINOIS PROFESSIONAL LIABILITY
CASES**

WILLIAM LYNCH SCHALLER*

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This is thy negligence. Still, thou mistakest, or else committ'st thy
knaveries willfully.¹

I. INTRODUCTION

Policing doctrinal divides has been a frequent preoccupation of
the Illinois Supreme Court.² Perhaps the best known Illinois

*Partner, Baker & McKenzie, Chicago, Illinois. This paper is dedicated to the Bauers (Pat, Linda, Sidonie, my late friend Mike, Patricia, and Bill), the Braults (Mimi, Jim, Mary, and my late friend Jerry), the Breens (Heather, Melissa, my sister Gail, and Tom), the Buhlers (Eunice, Costa, Violetta and Robert), the Drakes (Haley, Tommy, my sister Gloria, and Tom), the Hawkinsons (Erica, Jeff, April, Rickie, and my late pal Bill), the Iaconos (Juliana, Johnny, Tina, and John), the Karasiks (Jack, Alex, Kendra, and Mark; Victoria and Paul; and Ruberta and my late friend Sidney), the Knoxes (Michele, Elizabeth, Mary, and Lance), the Lynches (the late Marge and Bill), the Maatmans (Emily, Taylor, Drew, Kathryn, and Jerry), the Murphys (Bobby, Elizabeth, Tommy, Cathy, and John), the Nudos (Tate, Whitney, Anne, and Jerry), the Pollards (Emily, Meg, Drew, Kathleen, Moira, and Mike), the Putnams (Sharron and Jerry), the Schallers (Katie, Beth, Nancy, and my brother Bob; Kyle, Grant, Laurie, and my brother Mark; Chris, Carrie, Lauren, Jean, and my late brother George; my mother Dolores and my late father George), the Simons (Lindsey, Millie, and John), the Tomczaks (John, Matt, Paul, Gabby, Danielle, and Pete), the Townsends (MarrGwen and Stuart), the Vankos (Langdon, Karen, and Ken), the Vitullos (my late nephew Clint, Brett, Louis, my sister Joyce, and Lou), and the Wagners (Becca, Claire, Kate, John, Sarah, and Mike) – great Chicago families the Schallers (Ali, Billy, George, Sami, Jane, and Bill) have long admired.

1. WILLIAM SHAKESPEARE, A MIDSUMMER'S NIGHT DREAM, act. 3, sc. 2, in THE COMPLETE WORKS OF WILLIAM SHAKESPEARE CAMBRIDGE EDITION 402 (William Aldes Wright ed., 1936).

2. See, e.g., *Morrow v. L.A. Goldschmidt Assoc.*, 112 Ill. 2d 87, 96, 492 N.E.2d 181, 184 (1986) (“The line of demarcation between tort and contract is sometimes difficult to make, and occasionally, the conduct complained of can constitute both a breach of contract and a tort.”). See generally STEVEN L.

doctrinal conflict is found in “economic loss” cases beginning in earnest over 30 years ago with *Moorman Manufacturing Co. v. National Tank Co.*³ The claim for economic loss under strict liability and negligence theories arising out of a contract relationship perplexed the *Moorman* court and caused it to reflect at length on the differing purposes of tort and contract law before holding that contract trumped tort due to commercial expectations in the context of buyers and sellers operating under the Uniform Commercial Code.⁴ The Illinois bench and bar have since paid close attention to the court’s continuing exposition on this economic loss flash point,⁵ given every plaintiff’s desire for longer tort statutes of limitations, unlimited tort compensatory damages and hefty punitive damages, and given every defendant’s desire for shorter contract statutes of limitations, limited contract compensatory damages, and no punitive damages.⁶

The economic loss doctrine also supplies a useful example of the doctrinal tension between tort and contract in the professional services context, as one might expect. In *Collins v. Reynard*⁷ the Illinois Supreme Court held that even though contract and tort

WINTER, A CLEARING IN THE FOREST: LAW, LIFE AND MIND (2001) (discussing use of categorization in the law).

3. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

4. *Id.* at 86, 435 N.E.2d at 450 (“Tort theory is appropriately suited for personal injury or property damage resulting from a sudden or dangerous occurrence of the nature described above. The remedy for economic loss, loss relating to a purchaser’s disappointed expectations due to deterioration, internal breakdown or nonaccidental cause, on the other hand, lies in contract.”).

5. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 416–24, 821 N.E.2d 1099, 1139–43 (2004) (rejecting public nuisance claim against handgun manufacturers in part on *Moorman* economic loss grounds); *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 205–07, 680 N.E.2d 265, 278–80 (1997) (rejecting claims resulting from massive flooding of Chicago’s downtown business district in part on *Moorman* economic loss grounds); *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill. 2d 146, 155, 503 N.E.2d 246, 250 (1986) (Simon, J., concurring) (“Judges should ‘look to the policies behind the regimes of torts and contracts to see which is more appropriate’ for assigning the loss in the case at hand . . . and the court should be less concerned with the metaphysical distinction between injuries to property versus profits than with the circumstances by which an interest in either has been injured.”); *Doe v. Roe*, 289 Ill. App. 3d 116, 127, 681 N.E.2d 640, 648 (1st Dist. 1997) (“Reasoning from the injury to the classification of an action, and thus determining the range of compensable damage, is exactly the reverse logic that has led to the controversy and criticism surrounding the economic loss doctrine.”).

6. *See, e.g., Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 187, 384 N.E.2d 353, 360 (1978) (recognizing “independent tort” of retaliatory discharge as an exception to the contract rule against punitive damages); *Morrow*, 112 Ill. 2d 87, 98–99, 492 N.E.2d 181, 186 (1986) (rejecting “willful and wanton” breach of contract as an exception to the contract rule against punitive damages); *Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 293–95, 751 N.E.2d 1126, 1130–32 (2001) (rejecting independent cause of action for “bad faith” breach of contract).

7. 154 Ill. 2d 48, 607 N.E.2d 1185 (1992).

claims can both arise in professional malpractice cases – there a legal malpractice lawsuit alleging an attorney had failed to protect his client’s security interest in property being sold – the economic loss doctrine does not limit tort recovery in such cases. The court explicitly relied upon history rather than logic in justifying its conclusion.⁸ Similarly, in *Congregation of the Passion v. Touche, Ross, & Co.*,⁹ the Illinois high court held that “[w]here a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty.”¹⁰ Thus, the accounting firm’s extra-contractual duty to properly record certain investments at market, rather than at cost, triggered tort liability and avoided the *Moorman* economic loss bar in *Congregation of the Passion*.¹¹ As a result of these teachings, Illinois professional malpractice claims escape the *Moorman* bar on economic losses, at least where the duty in question does not rest on a contract.¹²

The same problem of intersecting doctrines has also played out between tort and fiduciary duty law in the professional malpractice context with much the same result: tort duties have prevailed more for reasons of history than logic. The Illinois Supreme Court first directly confronted this issue in *Neade v. Portes*,¹³ a medical malpractice case in which the court held that the defendant-doctor’s traditional tort duty, under the standard of care, did not change by virtue of a “duplicative” fiduciary duty claim based upon the doctor’s apparent financial disincentive to refrain from performing certain medical tests.¹⁴ The Illinois Appellate Court recently followed *Neade* in *Pippen v. Pedersen & Houpt*,¹⁵ a legal malpractice action in which former Chicago Bulls basketball star Scottie Pippen saw 75% of his \$8.7 million tort judgment disappear as a result of contributory negligence – a defense that arguably was not available under Pippen’s “duplicative” conflict of interest fiduciary duty claim

8. *Id.* at 50, 607 N.E. 2d at 1186:

Our ruling is grounded on historical precedent rather than logic. If something has been handled in a certain way for a long period of time and if people are familiar with the practice and accustomed to its use, it is reasonable to continue with that practice until and unless good cause is shown to change the rule. Certainty in the law enables parties to understand their relative rights and duties and facilitates rationality and planning in matters of commerce and social intercourse. Uncertainty, on the other hand, introduces dysfunction and chaos.

9. 159 Ill. 2d 137, 636 N.E.2d 503 (1994).

10. *Id.* at 162, 636 N.E.2d at 514.

11. *Id.* at 164–65, 636 N.E. 2d at 515.

12. 2314 Lincoln Park W. Condo. Ass’n v. Mann, Gin, Ebel & Frazier, Ltd., 136 Ill. 2d 302, 317–18, 555 N.E.2d 346, 353 (1990) (reasoning that because defendant architect’s duties originated in contract, *Moorman* barred economic loss recovery in tort).

13. 193 Ill. 2d 433, 739 N.E.2d 496 (2000).

14. *Id.* at 442–50, 739 N.E.2d at 502–06.

15. 2013 IL App (1st) 111371, 986 N.E.2d 697 (1st Dist. 2013).

the court dismissed.¹⁶ I think both *Neade* and *Pippen* were correctly decided, but there is more to this debate than these cases suggest.

This article explores the role of fiduciary duty law in the professional liability setting in Illinois in the wake of *Neade* and *Pippen*. I begin in Part II with the Illinois Supreme Court's leading fiduciary duty opinions in *Kinzer v. City of Chicago*,¹⁷ *Armstrong v. Guigler*,¹⁸ and *Martin v. Heinold Commodities, Inc.*¹⁹ as my points of departure. Each offers insight on the "unique nature" of fiduciary duties: *Kinzer* held that Illinois fiduciary duty law is the product of "agency, contract and equity" rather than tort law;²⁰ *Armstrong* addressed implied fiduciary duties arising out of agency contracts;²¹ and *Martin* analyzed a traditional equity claim against a fiduciary as well as a statutory tort claim against the same fiduciary.²² I then turn in Part III to *Neade* and *Pippen*, both professional negligence cases involving conflicts of interest, to demonstrate how these cases were argued and why they chose the "duplication" test to exclude fiduciary duty claims in these professional negligence cases. I seek in Part IV to show the difference between the fiduciary duty of due care and the fiduciary duty of undivided loyalty as the basis for reconciling these and other Illinois professional liability precedents with *Neade* and *Pippen*. I suspect this distinction will prove determinative in shaping future Illinois fiduciary duty cases against professionals, as I illustrate in Part V using loyalty claims predicated on abuse of trust such as sex with patients or clients, disclosures of confidential information, self-dealing transactions, and other conflicts of interest yielding personal or commercial advantage to the disloyal fiduciary at the expense of the patient or client. I close in Part VI by urging Illinois courts to resolve future professional liability cases not by focusing on the injury caused by the professional's conduct, as *Neade* holds, but rather, on the nature of the controversy and the policy governing it.²³

II. FIDUCIARY DUTY: A LAW APART

One doesn't need to look too far to understand a basic problem in comparing tort and fiduciary duty law: law schools don't teach

16. *Id.*

17. 128 Ill. 2d 437, 539 N.E.2d 1216 (1989).

18. 174 Ill. 2d 281, 673 N.E.2d 290 (1996).

19. 163 Ill. 2d 33, 643 N.E.2d 734 (1994).

20. *Kinzer v. City of Chicago*, 128 Ill. 2d 437, 444, 539 N.E.2d 1216, 1220 (1989).

21. *See generally Armstrong*, 673 N.E.2d 290 (1996).

22. *See generally Martin*, 643 N.E.2d 734 (1994).

23. *Cf. Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 74, 643 N.E.2d 734, 754 (1994) ("Heinold again argues that whether the right to a jury trial exists depends upon the nature of the controversy rather than on the form of the action.").

fiduciary duty law as a foundational course on par with tort law.²⁴ As a result, many lawyers and courts do not automatically appreciate that fiduciary duty law differs profoundly from tort law in such fundamental areas as duty, breach, proximate cause, remedies and defenses.²⁵ The same is true of the fiduciary duty/contract law divide, and for much the same reason – law schools seldom teach this dichotomy beyond remedies courses, if they teach it at all.²⁶ The unique character of fiduciary duty law has not been lost on the Illinois Supreme Court, however. The court has frequently examined the historical and conceptual differences between fiduciary duty law and other fields, as reflected in *Kinzer*, *Armstrong*, and *Martin* and the cases cited within those key decisions. I have touched on *Kinzer*, *Armstrong*, and *Martin* in the

24. See generally Rafael Chodos, *Fiduciary Law: Why Now? Amending the Law School Curriculum*, 91 B.U. L. REV. 837 (2011) (reviewing the lack of focus on fiduciary duties as a law school subject).

25. The problem is compounded by tort law's amorphous and expansive character, as the Illinois Supreme Court itself noted in *Gerill Corp. v. J.L. Hargrove Builders, Inc.*:

Similarly, Wigmore stated that "Never did a Name so obstruct a true understanding of the Thing. To such a plight has it brought us that a favorite mode of defining a Tort is to declare merely that it is not a Contract." (1 J. WIGMORE, SELECT CASES ON THE LAW OF TORTS, at vii (1912), quoted in W. Prosser & W. Keeton, Torts § 1, at 2 n. 3 (5th ed. 1984).) One such ambiguous statement was this court's definition of a tort as "an act or omission giving rise, in virtue of the common law jurisdiction of the court, to a civil remedy which is not an action of contract." (*Morris v. Jamieson* (1903), 205 Ill. 87, 105, quoting F. POLLOCK, LAW OF TORTS 4.) Clearly, the problems courts and commentators have had in defining the term indicate that the meaning of the word "tort" is ambiguous.

128 Ill. 2d 179, 202–03, 538 N.E.2d 530, 541 (1989).

The Delaware Supreme Court made much the same point in another context in a case I recently argued there, *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund*:

Many centuries ago, Aristotle observed that we "often gain knowledge of (a) a characteristic by the opposite characteristic, and (b) of characteristics by those things in which they are exhibited." It follows, Aristotle then noted, that if one term in a pair of opposites is used in more than one sense, the other term will also be used in more than one sense. Good faith and bad faith are illustrative examples of opposite characteristics – as described by Aristotle – in that each is used in more than one sense and thereby informs our understanding of each other.

75 A.3d 101, 110 (Del. 2013) (footnotes omitted) (quoting ARISTOTLE, NICOMACHEAN ETHICS, BOOK V).

26. See Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008) (detailing how "equity" was gradually replaced by "remedies" as a law school subject following the adoption of the Federal Rules of Civil Procedure in 1937); Terence Kiely, *Damages, Equity and Restitution – Illinois Remedial Options*, 24 DEPAUL L. REV. 274, 274 n.1 (1975) ("Until relatively recent times, separate courses in Equity, Restitution, or Damages were offered with varying degrees of frequency. In addition, topics included within those subjects were and continue to be touched on in the context of other substantive courses such as Contracts, Torts, etc.").

past,²⁷ but I take the time to examine them more closely here because of their potential impact on future professional misconduct cases.

A. Kinzer v. City of Chicago

The question in *Kinzer* was whether the Illinois Local Governmental and Governmental Employees Tort Immunity Act (Illinois Tort Immunity Act)²⁸ protected Daniel Grim, a City of Chicago official, from liability for entering into contracts and incurring expenses, without prior City Council appropriations, in connection with the summer festival then known as “ChicagoFest,” the forerunner to the popular “Taste of Chicago.”²⁹ The festivals at issue took place between 1978 and 1983, with the case finally reaching the Illinois Supreme Court for decision in 1989.³⁰ The court ultimately found Grim enjoyed common law public official immunity for acting in good faith on the advice of the Corporation Counsel and consistent with past practice.³¹

Of greater interest for present purposes was the court’s treatment of the Illinois Tort Immunity Act defense. Count II of the complaint alleged that Grim had breached his fiduciary duties to the City of Chicago.³² Grim argued that this claim constituted a “tort” subject to the Illinois Tort Immunity Act because such claims are considered “torts” under Section 874 of the Restatement (Second) of Torts.³³ The court responded that it “has not accepted the Restatement (Second) of Torts view but has regarded breach of fiduciary duty as controlled by the substantive laws of agency, contract and equity.”³⁴ In support of this holding, the court cited its own decisions in *City of Chicago ex rel. Cohen v. Keane*³⁵ and *People ex rel. Daley v. Warren Motors, Inc.*³⁶ as well as the United States Supreme Court’s decision in *United States v. Carter*.³⁷ These well-known opinions deserve more comment than the Illinois Supreme Court’s brief, understated parenthetical following its citation to *Keane* noting that “restitution is [a] proper remedy for breach of

27. William Lynch Schaller, *Corporate Opportunities and the Third Party “Refusal to Deal” Defense: Policy and Practice Lessons from Illinois*, 47 J. MARSHALL L. REV. 1, 6–9 (2014).

28. Ill. Rev. Stat. 1985, ch. 85, par. 1–101 (now codified at 745 ILL. COMP. STAT. §§ 10/1-101–102).

29. 128 Ill. 2d at 439–42, 539 N.E.2d at 1217–18.

30. *Id.* at 440, 539 N.E.2d at 1217.

31. *Id.* at 445–46, 539 N.E.2d at 1220.

32. *Id.*, 539 N.E.2d at 1220.

33. *Id.*, 539 N.E.2d at 1220.

34. *Id.*, 539 N.E.2d at 1220 (citations omitted).

35. 64 Ill. 2d 559, 357 N.E.2d 452 (1976).

36. 114 Ill. 2d 305, 500 N.E.2d 22 (1986).

37. 217 U.S. 286 (1910).

fiduciary duty.”³⁸

1. City of Chicago ex rel. Cohen v. Keane

Keane could hardly be more famous for aficionados of either Illinois public corruption or Illinois fiduciary duty law. Public corruption is practically synonymous with Illinois government,³⁹ of course, and has been at least since the wide-open days of Chicago Mayor William Hale Thompson and gangster Al Capone.⁴⁰ The “provocatively uncouth” Thompson “established a standard of citywide venality and local favor-mongering on par with the misdeeds of any of the city’s wrong-thinking, Catholic-leaning Democratic Party factions.”⁴¹ This set the stage for the emergence of the Cook County Democratic machine later run by Mayor Richard J. Daley,⁴² with Alderman Thomas Keane serving as his City Council floor leader and finance chief.⁴³ “[I]n the lore of Chicago politics,” Keane “settled for second-tier political influence in order to amass a material fortune”⁴⁴ – a fortune that rested in part on his secret acquisition of properties he subsequently caused the City of Chicago to purchase at a premium as part of its urban renewal efforts, all without disclosing his conflicts of interest.⁴⁵ Unfortunately for Keane, United States Attorney William J. Bauer and his successor James R. Thompson were busy developing the “intangible rights” doctrine as a basis for prosecuting Illinois state and local officials for depriving Illinois of their “honest services.” The first of such prosecutions came in 1973, with the convictions of former Illinois Governor (and then sitting Seventh Circuit Judge)

38. *Kinzer v. City of Chicago*, 128 Ill. 2d 437, 445, 539 N.E.2d 1216, 1220 (1989).

39. See, e.g., Juan Perez, Jr., *In Illinois, We of Little Faith in Our Politicians: Poll: 28% of Residents Trust State Government – Lowest Rate in U.S.*, CHI. TRIB., Apr. 5, 2014, § 1, at 1 (describing Gallop poll that “put Illinois 50th nationwide and far behind Rhode Island and Maine, where 40 percent of residents polled had at least a fair level of trust in their state government.”).

40. Joel Hood, *Al Capone, Chicago Mayor “Big Bill” Thompson Shown Together in Photo: Professor Says Picture is Proof of Link Between the Men*, CHI. TRIB., June 2, 2009, http://articles.chicagotribune.com/2009-06-02/news/0906010546_1_al-capone-mayor-evasion (“In a city known for its corruption and cronyism, ‘Big Bill’ Thompson was sometimes called the best mayor money could buy.”).

41. LARRY BENNETT, *THE THIRD CITY: CHICAGO AND AMERICAN URBANISM* 3 (2010).

42. *Id.*

43. *Keane*, 64 Ill. 2d at 561, 357 N.E.2d at 453; THOMAS DYJA, *THE THIRD COAST: WHEN CHICAGO BUILT THE AMERICAN DREAM* 285 (2013).

44. BENNETT, *supra* note 41, at 64. See also ADAM COHEN & ELIZABETH TAYLOR, *AMERICAN PHARAOH: MAYOR RICHARD J. DALEY – HIS BATTLE FOR CHICAGO AND THE NATION* 533 (2000) (quoting Keane as saying that “Daley wanted power, and I wanted to make money, and we both succeeded.”).

45. *Keane*, 64 Ill. 2d at 562, 357 N.E.2d at 453.

Otto Kerner, Jr. and former Illinois Director of Revenue Theodore Isaacs in connection with the Arlington Park Racetrack stock scandal.⁴⁶ Keane joined this expanding club in 1974 with his own corruption indictment,⁴⁷ and the Seventh Circuit sustained his eventual federal conviction in 1975.⁴⁸

There is much more to the *Keane* story from the Illinois Supreme Court's perspective.⁴⁹ Isaacs was not content with his racetrack misdeeds that led to his indictment with Kerner; he was also the subject of an unrelated state indictment that later engulfed the Illinois Supreme Court itself in scandal shortly before the *Keane* case arrived before that court. This earlier Isaacs scandal involved apparent bribery of two Illinois Supreme Court Justices to vote in favor of dismissing the state indictment against Isaacs, leading to a special commission investigation headed by then-attorney John Paul Stevens that ultimately resulted in the resignations of Justices Ray Klingbiel and Roy Solfisburg in 1969.⁵⁰ These judicial resignations, followed by the Seventh Circuit's affirmance of the Kerner, Isaacs and Keane convictions and a host of intervening indictments of other state and local officials that resulted in civil actions,⁵¹ set the political stage for the Illinois Supreme Court's review of the civil *Keane* case in 1976.

The purely legal aspects of *Keane* seem mundane by comparison, yet they would eventually prove more crucial to the

46. See generally *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974) (affirming convictions of Kerner and Isaacs); BILL BARNHART AND GENE SCHLICKMAN, *KERNER: THE CONFLICT OF INTANGIBLE RIGHTS* (1999); HANK MESSICK, *THE POLITICS OF PROSECUTION: JIM THOMPSON, RICHARD NIXON, MARJE EVERETT & THE TRIAL OF OTTO KERNER* (1978).

47. ROBERT E. HARTLEY, *BIG JIM THOMPSON OF ILLINOIS* 61–62 (1979).

48. *United States v. Keane*, 522 F.3d 534 (7th Cir. 1976).

49. I mean to suggest here that the historical evidence supports rather than undercuts the Illinois Supreme Court's decision in *Keane*. Cf. Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625 (2013) (suggesting use of history to undermine judicial precedent).

50. See generally KENNETH A. MANASTER, *ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS* (2001).

51. See, e.g., *United States v. Bush*, 522 F.2d 641, 653 (7th Cir. 1975) (affirming conviction of Mayor Daley's press secretary Earl Bush on conflict of interest charges relating to Bush's ownership of an advertising firm doing business with O'Hare Airport); *United States v. Wigoda*, 521 F.2d 1221, 1230 (7th Cir. 1975) (affirming conviction of Chicago alderman Paul Wigoda on bribery charges that later resulted in civil litigation in *Chicago Park District v. Kenroy, Inc.*, 78 Ill. 2d 555, 402 N.E.2d 181 (1980)); *Fuchs v. Bidwell*, 65 Ill. 2d 503, 505–07, 359 N.E.2d 158, 159–60 (1976) (fiduciary duty action against Illinois General Assembly leader Arthur Bidwell and other legislators who received secret stock as part of the Arlington Park Racetrack scandal); *County of Cook v. Barrett*, 36 Ill. App. 3d 623, 625–27, 344 N.E.2d 540, 543–45 (1st Dist. 1975) (fiduciary duty action against Cook County Clerk Edward Barrett for taking bribes in connection with voting machine purchases); Joel Flaum & Jane Carr, *The Equitable Bill of Accounting – A Viable Remedy for Combatting Official Misconduct*, 62 ILL. B.J. 622, 627 (1974) (discussing civil actions available against corrupt public officials).

outcome in *Kinzer*. Here, too, a bit of history is in order. In 1974, Justice Walter Schaefer authored the Illinois Supreme Court's seminal corporate opportunity fiduciary duty decisions in *Kerrigan v. Unity Savings Ass'n*.⁵² and *Vendo Co. v. Stoner*.⁵³ The upshot of these opinions was that a fiduciary who fails to disclose his secret interest in a transaction faces liability for damages, restitution and compensation forfeiture when the business opportunity falls within his principal's "line of business."⁵⁴ The outcomes in these cases were particularly tough: *Kerrigan* ended in a judgment on the pleadings for the plaintiff with a constructive trust ordered against the fiduciaries on remand,⁵⁵ and *Vendo* affirmed a \$7 million damages award against a fiduciary plus three years of compensation forfeiture representing the period of his disloyalty.⁵⁶

With this background in mind, the Illinois Supreme Court made short work of Keane's secret land deal profits. Citing *Kerrigan* and *Vendo*, Justice Schaefer in *Keane* quickly turned aside Keane's argument that the City of Chicago was not in the business of acquiring properties at scavenger sales and therefore had no interest or expectancy in the properties in question. "If in fact the City did not exercise that power," Justice Schaefer observed, "its omission in that regard would furnish no defense to the defendant in view of his failure to disclose his own adverse interest in the matter."⁵⁷ Justice Schaefer then commented that a public sector fiduciary should suffer the same fate as a private sector fiduciary who exploits his position for personal benefit: "The fiduciary responsibility of a public officer cannot be less than that of a private individual. In both instances it is gain to the agent from the abuse of the relationship that triggers the right to recover, rather than loss to the principal."⁵⁸ Justice Schaefer later cited *United States v. Carter*⁵⁹ as further support for his restitutionary holding in *Keane* that a public fiduciary cannot profit through his breach of trust.⁶⁰

2. People ex rel. Daley v. Warren Motors, Inc.

In a classic turn of events, a decade after Keane's tribulations,

52. 58 Ill. 2d 20, 22, 317 N.E.2d 39, 40 (1974).

53. 58 Ill. 2d 289, 292, 321 N.E.2d 1, 3 (1974).

54. *Kerrigan*, 58 Ill. 2d at 27–30, 317 N.E.2d at 43–44, *Vendo*, 58 Ill. 2d at 303–07, 321 N.E.2d at 9–11.

55. *Kerrigan*, 58 Ill. 2d at 24, 31–32, 317 N.E.2d at 41, 45.

56. *Vendo*, 58 Ill. 2d at 313–14, 321 N.E.2d at 14–15.

57. *Keane*, 64 Ill. 2d at 564, 357 N.E.2d at 455.

58. *Id.* at 565–66, 357 N.E.2d at 456.

59. *Id.*, 357 N.E.2d at 456 (citing *Carter*, 217 U.S. 286 (1910)).

60. *Id.*, 357 N.E.2d at 456–57. Justice Schaefer again relied upon *Carter* in making the same public official fiduciary duty arguments in his dissent in *Fuchs*, 65 Ill. 2d at 511–16, 359 N.E.2d at 162–65 (1976), another public corruption case handed down the day after the Illinois Supreme Court denied rehearing in *Keane*.

Mayor Daley's son became Cook County State's Attorney and brought an action styled *People ex rel. Daley v. Warren Motors, Inc.*⁶¹ The underlying problem in *Warren Motors* was all too familiar: public corruption, this time in the form of bribes Warren Motors and its president, Warren Ottinger, had paid to Cook County board of appeals officials in an effort to secure real estate tax relief during the years 1974 to 1980.⁶² The case prompted an opinion by Justice Daniel Ward, himself a former Cook County State's Attorney and a survivor of the Illinois Supreme Court's dark years following the Klingbiel/Solfisburg scandal.⁶³ In fact, he was Chief Justice of the Illinois Supreme Court at the time of the *Keane* decision.⁶⁴

Given his deep familiarity with this sordid history, Justice Ward condemned the bribery scheme in *Warren Motors*. Summoning *Keane* and other public and private sector fiduciary cases,⁶⁵ Justice Ward held that constructive trust and restitution principles sounding in equity precluded Warren Motors and Ottinger from benefiting by their inducement of fiduciary misconduct.⁶⁶ Accordingly, the court found Warren Motors and Ottinger liable for the tax reductions they received.⁶⁷ Indeed,

61. 114 Ill. 2d 305, 500 N.E.2d 22 (1986).

62. *Id.* at 308, 500 N.E.2d at 23.

63. *Id.*, 500 N.E.2d at 23.

64. *Chief Justices of the Illinois Supreme Court*, ILLINOIS SUPREME COURT, <http://www.state.il.us/court/supremecourt/historical/Chiefs.asp> (last visited Mar. 15, 2015).

65. *See* 114 Ill. 2d at 314–15, 500 N.E.2d at 26:

Equity will assume jurisdiction and impose a constructive trust to prevent a person from holding for his own benefit an advantage gained by the abuse of a fiduciary relationship. (*Perry v. Wyeth* (1962), 25 Ill. 2d 250, 253, 184 N.E.2d 861.) At the time the tax assessments were reduced on the dealership property, Lavin and Erskine, in their capacities relating to the assessment and levying of taxes, were acting as fiduciaries for the people of Cook County. (*See Chicago Park District v. Kenroy, Inc.* (1980), 78 Ill. 2d 555, 564–65, 402 N.E.2d 181. and cases cited therein.) If a fiduciary acquires title to property by virtue of that relation, equity will regard him as a trustee of the legal title (*Doner v. Phoenix Joint Stock Land Bank* (1942), 381 Ill. 106, 113–14, 45 N.E.2d 20; *County of Cook v. Barrett* (1975), 36 Ill. App. 3d 623, 628, 344 N.E.2d 540), and the fiduciary responsibility of a public official cannot be considered less than that of a private person (*City of Chicago ex rel. Cohen v. Keane* (1976), 64 Ill. 2d 559, 565, 357 N.E.2d 452). Constructive trusts have been recognized as a proper remedy where a public official has breached his fiduciary responsibilities (*Village of Brookfield v. Pentis* (7th Cir.1939), 101 F.2d 516; *Chicago Park District v. Kenroy, Inc.* (1980), 78 Ill. 2d 555, 402 N.E.2d 181; *City of Chicago ex rel. Cohen v. Keane* (1976), 64 Ill. 2d 559, 357 N.E.2d 452; *County of Cook v. Barrett* (1975), 36 Ill. App. 3d 623, 344 N.E.2d 540; *cf. Fuchs v. Bidwill* (1976), 65 Ill. 2d 503, 359 N.E.2d 158), and, considering the allegations, the plaintiff here properly sought relief in equity.

66. *Id.* at 314–20, 500 N.E.2d at 26–29.

67. *Id.* at 321, 500 N.E.2d at 29.

quoting both *Winger v. Chicago City Bank & Trust Co.*⁶⁸ and *United States v. Carter*,⁶⁹ the *Warren Motors* court went further and held that restitution was required even if there was no identifiable *res*.⁷⁰ In addition, the Illinois Supreme Court held that the trial court had properly struck the defendants' jury demand since the action arose in equity.⁷¹

3. United States v. Carter

As noted, the United States Supreme Court's decision in *United States v. Carter*⁷² made a guest appearance in both *Keane*⁷³ and *Warren Motors*.⁷⁴ In that case Oberlin Carter, an army captain in charge of a harbor improvement project in Georgia, secretly profited by his award of the construction contract.⁷⁵ The Court held that the fairness of the contract was beside the point; no secret profit on the fiduciary's part could be allowed.⁷⁶ In support of its holding, the Court in *Carter* reached back to the foundational case of all Anglo-American fiduciary duty law, Lord Chancellor King's 1726 opinion in *Sanford v. Keech*.⁷⁷

B. Armstrong v. Guigler

As should be apparent, the Illinois Supreme Court's cryptic statement in *Kinzer*, that breach of fiduciary duty is not a tort and is instead "controlled by the substantive laws of agency, contract

68. *See id.* at 317, 500 N.E.2d at 27 (citing *Winger*, 394 Ill. 94, 67 N.E. 265 (1946)).

69. *See id.* at 318, 500 N.E.2d at 27 (citing *Carter*, 217 U.S. 286, 317 (1910)).

70. *Id.* at 315–18, 500 N.E.2d at 26–28. Justice Ward did not bother to cite his earlier opinion for the court to the same effect in *Mullaney, Wells & Co. v. Savage*, 78 Ill. 2d 534, 552–53, 402 N.E.2d 574, 583 (1980):

We also question whether a determination of the plaintiff's rights to restitution required a tracing of trust property into its product, as the appellate court assumed The defendants' duty to make restitution could not be diminished by their subsequent loss of that property through forfeiture any more than it would be if the value of the Blossman shares had been dissipated in some imprudent investment.

71. *Warren Motors*, 114 Ill. 2d at 316–17, 500 N.E.2d at 27.

72. 217 U.S. 286 (1910).

73. *Keane*, 64 Ill. 2d at 567, 357 N.E.2d at 456.

74. *Warren Motors*, 114 Ill. 2d at 317, 500 N.E.2d at 27.

75. *Carter*, 217 U.S. at 287.

76. *Id.* at 306 ("So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.").

77. *Id.* at 307. *See* Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. REV. 921, 922, 942–45 (2011) (discussing the history and holding of *Keech*).

and equity,"⁷⁸ could not have been more freighted with history or meaning. The same holding appeared in a later Illinois Supreme Court opinion, *Armstrong v. Guigler*,⁷⁹ in which the court weighed competing statute of limitations arguments under contract and fiduciary duty law. *Armstrong* is especially relevant here, as it offered the court an opportunity to expound on the "unique character" of fiduciary duty law.⁸⁰

The facts in *Armstrong* were relatively prosaic. Armstrong and his wife contracted with a brokerage firm to sell their property, and Guigler was an agent of the brokerage firm. Eventually the parties entered into a contract for the purchase and sale of the property, with Guigler and the other buyers agreeing to assume the mortgages on the property.⁸¹ The mortgages were never assumed, however, and Armstrong and his wife thereafter sued for breach of fiduciary duty.⁸² The trial court dismissed the Armstrongs' action on the strength of the five-year "catch-all" statute of limitations,⁸³ but the appellate court reversed on the ground that the 10-year contract statute of limitation applied.⁸⁴ Thus, the underlying question before the Illinois Supreme Court was how to characterize the Armstrongs' claim for statute of limitations purposes.

After noting that it was the court's obligation to look behind the allegations in a complaint to discover the true character of plaintiffs' cause of action, the Illinois Supreme Court focused on a controlling fact: the Armstrongs were not seeking damages for Guigler's failure to perform his contractual duties set forth in the brokerage listing agreement.⁸⁵ "Rather, plaintiffs claim[ed] that defendants, in their legal status as agents, breached a general duty to disclose all material information, resulting in compensable injury to plaintiffs."⁸⁶ Breach of such an implied fiduciary duty, the court held, "is not an action *ex contractu* simply because the duty arises by legal implication from the parties' relationship under a written agreement . . . In fact, a fiduciary relationship is founded on the

78. *Kinzer*, 128 Ill. 2d at 445, 539 N.E.2d at 1220.

79. *Armstrong*, 174 Ill. 2d at 294, 673 N.E.2d at 296 ("In fact, a fiduciary relationship is founded on the substantive principles of agency, contract and equity.") (emphasis in original).

80. *Id.*, 673 N.E.2d at 296 ("It is precisely because a fiduciary relationship is an amalgamation of various aspects of legal jurisprudence that a purely contractual statute of limitations is inapplicable to a breach thereof.")

81. *Id.* at 284, 673 N.E.2d at 292.

82. *Id.* at 284, 673 N.E.2d at 292.

83. *Armstrong v. Guigler*, 273 Ill. App. 3d 85, 85, 652 N.E.2d 355, 356 (3d Dist. 1995).

84. *Id.* at 88, 652 N.E.2d at 357.

85. *Armstrong*, 174 Ill. 2d at 290, 673 N.E.2d at 295; accord *Miller v. Harris*, 2013 IL App 2d 120512, at ¶ 18–20, 985 N.E.2d 671, 677–78 (2d Dist. 2013) (finding accountant owed fiduciary duties to plaintiffs, notwithstanding contract disclaimer to the contrary).

86. *Armstrong*, 174 Ill. 2d at 292–93, 673 N.E. 2d at 296.

substantive principles of agency, contract and equity.”⁸⁷ The court also pointed to the “unique character” of fiduciary duties as recognized in a Seventh Circuit limitations case.⁸⁸

All of this is consistent with the *sui generis* nature of agency contracts under the Restatement (Second) of Agency, as I have explained elsewhere.⁸⁹ For example, Illinois courts have been reluctant to permit advance waivers of fiduciary duties.⁹⁰ Similarly, Illinois courts have scrutinized fiduciary releases with an intensity unknown in other contexts.⁹¹ Illinois courts have also treated fiduciary releases as distinct from tort releases for purposes of the Contribution Among Joint Tortfeasors Act.⁹² In addition, the Illinois Supreme Court has held that fiduciary compensation can be subject to disclosure obligations, even though the parties are otherwise dealing at arm’s length in negotiating their contractual relationship.⁹³ Combine these outcomes with prejudgment interest, compensation forfeiture, corporate opportunity liability, corporate competition exposure, fairness inquiries and other special fiduciary duty rules,⁹⁴ and one can quickly see that fiduciary duty law is plainly not interchangeable with tort and contract law.

87. *Id.* at 293–94, 673 N.E.2d at 296 (citing *Kinzer v. City of Chicago*, 128 Ill. 2d 437, 445, 539 N.E.2d 1216, 1220 (1989)).

88. *Id.* at 294, 673 N.E.2d at 296–97 (citing *Havoco of America, Ltd. v. Sumitomo Corp.*, 971 F.2d 1332 (7th Cir. 1992)).

89. See Schaller, *supra* note 27, at 7–8, n. 27 (discussing *Armstrong* and quoting the Introductory Note from the Restatement).

90. See *Labovitz v. Dolan*, 189 Ill. App. 3d 403, 417, 545 N.E.2d 304, 313 (1st Dist. 1989) (explaining advance waivers of fiduciary duties are not permitted under Illinois law).

91. See, e.g., *Peskin v. Deutsch*, 134 Ill. App. 3d 48, 479 N.E.2d 1034 (1st Dist. 1985) (reviewing release to see if it was just and equitable, with the defendant asserting the release bearing the burden of clear and convincing proof).

92. See *Cherney v. Soldinger*, 299 Ill. App. 3d 1006, 1075, 702 N.E.2d 231, 238 (1st Dist. 1998) (release of one released all fiduciary wrongdoers).

93. See *Martin v. Heinold Commodities, Inc.*, 117 Ill. 2d 67, 78, 510 N.E.2d 840, 845 (1987) (noting that agent has duty to disclose special compensation knowledge at the outset of agency relationship).

94. See generally William Lynch Schaller, *Corporate Opportunities and Corporate Competition in Illinois: A Comparative Discussion*, 46 J. MARSHALL L. REV. 1, 16–31 (2012) (discussing Illinois fiduciary duties and remedies); William Lynch Schaller, *Competing After Leaving: Fiduciary Duties of Closely Held Corporation Shareholders After Hagshenas v. Gaylord*, 84 ILL. B. J. 354 (1996) (criticizing recognition of shareholder fiduciary duties based upon inapt analogy to partner fiduciary duties); William Lynch Schaller, *Disloyalty and Distrust: The Eroding Fiduciary Duties of Illinois Employees*, 3 DEPAUL BUS. L. J. 1 (1991) (criticizing the “preparing to compete” defense in Illinois fiduciary competition cases); Lin Hanson, *Downsizing Shareholders’ Fiduciary Duties*, 99 ILL. B. J. 314 (2011) (discussing 805 ILCS5/7.90, under which a shareholder may renounce his voting, board representation, management and control rights, as a way around shareholder fiduciary liability in Illinois closely held and close corporations).

C. Martin v. Heinold Commodities, Inc.

I will return to this “unique character” theme later, but let me first illustrate it by examining *Martin v. Heinold Commodities, Inc.* (*Martin II*),⁹⁵ a fiduciary duty case decided between *Kinzer* and *Armstrong*, in which equitable and legal relief were sought and addressed. Even though *Martin II* did not cite *Kinzer* and could not cite *Guigler*, it vividly demonstrates the interplay among “agency, contract and equity” described in *Kinzer* and *Guigler*.

Martin II, as the designation suggests, was the Illinois Supreme Court’s second opinion in that protracted litigation. The court’s first opinion, *Martin v. Heinold Commodities, Inc.* (*Martin I*),⁹⁶ held that Heinold, as a commodities broker and agent with specialized knowledge, arguably owed a pre-agency fiduciary duty of full disclosure to its customer-principals in setting its initial compensation terms,⁹⁷ notwithstanding the general rule that “an agent is subject to no fiduciary duty in making the agreement by which he becomes [an] agent and may thereafter act in accordance with its terms.”⁹⁸ These terms included a “foreign service fee” that was actually a disguised commission on top of other compensation customers were to pay Heinold in connection with their London Commodities Options investments.⁹⁹ On remand following *Martin I*, the trial court, sitting in equity without a jury, held that the details surrounding this “foreign service fee” were material, misleading and had not been fully disclosed and therefore ordered Heinold to pay compensatory damages reflecting plaintiffs’ entire investment losses of \$1,728,948.27, of which \$597,800 was payment for foreign service fees, and punitive damages of \$500,000, plus prejudgment interest.¹⁰⁰

Two aspects of the Illinois Supreme Court’s *Martin II* decision

95. 163 Ill. 2d 33, 643 N.E.2d 734 (1994).

96. 117 Ill. 2d 67, 510 N.E.2d 840 (1987).

97. *Id.* at 76–77, 510 N.E.2d at 844 (“There is also no dispute as to the nature of the defendant’s fiduciary duty to the plaintiff class. Within the scope of its agency, defendant is required to act on behalf of the plaintiff class and in its interests, refraining from acting in its own interest without first disclosing those facts which it has reason to believe would be material to the investment decisions made by members of the plaintiff class.”) (citing *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 385, 432 N.E.2d 849, 851–52 (1982); *Moehling v. W.E. O’Neil Constr. Co.*, 20 Ill. 2d 255, 267–68, 170 N.E.2d 100, 107 (1960); *Blanchard v. Lewis*, 414 Ill. 515, 524, 112 N.E.2d 167, 172 (1953); RESTATEMENT (SECOND) OF AGENCY §§ 389, 390 (1958)).

98. See *Martin I*, 117 Ill.2d at 78, 510 N.E.2d at 845 (quoting Restatement (Second) of Agency § 389, comment b (1958)).

99. *Id.* at 73, 510 N.E.2d at 842–43. As it happens, I encountered “foreign service fees” in connection with London Commodities Options in a bond coverage case back in the early 1980s. See *Mortell v. Ins. Co. of N. Am.*, 120 Ill. App. 3d 1016, 458 N.E.2d 922 (1st Dist. 1983), *later appeal*, 165 Ill. App. 3d 915, 520 N.E.2d 847 (1st Dist. 1988).

100. *Martin II*, 163 Ill. 2d at 43, 643 N.E.2d at 739.

stand out. First, throughout its opinion the court repeatedly reaffirmed the unique character of fiduciary duties in terms of rights, remedies and procedure. Focusing on Heinold's wrongful gain represented by the fake foreign service fee, the supreme court noted that equitable actions seeking constructive trusts and accountings hold defendants liable for their unjust profits, not for damages.¹⁰¹ "[I]t is gain to the agent from the abuse of the relationship that triggers the right to recover, rather than loss to the principal," the court observed, citing *Keane*.¹⁰² The fake foreign service fee had plainly caused Heinold to be unjustly enriched, so the supreme court affirmed the \$597,800 constructive trust determination.¹⁰³ The court went on to hold that breach of fiduciary duty gives rise to equitable relief like an accounting and a constructive trust even if plaintiff has an adequate remedy at law, and no jury trial rights attach, as "[e]quity [has traditionally] recognized and enforced fiduciary duties."¹⁰⁴ The court also approved the \$500,000 punitive damage award for breach of trust as an appropriate deterrence measure: "A fiduciary such as Heinold would have little reason not to conduct its business in a fraudulent manner if the most it would be required to pay to plaintiffs would be Heinold's gains, as is the case here."¹⁰⁵

Second, the Illinois Supreme Court contrasted causation for gains with causation for losses. Under both their fiduciary duty and consumer fraud theories, plaintiffs argued they were entitled to recover their entire investment losses on a "but for" causation basis: if they had known of the fake foreign service fee they would not have invested at all.¹⁰⁶ The Supreme Court disagreed, stressing that plaintiffs sought to make their investments independent of the fake fee: "The harm here was not the inducement to purchase the LCO, but the inducement to pay an additional fee, the fraudulent foreign

101. *Id.* at 56–57, 643 N.E.2d at 745–46 (citing 1 D. DOBBS, LAW OF REMEDIES § 4.3(5), at 611 (2d ed. 1993)).

102. *Id.*, 643 N.E.2d at 745–46 (citing *Keane*, 64 Ill. 2d 559, 565–66, 357 N.E.2d 452, 455–57 (1976)).

103. *Id.* at 55, 643 N.E.2d at 745 ("[a] person who has conferred a benefit upon another because of a mistake, whether or not the mistake was induced by fraud or misrepresentation, is entitled to restitution only if the mistake caused the conferring of the benefit." RESTATEMENT OF RESTITUTION § 9 (1937)). The *Martin II* court stated: "[i]n the instant case, the mistake, plaintiffs' belief that the foreign service fee was a charge Heinold necessarily incurred in LCO transactions and not a commission, induced by Heinold's deception, caused plaintiffs to confer a benefit on Heinold." *Id.*

104. *Id.* at 79, 643 N.E.2d at 755–56 (quoting 1 D. DOBBS, LAW OF REMEDIES § 2.6(3), at 158 (2d ed. 1993), citing *Miller v. Russell*, 224 Ill. 68, 72, 79 N.E. 434, 455–57 (1906); *Mayr v. Nelson Chesman & Co.*, 195 Ill. App. 587, 602 (1st Dist. 1915); Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 IND. L. J. 463 (1985)).

105. *Martin II*, 163 Ill. 2d at 82, 643 N.E.2d at 757 (paraphrasing *Vendo Co.*, 58 Ill. 2d at 303–07, 321 N.E.2d at 9–11).

106. *Id.* at 53–54, 643 N.E.2d at 744–45.

service fee. The evil was the price paid.”¹⁰⁷ Thus, on these peculiar facts, the *Martin II* plaintiffs’ own investment choice caused their investment injury under any theory, leaving the court no reason to further explore the differences between proximate cause in the tort setting and proximate cause in the fiduciary setting. Curiously, the *Martin II* court claimed support for its proximate cause holding could be found in the Illinois Supreme Court’s earlier fiduciary duty damages decision in *Vendo*, even though *Vendo* in fact offered no proximate cause analysis.¹⁰⁸ The *Martin II* court also quoted *Vendo* for its crucial policy pronouncement that a fiduciary’s failure to gain from his wrongdoing does not operate to limit the principal’s right to seek damages for its losses.¹⁰⁹

In short, a review of *Kinzer*, *Armstrong*, *Martin I* and *Martin II* makes it clear that fiduciary duty law is a law apart. Its primary purpose is deterrence of fiduciary wrongdoing, as shown in one case after another holding that the principal is entitled to the fiduciary’s gain even if the principal has suffered no loss, as in *Kerrigan*, *Keane*, *Martin II* and *Carter*, and even if the fiduciary has dissipated his gains, as in *Mullaney* and *Warren Motors*. And the reverse is equally true: the principal is entitled to its losses even if the fiduciary has no gain, as the Illinois Supreme Court held in *Vendo* and reaffirmed in *Martin II*. All of these cases are of a piece: they reflect the powerful and unforgiving deterrence policy behind the fiduciary duty of loyalty.

III. THE PROFESSIONAL MALPRACTICE “EXCEPTION” TO FIDUCIARY DUTIES

As I noted at the outset, the Illinois Supreme Court recognized a medical malpractice tort exception to fiduciary duty claims in *Neade*, and the Illinois Appellate Court recently followed suit in embracing a legal malpractice tort exception to fiduciary duties in *Pippen*. Reconciling these cases with *Kerrigan*, *Vendo*, *Keane*, *Mullaney*, *Warren Motors*, *Kinzer*, *Martin II* and *Armstrong* requires a precise understanding of how *Neade* and *Pippen* were argued and decided.

107. *Id.* at 69, 643 N.E.2d at 751 (“Plaintiffs, as investors, necessarily assumed a risk, and that risk was the possibility that the market would not move in their favor. Where plaintiffs knowingly assumed the risk of the market at the price Heinold offered, this argument has no merit. Heinold’s deception did not affect the known market risk.”).

108. *Id.* at 64–66, 643 N.E.2d at 749–50.

109. *Id.* at 65, 643 N.E.2d at 749 (“The limitation on a plaintiff’s recovery proposed by defendants would mean that a fiduciary could violate his duty without incurring any risk. For if his misconduct were discovered the most he could lose would be the profit gained from his illegal venture; the law would have operated only to restore him [to the same position he would have been in had he faithfully performed his duties.]” (quoting *Vendo Co.*, 58 Ill. 2d at 305–06, 321 N.E.2d at 10–11)).

A. Neade v. Portes

The sad facts of *Neade* seemed to confirm everyone's worst fear: a doctor cutting corners to personally profit at the expense of his patient's health without so much as a warning. In particular, Therese Neade's husband, Anthony Neade, had a history of heart problems and began to exhibit symptoms of coronary artery blockage at age 37.¹¹⁰ Neade's primary physician, Dr. Steven Portes, hospitalized Neade for several days and had several tests run on Neade, including a thallium stress test and an electrocardiogram (EKG), but the test results were normal and Neade was discharged.¹¹¹ Neade continued to complain of chest pain and related symptoms over the next several weeks, but Dr. Portes again thought they were not cardiac-related based upon the previous hospital thallium and EKG test results. When Neade returned yet again a few weeks later, this time complaining of stabbing chest pains, Dr. Portes' associate, Dr. Huang, recommended an angiogram. Dr. Portes did not authorize an angiogram, however, either then or nine months later when Neade returned once more complaining of chest pain, despite another associate's recommendation that an angiogram be done. Shortly thereafter Neade died of a massive myocardial infarction caused by coronary artery blockage.¹¹²

The fiduciary duty dimension to the case centered on Dr. Portes' financial incentives under his contract with Chicago HMO, Neade's health insurer.¹¹³ Somewhat simplified, the contract established a "Medical Incentive Fund" of \$75,000 to cover costs for patient referrals and outside medical tests.¹¹⁴ If money was left over at year-end, 60% of the balance went to Dr. Portes and his fellow physicians and 40% went to Chicago HMO.¹¹⁵ If the fund was exhausted before year-end, Dr. Portes and his group were required to pay for outside consultants and tests.¹¹⁶ Thus, Dr. Portes at some level had an incentive not to have Neade undergo an angiogram. Needless to say, Neade was not informed of this arrangement.¹¹⁷ The trial court eventually ruled that Dr. Portes' financial incentive had no bearing on the negligence standard of care and dismissed Neade's separate fiduciary duty claim for failure to state a cause of action.¹¹⁸ Neade's motion to reconsider – stating she and her late husband would have sought a second opinion from a physician

110. *Neade v. Portes*, 193 Ill. 2d 433, 435, 739 N.E.2d 496, 498 (2000).

111. *Id.* at 436, 739 N.E.2d at 498.

112. *Id.* at 436–37, 739 N.E.2d at 498–99.

113. *Id.* at 437–38, 739 N.E.2d at 499.

114. *Id.* at 437, 739 N.E.2d at 499.

115. *Id.*, 739 N.E.2d at 499.

116. *Id.*, 739 N.E.2d at 499.

117. *Id.*, 739 N.E.2d at 499.

118. *Id.*, 739 N.E.2d at 499–500.

outside Dr. Portes' group had she known of the incentive, and offering an expert physician's opinion that disclosure was required – was also denied.¹¹⁹

The Illinois Supreme Court, speaking through Justice McMorrow, began its analysis by noting that Illinois courts had never recognized a cause of action for breach of fiduciary duty against a physician.¹²⁰ The court saw no reason to create such a new cause of action for failure to disclose HMO incentives, holding that the fiduciary duty claim before it was “duplicative” of traditional tort principles governing Neade's physician malpractice claim since the tort standard of care inquiry necessarily would turn on whether an angiogram should have been ordered – the same inquiry framed by Neade's fiduciary duty claim.¹²¹ Under Neade's fiduciary duty theory, that her husband would have sought a second opinion if Dr. Portes had made full disclosure of his incentives, Neade still “would have been required to present expert testimony that the expert, after having examined Mr. Neade and considering his history, would have ordered an angiogram.”¹²² The court also pointed out that the damages alleged in Neade's negligence and fiduciary duty counts were the same.¹²³ In addition, the court observed, the Illinois General Assembly had “chosen to put the burden of disclosing any financial incentive plans on the HMO, rather than on the physician.”¹²⁴ The court then distinguished a large number of

119. *Id.* at 438, 739 N.E.2d at 499–500.

120. *Id.* at 440, 739 N.E.2d at 500.

121. *Id.* at 445, 739 N.E.2d at 503.

122. *Id.*, 739 N.E.2d at 503.

123. *Id.* at 446, 739 N.E.2d at 503.

124. *See id.*, 739 N.E.2d at 504 (citing the Managed Care Reform and Patient Rights Act, 215 ILL. COMP. STAT. 134/15(b) (West Supp. 1999). The court did not directly comment on the fact that this statute became effective in 2000, long after Neade's death in 1991, noting instead that the legislature could have placed the burden of disclosure on physicians if it had wished to do so. *Id.* The court also did not comment on the argument of *amici* in support of Dr. Portes that “[i]f the law must impose a duty to disclose incentives not to provide care, then logically it should impose that duty upon the entity which creates and imposes the incentives – the managed care organization.” Brief for Ill. State Med. Soc'y and the Am. Med. Assoc., as Amicus Curiae Supporting Appellant, at 7, *Neade v. Portes*, No. 87445 (Ill. Feb. 9, 2000). In support of this position, *amici* stressed that (i) HMOs limit care and require the patient to pay for out-of-network expenses and (ii) “state law requires managed care organizations to disclose to their enrollees the nature and scope of coverage and benefits provided under the insurance policy, including imitations and exclusions.” *Id.* at 4. These arguments dovetailed with Dr. Portes' assertions aimed at Chicago HMOs potential liability under *Petrovich v. Share Health Plan*, 188 Ill. 2d 17, 31–32, 719 N.E.2d 756, 765–66 (1999) (adopting implied agency theory rendering HMO's liable for medical malpractice). Brief of Appellants at 13–14, *Neade v. Portes*, No. 87445 (Ill. Feb. 9, 2000). The court acknowledged this “HMO liability” argument but refrained from commenting on it. *See Neade*, 193 Ill. 2d at 448, 739 N.E.2d at 504–05 (stating “[h]owever, the issue of whether an HMO breaches its fiduciary duty in failing to disclose incentive schemes is not before us today”).

Illinois cases permitting fiduciary duty claims against “professionals other than physicians,”¹²⁵ including the combined legal malpractice/breach of fiduciary duty action in *Coughlin v. SeRine*,¹²⁶ on the ground that the courts in those cases “did not determine whether the plaintiffs’ injuries were sufficiently addressed by traditional negligence claims.”¹²⁷ The court also distinguished the California decision in *Moore v. Regents of the University of California*,¹²⁸ where a doctor recommended removal of portions of plaintiff’s spleen and other cells so that the doctor could conduct research on them and profit thereby.¹²⁹ The court in *Neade* did permit Dr. Portes to be cross-examined about his financial incentives in the event he chose to testify, however.¹³⁰ Chief Justice Harrison, in dissent, stressed that even if Dr. Portes acted within the standard of care in not ordering the angiogram, he still could have breached his fiduciary duty of disclosure and thus deprived Neade of a second opinion, thereby causing Neade’s death.¹³¹

This last assertion – implying that a second opinion would have made a difference – appeared to be the real bone of contention, judging by the *Neade* majority’s proximate cause discussion.¹³² The Illinois Supreme Court framed the controlling inquiry – “it is the operative facts together with the injury that we look to in order to determine whether a cause of action is duplicative”¹³³ – and then held that “the operative fact in both counts [was] Dr. Portes’ failure to order an angiogram for Mr. Neade.”¹³⁴ There was no allegation that a second opinion would have made a difference in the outcome, and this made it easy for the *Neade* majority to characterize the fiduciary duty claim as “duplicative” of the tort malpractice claim: Dr. Portes’ failure to disclose his financial incentives did not cause

125. *Neade*, 193 Ill. 2d at 449, 739 N.E.2d at 505.

126. *See* 193 Ill. 2d at 449–50, 739 N.E.2d at 505 (citing *Coughlin*, 154 Ill. App. 3d 510, 507 N.E.2d 505 (1st Dist. 1987)).

127. *Neade*, 193 Ill. 2d at 449–50, 739 N.E.2d at 505.

128. *Id.*, 739 N.E.2d at 505 (citing *Moore v. Regents of Univ. of California*, 51 Cal. 3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990)). *See generally* BARBARA K. REDMAN, RESEARCH MISCONDUCT POLICY IN BIOMEDICINE: BEYOND THE BAD-APPLE APPROACH (2013); University of Illinois Office of the Vice President for Research, *Conflict of Commitment and Interest (COCI) Reporting Process Review*, UNIVERSITY OF ILLINOIS REVIEW (March 15, 2014), available at www.propublica.org/documents/item/1093639-university-of-illinois-review.html.

129. *Moore*, 271 Cal. Rptr. at 148–49.

130. *Neade*, 193 Ill. 2d at 450, 739 N.E.2d at 506.

131. *Id.* at 451, 739 N.E.2d at 506 (Harrison, C.J., dissenting).

132. *See id.* at 444–45, 739 N.E.2d at 502–03 (reciting causation requirement several times, and noting that to sustain a breach of fiduciary duty claim, Neade would have to allege, *inter alia*, “that treatment [by another physician] could have prevented his eventual myocardial infarction and subsequent death”).

133. *Id.* at 443, 739 N.E.2d at 502.

134. *Id.*, 739 N.E.2d at 502.

any independent injury or indeed any injury at all.¹³⁵ On this peculiar set of facts, in which tort law required the same causation proof and yielded the same remedies as fiduciary duty law, there were plenty of reasons to reject Neade's fiduciary duty claim and really no reasons to allow it. Thus, *Neade* reached the right result.

B. *Pippen v. Pedersen & Houpt*

Pippen was a transactional legal malpractice case. The transactional facts were somewhat intricate: Pippen thought he might benefit financially by purchasing an aircraft; Pippen's agent and investment advisor, Robert Lunn of Lunn Partners, introduced Pippen to law firm Pedersen & Houpt and its well-known name partner, Peer Pedersen, to represent Pippen in the aircraft purchase transaction;¹³⁶ the seller, VG in Flight, was owned in part by Pippen's personal pilot, Craig Frost; and Pippen and Frost, through their own entities, were to own 51% and 49%, respectively, of the aircraft, with the aircraft then to be leased to and maintained by Air Charter, a company owned by Frost.¹³⁷ Pippen, in turn, was to enter into an "open charter agreement" with Air Charter to allow Pippen to charter the aircraft at a specified price.¹³⁸ Pedersen & Houpt was to draft these agreements.¹³⁹ Pippen and Frost, together with their personal entities, would then borrow money to pay for the aircraft purchase.¹⁴⁰ Pippen signed these agreements on April 11, 2002, a few days after he signed a promissory note and personal guarantee of over \$5 million to finance the aircraft purchase.¹⁴¹

Unfortunately for Pippen, and unbeknownst to him at the time, a number of serious problems had developed with respect to these interrelated transactions. Lunn was supposed to do due diligence on Frost in return for a \$150,000 fee at closing, but never did any, apparently for fear of losing his fee;¹⁴² Lunn disbursed well over \$1 million in funds from Pippen's accounts to Air Charter, Frost, VG in Flight, Pedersen & Houpt, and Lunn himself, almost none of which went toward purchasing the aircraft and all of which preceded anyone signing anything relating to the aircraft deal;¹⁴³ VG in Flight refused to warrant its financial information;¹⁴⁴ Frost did not file his entity organizational papers in Delaware as promised;¹⁴⁵

135. *Id.* at 448–51, 739 N.E.2d at 505–06.

136. *Pippen*, 2013 IL App (1st) 111371, ¶ 4, 986 N.E.2d at 699.

137. *Id.* at ¶ 5, 986 N.E.2d at 699.

138. *Id.*, 986 N.E.2d at 699.

139. *Id.*, 986 N.E.2d at 699.

140. *Id.*, 986 N.E.2d at 699.

141. *Id.* at ¶¶ 6, 9, 986 N.E.2d at 700.

142. *Id.* at ¶ 7, 986 N.E.2d at 700.

143. *Id.* at ¶ 8, 986 N.E.2d at 700.

144. *Id.* at 701.

145. *Id.* at 701.

Frost was running competing aircraft leasing companies;¹⁴⁶ and Frost changed the aircraft co-ownership papers to give himself a 50% interest rather than his agreed upon 49% interest, thereby allowing him to pledge the aircraft's engines as collateral for preexisting debts – a pledge that later resulted in the engines being repossessed and the aircraft being rendered unusable.¹⁴⁷ The rest one can probably guess: Frost and his entities defaulted on the loan Phippen had personally guaranteed and instituted litigation and arbitration proceedings against Phippen; Phippen never realized any money on the aircraft venture; Phippen instead ended up paying out in excess of \$1.7 million in connection with the aircraft; and Phippen faced personal liability on his loan guarantee for an additional \$5 million plus interest, penalties and attorney fees.¹⁴⁸ Lunn tumbled into bankruptcy and Phippen sued his accountants and lawyers,¹⁴⁹ including, of course, Pedersen & Houpt, charging the latter with failures aplenty.¹⁵⁰

Phippen acknowledged *Kinzer* and *Armstrong* as leading fiduciary duty precedents that treat such obligations as “founded on the substantive principles of agency, contract and equity” rather than tort law,¹⁵¹ an observation one would expect from its author, Justice Simon, an experienced fiduciary duty litigator during his days in private practice.¹⁵² Nevertheless, *Phippen* extended the

146. *Id.* at 701.

147. *Id.* at ¶¶ 10–11, at 701.

148. *Id.* at ¶¶ 11–12, 701–02. Phippen recited his losses with specificity in his appellate brief:

Phippen ended up paying \$1,350,000 toward the purchase of the plane. He paid Lunn's \$150,000 fee for the transaction. He paid over \$600,000 in invoices submitted by Frost. He paid more than \$55,000 in legal fees on the transaction. He signed a promissory note to U.S. Bank for a little more than \$5 million, and he ultimately had to pay almost \$6.1 million to settle that obligation.

Brief of Appellants at 13, *Phippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. Nov. 17, 2011).

149. See Shane Tritsch, *Foul Trouble*, CHICAGO MAGAZINE (June 26, 2007), available at <http://www.chicagomag.com/Chicago-Magazine/December-2005/Foul-Trouble/> (recounting the circumstances surrounding the Phippen-Lunn relationship, its collapse and its aftermath).

150. See *Phippen*, 2013 IL App (1st) 111371, at ¶ 12, 968 N.E.2d at 702 (listing failure to use reasonable skill and care; failure to adequately investigate VG in Flight and Frost and improper reliance on Lunn to do so, despite Lunn's conflict of interest; failure to inform Phippen of Lunn's management fee; failure to alert Phippen of Pedersen & Houpt's concerns that arose regarding the aircraft purchase; failure to ensure Phippen's money was not distributed until proper documents were signed; failure to ensure Phippen did not sign any documents until all parties had signed all documents; and failure to advise Phippen that the aircraft co-ownership agreement had been altered to give Frost a 50% interest).

151. See *id.* at ¶ 22, 968 N.E.2d at 704 (citing *Kinzer*, 128 Ill. 2d 437,445, 539 N.E.2d 1216 (1989) and *Armstrong*, 174 Ill. 2d 281, 294, 673 N.E.2d 290 (1996)).

152. See, e.g., *FDIC v. Miller*, 781 F. Supp. 1271, 1273 (N.D. Ill. 1991).

Neade “duplication” defense to legal malpractice actions, holding that Phippen’s fiduciary duty claims were equivalent to his tort claims for negligence against Pedersen & Houpt because they rested on the same operative facts.¹⁵³ The *Phippen* court defined “operative facts” as “those facts that actually caused the plaintiffs’ injuries,” citing *Neade*.¹⁵⁴ Pedersen & Houpt’s conflict of interest arising from its representation of both Phippen and Lunn, though a traditional fiduciary duty concern, did not cause Phippen’s injuries; this conflict merely reflected Pedersen & Houpt’s motive, the court concluded.¹⁵⁵ Importantly, showing fealty to *Neade*, the *Phippen* court stressed that “to establish they were injured by defendants’ breach of fiduciary duty, plaintiffs must prove that they otherwise would have retained counsel that would not have injured them and, in doing so, must necessarily prove that defendants engaged in negligent acts and that those acts caused the injuries at issue.”¹⁵⁶ I agree with this position, as far it goes, and so I think *Phippen*, like *Neade*, was correctly decided.

The hard question in *Phippen*, and one that was not presented in *Neade*, concerned the role of contributory negligence in attorney fiduciary duty actions.¹⁵⁷ To be sure, *Neade* stands for the proposition that when the same operative facts give rise to the same remedies, the fiduciary duty claim is duplicative of the tort malpractice claim. If the Illinois Supreme Court’s position in *Neade* is to be understood as reflecting a desire to achieve a “tort only” regime in the interest of simplicity and predictability for pleading, proof, insurance and other purposes, then the “tort only” outcome in *Phippen* is consistent with *Neade* and indeed compelled by it. This is essentially what Pedersen & Houpt argued on appeal,¹⁵⁸ citing a number of cases rejecting “duplicative” fiduciary duty/legal malpractice claims¹⁵⁹ and a forceful law review article to the same

153. *Phippen*, 2013 IL App (1st) 111371, at ¶¶ 21–28, 986 N.E.2d at 704–06.

154. *Id.* at ¶ 25, 986 N.E.2d at 704–05.

155. *Id.* at ¶ 26, 986 N.E.2d at 705.

156. *Id.* at ¶ 28, 986 N.E.2d at 706.

157. See generally Brian M. Serafin, Note, *Comparative Fault and Contributory Negligence as Defenses in Attorney Breach of Fiduciary Duty Cases*, 21 GEO. J. LEGAL ETHICS 993 (2008) (collecting cases).

158. Brief of Appellees at 6–10, *Phippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. June 1, 2012).

159. See *Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737, 744 (7th Cir. 2004) (“when a breach of fiduciary claim is based on the same operative facts as a legal malpractice claim, and results in the same injury, the later claim should be dismissed as duplicative.”); *Parus Holdings, Inc. v. Banner & Witcoff, Ltd.*, 585 F. Supp. 2d 995, 1006 (N.D. Ill. 2008); *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 761, 899 N.E.2d 1252, 1267–68 (1st Dist. 2008); *Radtke v. Murphy*, 312 Ill. App. 3d 657, 665, 728 N.E.2d 715, 721 (1st Dist. 2000); *Calhoun v. Rane*, 234 Ill. App. 3d 90, 95, 599 N.E.2d 1318, 1321 (1st Dist. 1992); *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 273–74, 653 N.E.2d 915, 920–21 (1st Dist. 1995); *Fabricare Equip. Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784, 791, 767 N.E.2d 470, 476–77 (1st

effect.¹⁶⁰

On the other hand, if the holding in *Neade* is to be understood as applying only when there is complete congruence of claims and remedies, then the door remains open to argue, as Phippen did, that differences in defenses (such as the availability of contributory negligence) or even differences in burdens of proof dictate allowance of separate fiduciary duty claims.¹⁶¹ As Phippen rightly stressed, until his case no Illinois Appellate Court decision had “articulated the difference between negligence (professional malpractice) claims made against attorneys, and claims for breach of fiduciary duty.”¹⁶² On the key issue of contributory negligence, Phippen cited non-Illinois cases that did not concern professional malpractice for the proposition that contributory negligence is not a defense to breach of fiduciary duty¹⁶³ but offered no rationale distinguishing fiduciary duty from tort negligence cases for contributory negligence purposes.¹⁶⁴ Phippen in his opening brief also relied upon Illinois cases holding that contributory negligence is not a defense to intentional torts¹⁶⁵ and that breach of fiduciary duty is not a “tort”

Dist. 2002).

160. See Charles Wolfron, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 704, 722–23 (2006) (arguing against fiduciary duty theory because of “its broad sweep, its indeterminate application as doctrine, its forensic volatility, and its overall potential to extend lawyer liability far beyond what otherwise well-settled legal malpractice theory and practice would support”).

161. Brief of Appellants at 27–29, *Phippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. Nov. 17, 2011).

162. *Id.* at 20.

163. See *id.* at 27 (citing, without the following parentheticals, *In re Beacon Assocs. Lit.*, 745 F. Supp. 2d 386, 427–28 (S.D.N.Y. 2010) (declining to recognize contributory negligence as a defense available to an ERISA fiduciary in action arising out of Bernard Madoff’s Ponzi scheme); *Graske v. Auto-Owners Ins. Co.*, 647 F. Supp. 2d 1105, 1109–10 (D. Neb. 2009) (holding in an insurance bad faith action that Nebraska does not permit contributory negligence as a defense to intentional torts); *Solutia Inc. v. FMC Corp.*, 456 F. Supp. 2d 429, 452 (S.D.N.Y. 2006) (holding in a food chemical joint venture dispute that New York does not permit a comparative negligence defense to breach of fiduciary duty claims); *Medicine v. United States*, 192 F. Supp. 2d 1053, 1068 (D. Mont. 2002) (holding in a timber-cutting personal injury action that Montana does not permit comparative negligence as a defense to breach of fiduciary duty claims: “The purpose of a fiduciary relationship would be completely undermined if a beneficiary’s negligent conduct could be used by the fiduciary as a defense against the person he is supposed to protect, even though there is a non-delegable duty to protect that person.”); *Electroformers, Inc. v. Richter*, CV010343157S, 2002 Conn. Super. LEXIS 593, * 4 (Conn. Super. Ct. Feb. 25, 2002) (holding in an employee corporate opportunity usurpation/trade secret misappropriation action that Connecticut “General Statute 52-572h(k) expressly states that comparative negligence is not a defense to a fiduciary duty claim”).

164. Brief of Appellants at 27–29, *Phippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. Nov. 17, 2011).

165. See *id.* at 28 (citing *Poole v. City of Rolling Meadows*, 167 Ill. 2d 41, 656

subject to the Contribution Among Joint Tortfeasors Act.¹⁶⁶ Pippen made the same point in his reply brief, offering a parenthetical after a Missouri case “holding that legal malpractice claims sound in negligence while breach of fiduciary duty claims are more like fraud claims,”¹⁶⁷ and then citing to *Mueller Industries, Inc. v. Berkman*¹⁶⁸ for the proposition that “[t]here are parallels between fraud and the intentional breach of fiduciary duty cases.”¹⁶⁹

But unfortunately for Pippen, Pedersen & Houpt’s conduct simply did not approach “fraud” or “intentional” wrongdoing. Instead, Pippen’s fiduciary duty claims as alleged really were “duplicative” of his tort claims because the “operative facts” – meaning, under *Neade*, “those facts that actually caused the plaintiffs’ injuries” – merely showed professional negligence. Indeed, Pippen’s counsel admitted: “I clearly think that the events that took place here were, in fact, negligent, but motivated by conflicts of interest.”¹⁷⁰ Pippen’s “counsel also admitted that plaintiffs were seeking the same amount of compensatory damages in both the negligence and breach of fiduciary duty counts.”¹⁷¹ In addition, on appeal Pippen did not challenge the factual basis for the jury’s contributory negligence finding, which apparently was based in part upon Lunn’s status as Pippen’s own agent; in part upon the failure of Pippen’s accountants, Weinberg & Lewis, to ensure that Lunn properly followed Pippen’s investment plan; and in part on Pippen’s receipt of independent advice from another law firm, Katten Muchin.¹⁷² These actors settled with Pippen, resulting in a set off of \$1,270,000 that further reduced Pippen’s net award to \$790,901.89.¹⁷³ In other words, it may have been these actors’ jobs to warn Pippen about Frost; indeed, Katten Muchin apparently did

N.E.2d 768 (1995)).

166. See *id.* at 28 (citing *People ex rel. Hartigan v. Comm. Hosp.*, 189 Ill. App. 3d 206, 213–14, 545 N.E.2d 226 (1st Dist. 1989)).

167. Reply Brief of Appellants at 7, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. June 22, 2012).

168. 399 Ill. App. 3d 456, 471, 927 N.E.2d 794, 809 (2d Dist. 2010) (noting that intentional breach of fiduciary duty is analogous to the tort of fraud for purposes of the crime-fraud exception to the attorney-client privilege).

169. Reply Brief of Appellants at 7, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. June 22, 2012).

170. Brief of Appellees at 8, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. June 1, 2012).

171. *Id.* at 9.

172. *Id.* at 4 (“As outlined in the jury instructions, plaintiffs’ comparative fault included signing various loan and closing documents without reading them or knowing their contents even though Pippen had been advised by an attorney other than defendants not to do so, failing to maintain the plane or make payments on the loans, delegating broad powers for the Lunn entities to act on his behalf without monitoring their acts, and failing to contact the defendants to discuss any of the transactions.”) (trial record citations omitted).

173. See *Pippen*, 2013 IL App (1st) 111371, at ¶¶ 1, 18, 986 N.E.2d at 697, 699, 703; Brief of Appellants at 17, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. Nov. 17, 2011).

so to the extent it independently told Phippen not to proceed with the deal until all the aircraft-related paperwork was executed.¹⁷⁴ Thus, on these facts, the *Phippen* court was right to follow *Neade*, despite the contributory negligence wrinkle.

IV. FIDUCIARY DUE CARE AND FIDUCIARY LOYALTY

Are *Neade* and *Phippen* really inconsistent with *Kerrigan*, *Vendo*, *Keane*, *Warren Motors*, *Kinzer*, *Martin II* and *Armstrong*? Not if *Neade* and *Phippen* are understood as applications of the fiduciary duty of due care, as opposed to the fiduciary duty of loyalty.¹⁷⁵

Agents owe their principals a variety of duties, as set forth in the Restatement (Second) of Agency. These include the duty of loyalty,¹⁷⁶ the duty of due care,¹⁷⁷ the duty to give information,¹⁷⁸ the duty to keep and render accounts,¹⁷⁹ the duty of obedience,¹⁸⁰ and the duty to maintain confidences.¹⁸¹ By far the most frequently and intensely litigated are loyalty claims, typically arising out of self-dealing, corporate opportunity usurpation, corporate competition and other conflicts of interest in which agents benefit

174. Brief of Appellees at 4, *Phippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. June 1, 2012) (noting Phippen's "comparative fault included signing various loan and closing documents without reading them or knowing their contents even though Phippen had been advised by an attorney other than defendants not to do so").

175. See William A. Gregory, *The Fiduciary Duty of Care: A Perversion of Words*, 38 AKRON L. REV. 181, 183 (2005) ("The duty of care is a negligence concept quite unlike the duty of loyalty. Equating the duty of care with the duty of loyalty is bad law and worse semantics. Using legal terms with fixed meanings that have developed over centuries in different ways leads only to confusion and chaos."); Meredith J. Duncan, *Legal Malpractice By Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1139 (1999) ("[p]ermitting clients to pursue breach of fiduciary duty claims against their former attorneys is a critical development in the law of lawyering for several reasons. Although an important development in the law, courts have nonetheless, at times, done an inadequate job of creating and applying fiduciary law to the attorney-client relationship. To make matters worse, courts have, at times, failed even to distinguish breach of fiduciary duty claims from traditional professional negligence claims. The failure of the courts to discuss and emphasize the distinctions between the two have led to a sloppy body of law that fails to consider, in any meaningful manner, the impact of these novel theories of recovery on the ever-expanding law of lawyering. Because the ramifications of each of these actions are unique, clearly distinguishing between the two is critical.").

176. RESTATEMENT (SECOND) AGENCY §§387–98.

177. RESTATEMENT (SECOND) AGENCY §379.

178. RESTATEMENT (SECOND) AGENCY §381.

179. RESTATEMENT (SECOND) AGENCY §382.

180. RESTATEMENT (SECOND) AGENCY §385.

181. RESTATEMENT (SECOND) AGENCY §395–96.

at the expense of their principals.¹⁸² The duty of confidence is a close second, as reflected in cases in which agents misuse trade secrets or other confidential information.¹⁸³ Due care, on the other hand, is seldom litigated outside the corporate context,¹⁸⁴ and even then it is usually the subject of director disputes under the business judgment rule.¹⁸⁵

Neade and *Pippen* simply involved negligence by professional fiduciaries and as such were properly decided under traditional negligence standards. There is nothing special about due care actions against such fiduciaries, other than the higher standard of care that must usually be proven through expert testimony¹⁸⁶ and perhaps the professional judgment defense.¹⁸⁷ *Neade* and *Pippen* should have offered these straightforward propositions rather than the misguided “duplicative” test.¹⁸⁸ When a fiduciary commits other

182. See generally Schaller, *Corporate Opportunities and Corporate Competition*, *supra* note 94, at 4-12 (collecting Illinois cases).

183. See generally William Lynch Schaller, *Secrets of the Trade: Tactical and Legal Considerations from the Trade Secret Plaintiff's Perspective*, 29 REV. LITIG. 729 (2010) (collecting cases from Illinois and other jurisdictions).

184. See, e.g., ERISA § 404(a) (1), 29 U.S.C. § 1104(a) (1) (West 2014) (prudent man standard of care) (duty to administer the plan with the diligence and care expected of “a prudent man acting in a like capacity and familiar with such matters,” and the duty to diversify plan assets so as to minimize the risk of large losses); *Dudenhoeffer v. Fifth Third Bancorp*, 134 S. Ct. 2459 (2014) (holding that “stock drop” ESOP claims are subject to the standard ERISA prudent man presumption).

185. See, e.g., *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 52–53 (Del. 2006) (corporate directors were not grossly negligent in approving \$140 million payment to settle executive’s contract after only one year’s work); *Smith v. Van Gorkum*, 488 A.2d 858, 897 (Del. 1985) (corporate directors were grossly negligent in quickly approving merger without substantial inquiry or expert advice). See generally Amitai Aviram, *Officers’ Fiduciary Duties and the Nature of Corporate Organs*, 2013 U. ILL. L. REV. 763 (2013) (carefully examining difference between officers and director in terms of due care and loyalty).

186. See, e.g., *Barth v. Reagan*, 139 Ill. 2d 399, 407, 564 N.E.2d 1196, 1200 (1990) (“the standard of care against which the attorney defendant’s conduct will be measured must generally be established through expert testimony”); David J. Fish, *The Use of the Illinois Rules of Professional Conduct to Establish the Standard of Care in Attorney Malpractice Litigation: An Illogical Practice*, 23 S. ILL U. L. J. 65, 72–85 (1998) (arguing against using ethics rules in place of expert testimony to establish the standard of care in Illinois legal malpractice actions).

187. See, e.g., *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122, ¶¶31–38, 997 N.E.2d 872, 881–88 (1st Dist. 2013) (discussing “judgmental immunity” defense and related “mere errors of judgment” defense in attorney malpractice cases).

188. Cf. Melvin Eisenberg, *The Duty of Care of Officers and Directors*, 51 U. PITT. L. REV. 945, 948 (1989) (“Professionals, and agents in general, are also subject to liability for failure to exercise care, under the law of malpractice and the law of agency.”) (citing RESTATEMENT (SECOND) OF AGENCY, § 379(a) (1958)). Comment c to Section 379 of the Restatement (Second) of Agency explains:

[T]his rule is applicable not only to a servant doing manual work, but to an agent who is normally given discretion as to the manner in which he

wrongs – like usurping opportunities, secretly competing, or self-dealing – analysis should focus on the nature of those wrongs, not whether they are “duplicative” of other claims. Yet, surprisingly, only one Illinois legal malpractice decision has offered this obvious insight.¹⁸⁹

The difference between due care and loyalty cases is most apparent in their governing legal standards, as Judge Bauer recently and carefully explained in *Ball v. Kotter*.¹⁹⁰ With the exception of medical malpractice *res ipsa loquitur* situations like instruments left inside patients and their legal malpractice equivalents like blown statutes of limitations, professional negligence cases generally require expert testimony to establish the standard of care,¹⁹¹ with plaintiff bearing the burden of proof by a preponderance of the evidence.¹⁹² In stark contrast, whether a fiduciary duty of loyalty exists is a question of law for the court, as the Illinois Appellate Court expressly held in *LID Associates v. Dolan*.¹⁹³ And starker still is the burden of proof: once loyalty obligations are triggered, all transactions with the fiduciary are deemed presumptively unfair¹⁹⁴ and the *fiduciary* bears the burden of showing by clear and convincing proof entire fairness, utmost

performs his duty. In the use of this discretion he is under a duty to act competently and carefully and for a mistake in judgment resulting from a failure to have the standard knowledge or to use the standard care, he is subject to liability to the principal.

RESTATEMENT (SECOND) OF AGENCY, § 379(a) cmt. c (1958).

189. See *Metrick v. Chatz*, 266 Ill. App. 3d 649, 656, 639 N.E.2d 198, 203 (1st Dist. 1994) (“[n]o facts are alleged which infer that the defendants were unfaithful to the plaintiffs, that they were dishonest, that they acted in bad faith, that they had a conflict of interest, or that they engaged in self-dealing”).

190. 723 F.3d 813, 823–27 (7th Cir. 2013) (applying Illinois law).

191. See *Barth*, 139 Ill. 2d at 407, 564 N.E.2d at 1200 (“[t]he standard of care against which the attorney defendant’s conduct will be measured must generally be established through expert testimony”).

192. See *Ball*, 723 F.3d at 821–25 (discussing “common knowledge” exception to expert witness requirement in both medical and legal malpractice cases, and then holding that summary judgment was properly granted in favor of real estate attorney where plaintiff failed to offer expert testimony on the propriety of the defendant lawyer’s alleged failure to adequately communicate with her client and her alleged failure to adequately address conflicts of interest between her client and her client’s broker in a real estate transaction).

193. 324 Ill. App. 3d 1047, 1058–59, 756 N.E.2d 866, 877 (1st Dist. 2001) (real estate attorney improperly testified as to the applicable legal standards in partnership disloyalty/unfair transaction case). This view tracks the Illinois Supreme Court’s position in *In re Masters*, 91 Ill. 2d 413, 423–36, 438 N.E.2d 187, 191–92 (1982), where the court held it is for the court rather than experts to set the controlling standard of ethical conduct for attorneys. The Illinois Supreme Court in *Masters* reasoned that, “[a]lthough opinions of qualified writers and amicus briefs are considered by this court, they are not an appropriate subject of expert testimony.” *Id.* at 425, 438 N.E.2d at 192.

194. See *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 461–65, 448 N.E.2d 872, 876–77 (1983) (discussing “bursting bubble” presumption of undue influence when an attorney stands to benefit from a will he drafted).

candor and good faith in his every act.¹⁹⁵ Indeed, some transactions with fiduciaries, such as corporate opportunity usurpation and competition during the agency, are subject to irrebuttable presumptions of unfairness in the form of *per se* rules completely barring them.¹⁹⁶

This duty of due care/duty of loyalty distinction also serves to harmonize Illinois decisions involving other fiduciaries. The fiduciary duty cases involving “professionals other than physicians” distinguished in *Neade* make perfect sense from this point of view.¹⁹⁷ Most were duty of loyalty cases,¹⁹⁸ and none involved mere professional negligence,¹⁹⁹ with the exceptions of a bank acting as a land trustee²⁰⁰ – a problem more akin to trust law than tort law.²⁰¹

195. See *Rizzo v. Rizzo*, 3 Ill. 2d 291, 305, 120 N.E.2d 546, 553 (1954):

[T]he presumption of fraud or undue influence arises from the confidential relationship where the dominant party has enjoyed a benefit by virtue of his fiduciary status, and the burden is upon that party who has so benefited to rebut the presumption by clear and convincing proof that he has exercised good faith and has not betrayed the confidence reposed in him. (*Jones v. Washington*, 412 Ill. 436, 441, 107 N.E.2d 672 (1952); *Bremer v. Bremer*, 411 Ill. 454, 104 N.E.2d 299 (1952); *Stahl v. Stahl*, 214 Ill. 131, 73 N.E. 319 (1905)). Factors significant in determining whether a particular transaction between parties standing in a fiduciary relation is fair include a showing that the fiduciary has made a frank disclosure of all relevant information which he had, that the consideration was adequate, and that the other party had competent and independent advice before completing the transaction. *Jones v. Washington*, 412 Ill. 436, 107 N.E.2d 672 (1952).

196. See Schaller, *Corporate Opportunity and Corporate Competition*, *supra* note 94, at 14–15 (collecting Illinois corporate opportunity and corporate competition cases treating such conduct as *per se* breaches of the fiduciary duty of loyalty).

197. *Neade*, 193 Ill. 2d at 449, 734 N.E.2d at 505.

198. See *Regnery v. Meyers*, 287 Ill. App. 3d 354, 357–59, 679 N.E.2d 74 (1st Dist. 1997) (self-dealing by corporate voting trustees); *Kurtz v. Solomon*, 275 Ill. App. 3d 643, 656 N.E.2d 184 (1st Dist. 1995) (uncle and brother/building owner engaged in self-dealing and refused to account); *Lossman v. Lossman*, 274 Ill. App. 3d 1, 653 N.E.2d 1280 (2d Dist. 1995) (undue influence by attorney in obtaining a note and mortgage to secure his fees after representation had already begun); *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 643 N.E.2d 1206 (1st Dist. 1994) (corporate opportunity usurpation and asset misappropriation by controlling shareholders, officers and directors); *In re Estate of Savage*, 259 Ill. App. 3d 328, 631 N.E.2d 797 (1994) (power of attorney holder engaged in self-dealing); *Glass v. Burkett*, 64 Ill. App. 3d 676, 381 N.E.2d 821 (5th Dist. 1978) (real estate broker engaged in self-dealing).

199. See *Doe v. Roe*, 289 Ill. App. 3d 116, 681 N.E.2d 640 (1st Dist. 1997) (attorney sexually assaulted and extorted client); *Winston & Strawn v. Nosal*, 279 Ill. App. 3d 231, 664 N.E.2d 239 (1st Dist. 1996) (expulsion of law firm partner); *Newton v. Aitken*, 260 Ill. App. 3d 717, 633 N.E.2d 213 (2d Dist. 1994) (real estate partners fight over rescission of contract).

200. See *Progressive Land Developers, Inc. v. Exchange National Bank*, 266 Ill. App. 3d 934, 641 N.E.2d 608 (1st Dist. 1994) (land trustee acted negligently in conveying property of Nation of Islam founder Elijah Muhammed).

201. See *Bank One, N.A. v. Borse*, 351 Ill. App. 3d 482, 488, 812 N.E.2d 1021, 1026 (2d Dist. 2004) (“Article 197 of the Restatement (Second) of Trusts

The court in *Neade* should have said this instead of trying to shoehorn them into its “duplication” test.²⁰² The same was true of the *Neade* court’s comment that “duplication” was not argued in *Coughlin v. SeRine*.²⁰³ *Coughlin* was not concerned with legal malpractice in which an attorney botched a lawsuit or deal on his client’s behalf; *Coughlin* was a loyalty case – though it did not use the term – in which the client alleged unfair dealing by his attorney in attempting to collect a “bonus” from the client for successfully settling a stock redemption/noncompetition covenant dispute, even though the bonus was not covered in the initial engagement.²⁰⁴ In other words, the question is not whether the case involves a fiduciary – all professional malpractice cases do – but the nature of the fiduciary’s wrongdoing.²⁰⁵

Pippen was right to analogize to intentional torts as support for his “no contributory negligence” argument; he just had the wrong facts. Illinois law has always taken a dim view of intentional wrongdoing,²⁰⁶ and duty of loyalty violations as a rule are of this character, as *Berkman* rightly suggested.²⁰⁷ In fact, I made this very argument in the identical context – the crime-fraud exception to the attorney-client privilege – before the same court 22 years earlier in *Radiac Abrasives, Inc. v. Diamond Technologies, Inc.*,²⁰⁸ an

acknowledges this historical classification [beneficiaries seeking damages against a trustee must proceed in a court of equity] for such an action, stating that ‘the remedies of the beneficiary against the trustee are exclusively equitable.’”); *Chicago City Bank and Trust Co. v. Lesman*, 186 Ill. App. 3d 697, 701, 542 N.E.2d 824, 826 (1st Dist. 1989) (finding remainder beneficiaries to a trust had standing to sue trustee for breach of fiduciary duty for mismanagement or to object to final accounting by trustee).

202. *Neade*, 193 Ill. 2d at 449, 734 N.E.2d at 505 (“These cases are inapposite, as the plaintiffs in those cases did not bring causes of action sounding in both breach of fiduciary duty and negligence. Thus, the courts in the cited cases did not determine whether the plaintiffs’ injuries were sufficiently addressed by traditional negligence claims.”).

203. 154 Ill. App. 3d 510, 507 N.E.2d 505 (1st Dist. 1987).

204. *See id.* at 513–14, 507 N.E.2d at 509 (noting allegations of unnecessary services, unauthorized services and demand for a bonus for which there was no agreement).

205. *See Metrick*, 266 Ill. App. 3d at 656, 639 N.E.2d at 203 (“While it can be argued that all breaches of fiduciary on the part of an attorney amount to legal malpractice, we are unwilling to concede that all negligence on the part of an attorney in the rendition of legal services rises to the level of a breach of fiduciary duty. Attorneys, like all other professionals, are cursed with the mortal attribute of fallibility and at times they will make errors which render them liable to their clients for the resulting damages, but mere negligence is a far cry from a breach of fiduciary duty.”).

206. *See Gerill v. J. L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 206 538 N.E.2d 530, 542 (1989) (intentional tortfeasor was not entitled to contribution from joint tortfeasor).

207. *See Berkman*, 399 Ill. App. 3d at 471, 927 N.E.2d at 808–09 (2d Dist. 2010) (intentional breach of fiduciary duty may serve as the fraud necessary to establish the crime-fraud exception to the attorney-client privilege).

208. 177 Ill. App. 3d 628, 634–38, 532 N.E.2d 428, 431–34 (2d Dist. 1988).

employee disloyalty case *Berkman* cited.²⁰⁹ In both fraud and disloyalty cases, the victim's justifiable reliance on and trust and confidence in the wrongdoer excuse the need for diligence on the victim's part. Thus, I doubt contributory negligence ever constitutes a defense to duty of loyalty breaches any more than it serves as a defense to fraud.²¹⁰ But mere negligence is not fraud.

Proximate cause is another area where the duty of due care/duty of loyalty distinction matters. Traditional tort proximate cause applies when a fiduciary commits malpractice, as the Illinois Supreme Court held in *Neade*, or when a fiduciary commits fraud, as the Illinois Supreme Court held in *Martin II*. However, as I have explained elsewhere,²¹¹ ordinary tort proximate cause conceptions do not apply to duty of loyalty disputes, such as corporate opportunity usurpation and self-dealing transactions.²¹² For example, under *Vendo* and *Mullaney*, a third party's claimed "refusal to deal" with plaintiff is not a proximate cause defense to corporate opportunity usurpation.²¹³ The deterrence policy behind the duty of loyalty justifies this pro-plaintiff proximate cause view; the compensation policy behind the duty of care probably does not. Thus, in "deal within a deal" malpractice cases,²¹⁴ plaintiff likely has to prove the deal counter-party would still have agreed to the deal even if plaintiff's negligent attorney had presented it differently – namely, the way plaintiff wanted it.²¹⁵ Which

209. *Berkman*, 399 Ill. App. 3d at 470, 927 N.E.2d at 807–08.

210. *See, e.g.*, *AMPAT/Midwest, Inc. v. Ill. Tool Works, Inc.*, 896 F.2d 1035 (7th Cir. 1989) (Posner, J.) ("There is no defense of contributory negligence to an intentional tort, including fraud.") (citing, *inter alia*, *Broberg v. Mann*, 66 Ill. App. 2d 134, 140–41, 213 N.E.2d 89, 92 (2d Dist. 1965)); *ABC Trans Nat'l Transport, Inc. v. Aeronautics Forwarders*, 62 Ill. App. 3d 671, 683, 379 N.E.2d 1228, 1237 (1st Dist. 1978) (an employee may compete after quitting, "but may not compete while still employed as the employer who, lulled by trust in the employee's fidelity and loyalty, is deprived of the opportunity to compete with that employee.").

211. Schaller, *supra* note 27, at 14–21.

212. *See generally* Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. REV. 851 (2011) (arguing for flexibility on proximate cause in fiduciary cases on policy grounds).

213. *See generally* Schaller, *supra*, note 27, at 14–21.

214. *See, e.g.*, *Union Planters Bank v. Thompson Coburn*, 402 Ill. App. 3d 317, 344, 935 N.E.2d 998, 1022 (5th Dist. 2010) ("We hold, however, that proving a case-within-a-case is not always required in transaction based legal malpractice cases where damages can otherwise be established Consequently, to establish the element of proximate cause, it is necessary for the client to plead and prove that had the undisclosed risk been known, he or she would not have accepted the risk and consented to the recommended course of action.").

215. *See Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 42–49, 7 N.E.3d 729, 739–41 (1st Dist. 2014) (citing *Pippen* and discussing causation in the context of breach of fiduciary duty claim against attorney for allegedly failing to report opposing party's settlement offers, with the court focusing on the conflicting interests of insured and insurer and whether the insurer might have accepted the settlement offers but for the attorney's failure to disclose them);

proximate cause model applies may be virtually outcome determinative in such cases.

The duty of due care/duty of loyalty distinction also carries significance when analyzing compensation forfeiture, as *Keane*, *Vendo* and their many descendants amply demonstrate. It is unlikely that a negligent attorney must repay earned legal fees for a breach that caused no injury.²¹⁶ By contrast, disgorgement of an attorney's fees can be ordered for breach of fiduciary duty if the breach is willful.²¹⁷ Disputes can surface in this context in many ways, including overbilling, erroneous billing, and misapplication of client funds absent a clear agreement.²¹⁸ Indeed, Pippen in his complaint sought "disgorgement of all legal fees paid to defendants."²¹⁹ On appeal, however, Pippen did not pursue compensation forfeiture as a separate remedy under fiduciary duty law; in fact, he did not press this claim at all on appeal, perhaps because the \$55,000 he paid to Pedersen & Houpt for the failed aircraft transaction was minor in comparison to the overall amount he was seeking or, more likely, because his appeal principally sought to use his fiduciary duty theory to escape the contributory negligence finding that operated to reduce his \$8,243,607.56 damage award (every penny he sought) by 75% to \$2,060,901.89 before set offs further reduced it to \$790,901.89.²²⁰

York v. Stiefel, 99 Ill. 2d 312, 321, 458 N.E.2d 488, 493 (1983) (affirming jury verdict that rested on implicit finding that attorney's negligent advice caused plaintiff to guarantee certain deal debt plaintiff otherwise would not have agreed upon); Horn v. Croegaert, 187 Ill. App. 3d 53, 57, 542 N.E.2d 1124, 1125 (5th Dist. 1989) (holding in transactional legal malpractice case that it was for "a jury to decide if [plaintiff] would have gotten a written agreement had she pursued one"); Viner v. Sweet, 135 Cal. Rptr. 2d 629, 636-37 (Cal. Ct. App. 2003) (holding that "but for" causation must be proven in legal malpractice actions arising out of transactions, but also holding that circumstantial evidence may be used for this purpose: "An express concession by the other parties to the negotiation that they would have accepted other or additional terms is not necessary.").

216. See, e.g., *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 353, 736 N.E.2d 145, 157 (1st Dist. 2000) (denying disgorgement claim where attorney's negligence in drafting right of first refusal agreement and attorney's breach of fiduciary duty in undertaking a subsequent, related representation against his client appeared to have caused no harm to plaintiff).

217. See, e.g., *In re Marriage of Pagano*, 154 Ill. 2d 174, 190-91, 607 N.E.2d 1242, 1250 (1992) (holding fee forfeiture was not warranted where attorney did not engage in willful misconduct and distinguishing the duty of loyalty/employee unfair competition decision upholding compensation forfeiture in *ABC Trans Nat'l Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817, 413 N.E.2d 1299 (1st Dist. 1980)).

218. See, e.g., *Dowling v. Chicago Options Assocs., Inc.*, 226 Ill. 2d 277, 875 N.E.2d 1012 (2007) (approving "earned upon receipt" arrangements in certain attorney-client circumstances).

219. *Pippen*, 2013 IL App (1st) 111371, at ¶ 13, 986 N.E.2d at 702.

220. See *id.* at ¶¶ 1, 16, 986 N.E.2d at 698; Brief of Appellants at 17, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. Nov. 17, 2011).

Forfeiture of compensation for physician negligence or disloyalty will rarely be a substantial issue from the plaintiff-patient's point of view. It didn't arise in *Neade*, for example, perhaps because any such restitutionary recovery by Neade attributable to Dr. Portes' financial savings on the by-passed angiogram (no pun intended) was *de minimis*, assuming Neade thought of this recovery at all. Whether it's an HMO arrangement as in *Neade*, a fee-for-service benefit through employment, an individual health care insurance policy (assuming such a thing still exists after the Affordable Healthcare Act commonly known as "Obamacare"),²²¹ or Medicare or Medicaid,²²² the patient is largely absolved of financial responsibility for medical services beyond co-payments or deductibles or premiums. And even when the patient is forced to pay out of pocket (and sometimes forced into bankruptcy as a result), the physician's charges are not necessarily or even normally "wrongful"; they presumably are reasonable and probably are negotiated with the insurance carrier or some other third-party payor.²²³

A more difficult area of significance concerns conflicts of interest. Conflicts of interest are not only more muted in the physician-patient setting from the patient's financial point of view; any injury they may cause is almost always subsumed within the traditional tort malpractice claim as well, as the Illinois Supreme Court pointed out in *Neade* in citing decisions from other states following variants of the "duplicative" rule.²²⁴ True, product

221. See, e.g., Avik Roy, *Obama Officials in 2010: 93 Million Americans Will be Unable to Keep Their Health Plans Under Obamacare*, FORBES (Oct. 31, 2013), <http://www.forbes.com/sites/theapothecary/2013/10/31/obama-officials-in-2010-93-million-americans-will-be-unable-to-keep-their-health-plans-under-obamacare/>.

222. See, e.g., Monifa Thomas, Scarlett Swerdlow & Tina Sfondeles, *First Look at Billing Data: Sanctioned Doc Made Millions from Medicare*, CHI. SUN-TIMES, Apr. 13, 2014, at 6 (reporting Medicare payments of \$5.3 million in 2012 to Illinois physician Rakesh Jagetia, a radiation oncologist now suspended until 2018).

223. See, e.g., Rob Kaiser, *Class Actions Filed Against Non-Profit Hospitals*, CHI. TRIB., June 18, 2004, http://articles.chicagotribune.com/2004-06-18/business/0406180307_1_non-profit-hospitals-uninsured-patients-charitable-care (reporting lawsuits alleging non-profit hospitals were overcharging uninsured patients and using aggressive collection tactics).

224. See *Neade*, 193 Ill. 2d at 441, 739 N.E.2d at 501 (citing *Hales v. Pittman*, 576 P.2d 493, 497 (Ariz. 1978) (declining to recognize separate breach of trust claim against physician for failure to adequately explain risks of surgical procedure; negligence and battery claims were deemed sufficient); *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. Ct. App. 1997) (drug distributor paid kickbacks to physician to prescribe Protopin; any personal injuries patients may have suffered were adequately addressed in traditional negligence actions); *Garcia v. Coffman*, 946 P.2d 216, 226 (N.M. Ct. App. 1997) (holding that chiropractor's scheme to defraud patients by providing unnecessary services warranted punitive damages under fraudulent misrepresentation theory, even though no actual damages were proven, but rejecting breach of fiduciary duty

endorsements, self-referrals and payments from drug companies may influence physician choices as to equipment, tests and drugs,²²⁵ but any personal injury caused by these choices will be covered in a traditional tort malpractice award and any separate, identifiable financial injury will likely be *de minimis*.²²⁶ This is not necessarily the case in attorney conflict of interest scenarios; attorneys' fees subject to forfeiture here may amount to thousands or even millions of dollars²²⁷ and conflicted attorneys may well receive additional financial benefits the client might be able to claim as restitutionary relief beyond ordinary malpractice "damages."²²⁸ For example, perhaps a client victimized by an attorney's conflict of interest could claim the disloyal attorney's stock in a start-up company if the attorney received that stock as part of the conflicted engagement.²²⁹

claim on the same facts and vacating fiduciary duty punitive damages award as duplicative of fraud punitive damages award); *Awai v. Kotin*, 872 P.2d 1332, 1336 (Colo. App. 1993) (breach of fiduciary duty claim was duplicative of negligence claim against court-appointed psychologist in divorce action); *Spoor v. Serota*, 852 P.2d 1292, 1294–95 (Colo. App. 1992) (breach of fiduciary duty claim was duplicative of negligence claim against plastic surgeon who failed to advise patient of the need for immediate follow up surgery)).

225. See, e.g., Karisa King & Jodi S. Cohen, *U. of I. Report: Beef Up Ethics; Review Launched After Doctors Were in Robot Firm's Ad*, CHI. TRIB., Mar. 19, 2014, Sec.1, at 13 (reporting internal review undertaken at the University of Illinois after doctors from its medical school posed in an advertisement for the da Vinci surgical robot); Larry Schook, *Conflict of Commitment and Interest (COCI) Reporting Process Review*, wwwpropublica.org/documents/item/1093639-university-of-illinois-review.html (University of Illinois Office of the Vice President for Research review of gaps in conflict of interest policies resulting from the da Vinci robot product endorsement incident).

226. See, e.g., Illinois Health Care Worker Self-Referral Act, 225 ILL. COMP. STAT. 47/1. Dr. Portes cited this statute as an example of legislative activity militating against court intervention in *Neade*. Brief of Appellants at 25–26, *Neade v. Portes*, No. 87445 (Ill. Feb. 9, 2000).

227. See, e.g., *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 246 Ill. App. 3d 979, 1001, 619 N.E.2d 1282, 1296 (1st Dist. 1993) (disqualifying Winston & Strawn due to conflict of interest).

228. See *Hoagland v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 744 (7th Cir. 2004) (Posner, J.) (rejecting as "duplicative" client's fiduciary duty claim seeking forfeiture of attorney's fees as restitutionary relief for conflict of interest); *Parus Holdings, Inc. v. Banner & Witcoff, Ltd.*, 585 F. Supp. 2d 995, 1006 (N.D. Ill. 2008) (holding that attorney's breach of confidence and conflict of interest amounted to nothing more than malpractice under *Hoagland*).

229. See *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 272, 653 N.E.2d 915, 920 (1st Dist. 1995) (holding lawyers may have "breached their attorney-client relationship" with Majumdar by not advising him to either cease direct competition with his employer Bel-Austin or to resign as an officer and director of Bel-Austin; their independent judgment on behalf Majumdar was affected by their loyalty to their other client, Bel-Austin, placing them in a conflict of interest); *Dempsey v. Sternik*, 147 Ill. App. 3d 571, 573–74, 498 N.E.2d 310, 311–12 (3d Dist. 1986) (action against attorney who both helped disloyal employees organize a rival concern and took an equity interest in the new concern); *ABC Trans Nat'l Transport, Inc.*, 90 Ill. App. 3d at 829–30, 413 N.E.2d at 1305–06 (1st Dist. 1980) (discussing attorney Weiss' role in assisting his

But presumably such forceful loyalty relief will be reserved for extreme conflict of interest cases in which attorneys knowingly and willfully injure their clients to benefit at their expense; cases involving attorneys who merely represent clients whose interests conflict fall far short of this mark and require expert testimony to determine if there was any wrongdoing at all.²³⁰

Pippen actually illustrates the “attorney benefitting at client expense” conflict of interest issue indirectly, although the court’s opinion did not touch on it. In his opening appellate brief, Pippen spent time developing the financial relationship between Robert Lunn and Peer Pedersen. Apart from their roles in the aircraft debacle, Pedersen had personally invested \$500,000 in Lunn Partners.²³¹ In addition, Pedersen had invested \$2 million in a Chicago real estate project that was struggling, and Lunn through Lunn Partners Cash Management had loaned \$3.25 million of Pippen’s money to that project.²³² Although Pedersen & Houpt sent a conflict waiver letter to Lunn as Pippen’s agent concerning this arrangement, it was not sent to Pippen himself even though it was his money being loaned.²³³ However, Pippen apparently did not make a separate claim for this \$3.25 million loan in the Pedersen & Houpt malpractice litigation, or at least he did not do so on appeal so far as the appellate briefs reveal.

Last but certainly not least, jury trials are the norm for professional malpractice actions, but they are not mandated in Illinois state court for equitable actions like breach of the fiduciary duty of loyalty. The Illinois Supreme Court has offered this “no jury” view in past fiduciary duty cases where equitable relief was sought,

corporate client ABC’s executives in starting rival Aeronautics Forwarders while they were still ABC’s fiduciaries); Scott Edward Walker, *Cash? Equity? How Should a Start Up Pay Its Attorneys?*, VENTURE BEAT (Nov. 22, 2010), available at <http://venturebeat.com/2010/11/22/cash-equity-how-should-a-start-up-pay-its-attorneys/>.

230. See, e.g., *Barth*, 139 Ill. 2d at 402–05, 564 N.E.2d at 1197–99 (attorney represented husband and wife in real estate dealings, part of which involved trust dealings in which husband was the trustee and wife was mere beneficiary); *Rogers v. Robson*, 81 Ill. 2d 201, 202, 407 N.E.2d 47, 48 (1980) (lawyer settled a medical malpractice action at insurer’s request, despite insured-client physician’s refusal to consent); *Nagy v. Beckley*, 218 Ill. App. 3d 875, 877, 578 N.E.2d 1134, 1135 (1st Dist. 1991) (attorney represented contract parties and non-contract parties jointly at franchise agreement trial); *Wissore v. Alvey*, 204 Ill. App. 3d 931, 933–38, 562 N.E.2d 978, 979–82 (5th Dist. 1990) (college chancellor alleged his attorney had a conflict of interest in litigation over improper use of college facilities for election activities, as the law firm also represented his employer); *Tucek v. Grant*, 129 Ill. App. 3d 236, 237–39, 472 N.E.2d 563, 564–65 (2d Dist. 1984) (attorney allegedly represented both sellers and buyers in real estate transaction, although attorney claimed he represented only sellers).

231. Brief of Appellants at 4, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. Nov. 17, 2011).

232. *Id.* at 5.

233. *Id.* at 6.

as reflected in *Warren Motors* and *Martin*.²³⁴ The Illinois Appellate Court has offered similar “no jury” fiduciary duty holdings as well, most recently in *Prodromos v. Everen Securities, Inc.*²³⁵ and *Bank One, N.A. v. Borse*.²³⁶ Interestingly, on this issue Phippen agreed that his fiduciary duty claims had to be tried to the bench while his negligence claims had to be tried to the jury,²³⁷ with any election by him between his legal and equitable recoveries coming at the time judgment was entered.²³⁸

V. ABUSE OF TRUST

As noted earlier, I expect future Illinois professional fiduciary duty cases to focus on more traditional fiduciary duty of loyalty fare like sex with patients or clients,²³⁹ disclosures of confidential

234. Federal courts follow a different jury trial analysis under the Seventh Amendment for fiduciary claims, emphasizing the remedy sought. *See Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2006).

235. 389 Ill. App. 3d 157, 906 N.E.2d 599 (1st Dist. 2009).

236. 351 Ill. App. 3d 482, 812 N.E.2d 1021 (2d Dist. 2004).

237. *See* Reply Brief of Appellants at 6, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. June 22, 2012). *See also* *Lozman v. Putnam*, 328 Ill. App. 3d 807, 809, 884 N.E.2d 756, 759 (1st Dist. 2008) (noting dual bench and jury trial on equitable and legal claims arising in a fiduciary duty case); *Boatmen’s Nat’l Bank v. Ward*, 231 Ill. App. 3d 401, 410, 595 N.E.2d 622, 629 (5th Dist. 1992) (“Where, as here, legal and equitable claims are tried together, the jury’s verdict governs factual issues common to them.”).

238. *See* Brief of Appellants at 31, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. Nov. 17, 2011) (citing *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 366, 489 N.E.2d 1374, 1381 (1986) (double recovery is prohibited, but election of remedies is not required until entry of judgment); *Hill v. Names & Addresses, Inc.*, 212 Ill. App. 3d 1065, 1084–86, 571 N.E.2d 1085, 1096–98 (1st Dist. 1991) (awarding alternative remedies of counter-plaintiff’s losses or counter-defendant’s gains in fiduciary unfair competition case).

239. *See, e.g.*, Brian Slodysko, *Des Plaines Doctor Allegedly Assaulted Patient*, CHI. SUN-TIMES (Mar. 24, 2014), available at <http://chicago.suntimes.com/uncategorized/7/71/177115/250000-bond-for-doctor-charged-in-sex-assault-of-bedridden-patient/> (reporting criminal charges against doctor who allegedly assaulted bedridden 61-year old woman).

information,²⁴⁰ self-dealing transactions,²⁴¹ and other conflicts of interest yielding personal advantage to disloyal fiduciaries beyond mere medical or legal fees.²⁴² These situations plainly exceed malpractice.²⁴³ Indeed, they call for public opprobrium.²⁴⁴ A few cases are illustrative.²⁴⁵

An obvious place to start is the attorney-client sexual relations opinion in *Doe v. Roe*,²⁴⁶ a case cited by the *Pippen* parties in their briefs²⁴⁷ but not by the *Pippen* court in its opinion. Attorney Roe represented Doe in an emotionally trying marital divorce, knew Doe

240. Fred C. Zacharias, *Who Owns Work Product?*, 2006 U. ILL. L. REV. 127 (2006). See also Jonathan Saltzman, *Judge: Killer Can Sue Former Lawyer*, BOSTON GLOBE (Sept. 20, 2006), http://www.boston.com/news/globe/city_region/breaking_news/2006/09/judge_killer_ca.html. (explaining convicted murderer can proceed with a case against his former lawyer for libel). The lawyer allegedly discussed the defendant's personal history at a continuing legal education seminar and wrote a book about the case containing personal facts before the case went to trial. *Id.* The killer claims that his former lawyer shared information that he provided to the lawyer to aid in his defense. *Id.* The case deals with some key issues lawyers should always beware of when discussing a case they have been involved in – putting aside the libel issues which deal with the truth of what was said – lawyers cannot divulge attorney/client privileged information that is not part of the public record while speaking at seminars or writing an article or book without first attaining the client's consent. *Id.*

241. See, e.g., *In re Imming*, 131 Ill. 2d 239, 259, 545 N.E.2d 715, 724 (1989) (attorney breached his ethical obligations by obtaining unsecured loans from his clients to finance his manufacturing business).

242. See *Metrick*, 266 Ill. App. 3d 649, 656, 639 N.E.2d 198, 203 (1st Dist. 1994) (“No facts are alleged which infer that the [attorney] defendants were unfaithful to the plaintiffs, that they were dishonest, that they acted in bad faith, that they had a conflict of interest, or that they engaged in self-dealing.”).

243. See *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 226, 856 N.E.2d 389, 394–95 (2006) (“The injury in a legal malpractice action is not a personal injury, nor is it the attorney's negligent act itself. Rather, it is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission.”).

244. Richard D. Cudahy, *What Use Is the Judiciary? Remarks of Judge Richard D. Cudahy*, 41 LOY. U. CHI. L. J. iii, v (2010) (“So we find that the courts, which are responsible for restoring the status quo and effecting restitution, are really fulfilling a symbolic function — assuring the victims that they have identified the sources of their woes and made the names of the miscreants into household words.”); JON RONSON, *SO YOU'VE BEEN PUBLICALLY SHAMED* (2015) (discussing social media shaming incidents).

245. I make no effort here to consider counterclaims by attorneys for their fees or even for damages caused by client defamation, client fraud and the like. See, e.g., *Pampattiar v. Hinson*, 756 S.E.2d 246, 254 (Ga. Ct. App. 2014) (affirming \$400,000 jury verdict in favor of attorney and against former client for fraud, defamation, and false light invasion of privacy); see also Debra Cassens Weiss, *Lawyer Who Sued Client for Allegedly Misleading Her During Consultation Wins*, ABA JOURNAL (Mar. 31, 2014), www.abajournal.com/news/articles.

246. 289 Ill. App. 3d 116, 681 N.E.2d 640 (1st Dist. 1997).

247. See Brief of Appellants at 22–23, 27, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. Nov. 17, 2011); Reply Brief of Appellants at 5, *Pippen v. Pedersen and Houpt*, No. 1-11-1371 (Ill. App. Ct. June 22, 2012).

was experiencing anxiety and insecurity, and knew Doe was dependent upon him.²⁴⁸ Things went from bad to worse when Doe's husband walked in on Doe and attorney Roe having sex in Doe's (and her husband's) home.²⁴⁹ Doe later alleged that attorney Roe settled her case on the cheap and otherwise failed to zealously press her interests "fearing personal embarrassment and potential professional discipline" at the hands of Doe's soon-to-be-former husband.²⁵⁰ To add insult to injury, attorney Roe later threatened Doe with legal proceedings over his bill unless she agreed to more sex – or at least that was Doe's interpretation of attorney Roe's demands²⁵¹ – and even secured a \$2500 judgment against Doe for his fees above her retainer, despite his original promise that any additional fees would be borne by her husband.²⁵²

The appellate court had no difficulty in holding that Doe had properly alleged actionable breaches of fiduciary duty by attorney Roe in connection with his underlying divorce representation, noting the undue influence rule applicable to attorney-client transactions such as the additional fee.²⁵³ In addition, and more significant, the *Doe* court declined to follow the Illinois Appellate Court's earlier decision in *Suppressed v. Suppressed*²⁵⁴ and held that Doe could recover emotional distress damages as part of her fiduciary duty claim against attorney Roe because he had used confidential information – Doe's emotional vulnerability – to take advantage of her.²⁵⁵ The *Doe* court supported this result by citing the Restatement (Second) of Contracts section allowing mental distress recovery where breach of a contract "is of such a kind that serious emotional disturbance was a particularly likely result"²⁵⁶ and by citing the Illinois Supreme Court's decision in *Corgan v. Muehling*,²⁵⁷ a well-known opinion authorizing emotional distress damages against a psychotherapist for engaging in sexual relations with a patient.²⁵⁸ While *Doe* is primarily interesting for opening the door to emotional distress damages against fiduciaries, at least where confidential information is abused, it also demonstrates how

248. 289 Ill. App. 3d at 121, 681 N.E.2d at 644.

249. *Id.*, 681 N.E.2d at 644.

250. *Id.*, 681 N.E.2d at 644.

251. *Id.* at 122, 681 N.E.2d at 645.

252. *Id.* at 124, 681 N.E.2d at 646.

253. *Id.*, 681 N.E.2d at 646 (citing *In re Marriage of Pagano*, 154 Ill. 2d 174, 607 N.E.2d 1241 (1992) and *Klaskin v. Klepak*, 126 Ill. 2d 376, 534 N.E.2d 971 (1989)).

254. *See id.* at 129, 681 N.E.2d at 649 (distinguishing *Suppressed*, 206 Ill. App. 3d 918, 923–25, 565 N.E.2d 101 (1st Dist. 1990)).

255. *Id.* at 130–31, 681 N.E.2d at 650–51.

256. *Id.* at 130, 681 N.E.2d at 650 (citing RESTATEMENT (SECOND) OF CONTRACTS, § 353, at 149 (1981)).

257. *See id.* at 126–28, 681 N.E.2d at 648–49 (citing *Corgan*, 143 Ill. 2d 296, 574 N.E.2d 602 (1991)).

258. *Corgan*, 143 Ill. 2d at 315, 574 N.E.2d at 610.

unfair transactions can come into play when revising a fee arrangement after the representation has begun.

But what of the initial fee agreement itself? Fairness under the “fiduciary” rubric was pressed by the client in *Maksym v. Loesch*,²⁵⁹ a case in which attorney Maksym successfully represented Loesch in a will contest and associated probate proceedings arising out of her father’s death, including defense of a customer fraud suit against the father.²⁶⁰ In anticipation of this complex representation, Maksym structured a fee agreement that ultimately yielded a fee of about \$126,000.²⁶¹ Loesch refused to pay, contending Maksym had used undue influence in setting the fee at the outset of the relationship, but she pointed to nothing “undue” other than the fact that Maksym was a lawyer who entered into a fee agreement with her.²⁶² The Seventh Circuit Court of Appeals considered Illinois law and held that “[f]iduciary law does not send the dark cloud of presumptive impropriety over the contract that establishes the fiduciary relationship in the first place and fixes the terms of compensation for it.”²⁶³ No special explanation was necessary beyond the agreement’s straight-forward terms, the court held, as they were not one-sided; it recognized that more specialized fee contracts might require heightened disclosure, however.²⁶⁴ This holding – that specialized compensation may trigger disclosure duties even at the beginning of the fiduciary relationship – was consistent with the Illinois Supreme Court’s adoption of this rule in its non-attorney fiduciary duty decision in *Martin I*,²⁶⁵ a case the Seventh Circuit did not cite in its *Maksym* opinion. The Seventh Circuit did not reach Maksym’s ratification defense, noting that Loesch’s acceptance of the benefits of Maksym’s representation for three years gave rise to a presumption of waiver as to any supposed fraud.²⁶⁶

A more intricate example of unfair transaction principles at work – and an example of ratification to boot – can be found in *Monco v. Janus*.²⁶⁷ In that case Janus performed landscaping services for attorney Monco and the two knew each other socially starting in 1970.²⁶⁸ They had an informal meeting in Monco’s

259. 937 F.2d 1237 (7th Cir. 1991) (Posner, J.).

260. *Id.* at 1239–40.

261. *Id.* at 1240.

262. *Id.* at 1243–46.

263. *Id.* at 1242. *See also* In re Marriage of Pagano, 154 Ill. 2d 174, 185, 607 N.E.2d 1242, 1248 (1992) (“What was noted 100 years ago remains true today: ‘Before the attorney undertakes the business of the client, he may contract with reference to his services, because no confidential relation then exists and the parties deal with each other at arm’s length.’”).

264. *Maksym*, 937 F.2d at 1243.

265. 117 Ill. 2d 67, 510 N.E.2d 840 (1987).

266. *Maksym*, 937 F.2d at 1244.

267. 222 Ill. App. 3d 280, 583 N.E.2d 575 (1st Dist. 1991).

268. *Id.* at 284, 583 N.E.2d at 577.

kitchen in 1985 in which Janus shared his idea for a beverage container to be worn around the neck.²⁶⁹ This “kitchen table” discussion evolved into Janus assigning his container patent rights to Jisconi, a corporation in which Janus and Monco each held a 50% interest.²⁷⁰ Janus and Monco later found themselves deadlocked, and Monco sought to dissolve the corporation.²⁷¹ Dissolution would have left each of the shareholders equal co-owners of the patent, with the right to market it without accounting to the other for any profits.²⁷² Monco admitted that he never advised Janus that if Janus were to assign the patent to a jointly-owned corporation, Janus would lose exclusive control over the patent in the event of corporate dissolution.²⁷³ Monco also admitted that he did not inform Janus of the option of licensing the patent to Jisconi as opposed to a full assignment. Monco explained that Janus was not his client and that anything less than a full assignment to a jointly-owned company would have been inconsistent with their agreement to be “50/50” partners.²⁷⁴ Both the trial and appellate courts found that Monco was Janus’ attorney and that Monco failed to meet his burden under *McFail v. Braden*²⁷⁵ to show, by clear and convincing proof, (1) that he made a full and frank disclosure of all relevant information; (2) that adequate consideration was given; and (3) that the client had independent advice before completing the transaction.²⁷⁶

The more interesting aspect of *Monco* was attorney Monco’s ratification defense.²⁷⁷ As the Janus/Monco relationship evolved, it became necessary for corporate papers to be drafted and signed, and additional attorneys were brought in for this purpose.²⁷⁸ At least one of them, Vaccarello, served as Janus’ corporate attorney, and another, Dvorak, may have been consulted earlier on Janus’ intellectual property rights, although not before the initial patent rights assignment from Janus to the Jisconi corporation.²⁷⁹ Given these facts, the appellate court concluded Monco was entitled to raise ratification as a defense and rejected Janus’ public policy arguments against it.²⁸⁰ The appellate court then held that the ratification defense itself was subject to the same three-factor

269. *Id.*, 583 N.E.2d at 577.

270. *Id.*, 583 N.E.2d at 577–78.

271. *Id.* at 288, 583 N.E.2d at 580.

272. *Id.* at 285, 583 N.E.2d at 578.

273. *Id.*, 583 N.E.2d at 578.

274. *Id.*, 583 N.E.2d at 578.

275. *See id.* at 291, 583 N.E.2d at 582–83 (citing *McFail*, 19 Ill. 2d 108, 118, 166 N.E.2d 46, 52 (1960)).

276. *See id.*, 583 N.E.2d at 582–83.

277. *Id.* at 292–96, 583 N.E.2d at 583–85.

278. *Id.* at 287–88, 583 N.E.2d at 579–80.

279. *Id.* at 285–87, 583 N.E.2d at 578–79.

280. *Id.* at 293, 583 N.E.2d at 583.

McFail test and remanded the matter for further proceedings.²⁸¹

A variation on this self-dealing theme, and one sure to resonate, can be seen in the prime rate prejudgment interest award in *In re Estate of Wernick*.²⁸² The decedent, doctor Wernick, had jointly owned two real estate parcels, the Cedar property and the Wabash property, in a land trust with his cousin and close friend, attorney Macks, who also served as chairman of a bank.²⁸³ The trial court found Macks breached his fiduciary duties in acquiring Wernick's half interest in these properties and awarded Wernick's estate one half of the sales proceeds for the Cedar property and a one-half beneficial interest in the Wabash property.²⁸⁴ The property that had been sold, the Cedar property, fetched a substantial sum that went only to Macks – because Wernick had assigned that property to Macks only days before Wernick's death from cancer. Macks claimed the other property had also been assigned to him at the same time as well.²⁸⁵ The trial judge followed the *McFail* test, found Macks breached his fiduciary duties in connection with the unfair assignments and was unjustly enriched by \$188,000, and awarded prejudgment interest at the statutory rate of five percent. The Illinois Supreme Court reversed the prejudgment interest ruling, holding that prime rate prejudgment interest was more appropriate.²⁸⁶ The Illinois Supreme Court emphasized that this higher interest rate was necessary to make the Wernick estate whole “by forcing the fiduciary to account for profits and interest he gained by the use of the injured party's money.”²⁸⁷

Having sex with patients or clients and engaging in unfair commercial transactions with patients or clients all fall under the “not a good idea” heading for fiduciaries, and so does disclosing patient or client confidential information.²⁸⁸ Such disclosures are plainly violations of fiduciary duties owed by doctors and lawyers under cases like *Neade*, and they probably also trigger tort liability

281. *Id.* at 294, 583 N.E.2d at 584.

282. 127 Ill. 2d 61, 535 N.E.2d 876 (1989).

283. *Id.* at 67, 535 N.E.2d at 878.

284. *Id.* at 75, 535 N.E.2d at 882.

285. *Id.* at 70, 535 N.E.2d at 880.

286. *Id.* at 89, 535 N.E.2d at 889.

287. *Id.* at 87, 535 N.E.2d at 888. *Cf.* *Tri-G, Inc. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 258, 856 N.E.2d 389, 412 (2006) (no prejudgment interest is permitted in legal malpractice action, whether in tort or in contract); *First Nat'l Bank v. Lowrey*, 375 Ill. App. 3d 181, 217–18, 872 N.E.2d 447, 481–82 (1st Dist. 2007).

288. *See* *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 159, 862 N.E.2d 985, 989 (2007) (Illini Hospital employee revealed plaintiff's pregnancy to plaintiff's sister at a tavern); HIPPA Privacy Rule, CFR §§ 164.500-164.534; Debra Wood, *Nurse Pleads Guilty to HIPPA Violation*, NURSING NEWS (2008), http://www.nursezone.com/nursing-news-events/more-news/Nurse-Pleads-Guilty-to-HIPAA-Violation_28082.aspx (reporting Arkansas nurse's criminal conviction for disclosing patient health information for personal gain in connection with an upcoming legal proceeding involving the patient).

for invasion of privacy under the Illinois Supreme Court's recent opinion in *Lawlor v. N. American Corp.*,²⁸⁹ in which the court formally embraced this tort. And of course such information can be abused even without disclosure, as *Doe* reflects.

Perhaps most difficult of all is determining whether, when and how to make disclosures to non-clients, without breaching fiduciary duties to clients, in connection with an ongoing transaction in which the attorney (or perhaps the doctor) is not a participant except as an attorney for one of the parties. The general principle of silence dictated by client loyalty is not novel or complex, but its application can be difficult, as shown by *Thornwood v. Jenner & Block*.²⁹⁰ Farm owner Thornton and architect Follensbee became partners in an effort to turn Thornton's farm into a residential community and golf course, with Thornton contributing the land and cash for development and Follensbee contributing architectural, engineering and development services and managing the partnership.²⁹¹ The partnership pursued outside investors, including Potomac Sports Properties, recognizing there was substantial upside if the golf course could host Professional Golf Association (PGA) tournament events.²⁹² Unfortunately, after Thornton had sunk \$8 million into the project, the PGA announced it was not interested "unless the developer [was] willing to start over."²⁹³ Nevertheless, Follensbee continued pursuing Potomac and the PGA as potential partners and began making plans with them on behalf of the partnership – without disclosing these key developments to his partner, Thornton.²⁹⁴ When Thornton in the midst of all this demanded liquidation of the partnership, Follensbee resisted and ultimately offered to buy out Thornton's interest – again, without disclosing that Potomac and the PGA were waiting in the wings and in fact had reached a conditional agreement to invest.²⁹⁵

Law firm Jenner & Block entered the picture at this point. Jenner & Block prepared a settlement agreement between Thornton and Follensbee as well as the so-called "Follensbee Release" and the "Jenner & Block Release."²⁹⁶ Thornton executed these documents but then challenged them four years later, apparently after learning the golf course project was going ahead with investors he had not been told about at the time he signed the settlement and release documents.²⁹⁷ The Illinois Appellate Court

289. 2012 IL 112530, 983 N.E.2d 414 (2012).

290. 344 Ill. App. 3d 15, 799 N.E.2d 756 (1st Dist. 2003).

291. *Id.* at 18, 799 N.E.2d at 760.

292. *Id.* at 18–19, 799 N.E.2d at 760.

293. *Id.* at 19, 799 N.E.2d at 760.

294. *Id.*, 799 N.E.2d at 760–61.

295. *Id.* at 20–21, 799 N.E.2d at 761–62.

296. *Id.*, 799 N.E.2d at 761–62.

297. *Id.* at 20–21, 799 N.E.2d at 762.

concluded that Thornton's complaint sufficiently alleged that the settlement agreement and *both* releases had been procured by fraud in the form of Follensbee's failure to disclose his continued negotiations with Potomac and the PGA.²⁹⁸ "This [was] true," the court observed, "regardless of whether Jenner & Block had a fiduciary duty to Thornton with regard to the Partnership because Follensbee's actions could invalidate the entire settlement agreement and related releases."²⁹⁹ The court acknowledged such a result might be unfair to an innocent law firm, but it then pointed to allegations that Jenner & Block was directly involved in the acts underlying Follensbee's fraud,³⁰⁰ including not least "the very insertion of the clause in the settlement agreement that purport[ed] to release certain fiduciary duties between Follensbee and Thornton from October 1, 1994, until the date the release was signed" – thus indicating "an awareness that breaches of fiduciary duties may have occurred during that time."³⁰¹

For our purposes, the court's last holding was its most important: the court found that Thornton had stated a cause of action against Jenner & Block for aiding and abetting Follensbee's fiduciary fraud.³⁰² Jenner & Block's mere passive receipt of Follensbee's letters to others was not enough, but Thornton alleged more. He alleged that Jenner & Block aided and abetted by knowingly and substantially assisting Follensbee in breaching his fiduciary duty by (1) communicating the competitive advantages available to the partnership from the PGA/Potomac plan to other parties, but specifically not to Thornton; (2) expressing Follensbee's interest in purchasing Thornton's interest in the partnership and negotiating the purchase of that interest without disclosing to Thornton the continued negotiations with the PGA and Potomac; (3) reviewing and counseling Follensbee with regard to the production of investment offering memoranda, financial projections, and marketing literature, which purposely failed to identify Thornton as a partner; and (4) drafting, negotiating, reviewing, and executing documents, including the Jenner & Block and Follensbee Releases, relating to the purchase of Thornton's interest and the PGA/Potomac plan with knowledge that Thornton was not aware of that plan.³⁰³ "All of these acts," the court stressed, were "alleged to have been perpetrated by Jenner & Block while it had knowledge that Thornton and Follensbee were partners, that Follensbee had a duty to disclose the PGA/[Potomac] plan to Thornton, and that Follensbee did not disclose the PGA/[Potomac] plan to Thornton

298. *Id.* at 26, 799 N.E.2d at 766.

299. *Id.*, 799 N.E.2d at 766.

300. *Id.*, 799 N.E.2d at 766–67.

301. *Id.* at 26–27, 799 N.E.2d at 767.

302. *Id.* at 27–29, 799 N.E.2d at 767–69.

303. *Id.* at 768–69.

despite having the opportunity and duty to do so.”³⁰⁴

Attorneys can agree to make statements to non-clients, of course, and they often do in the context of deals.³⁰⁵ But the failure to make statements to a non-client, the problem in *Thornwood*, is decidedly trickier. There is little doubt that on the facts alleged, Follensbee was guilty of corporate opportunity usurpation, and apparently Jenner & Block knew it, if the allegations there are to be believed.³⁰⁶ Thus, ironically, even when an attorney owes no fiduciary duty to a third party, and even when that same attorney owes a fiduciary duty of confidence to his client, the attorney may face liability to the third party for failing to disclose the client’s activities if those activities amount to an independent breach of fiduciary duty by the client to the third party. Yet even when a lawyer represents both parties the duty to speak is not always apparent,³⁰⁷ and more than a few attorneys may think, erroneously, that they are completely shielded from personal liability when dealing with non-clients on behalf of clients.³⁰⁸

VI. CONCLUSION

To be sure, breach of fiduciary duty claims can and should exist against professionals. Such claims are not substitutes for tort claims against professionals, however. When courts speak of a professional’s fiduciary duty to a patient or client, they almost always mean the professional’s duty of loyalty, not the professional’s duty of due care. Professional due care is adequately protected by the malpractice regime sounding in tort, as *Neade* and *Pippen* both correctly hold. Loyalty, on the other hand, is a specialized branch of fiduciary duty law that carries with it specialized rights, remedies,

304. *Id.* at 29, 799 N.E.2d at 769.

305. *See, e.g.*, *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 76, 981 N.E.2d 345, 369 (2012) (voluntary exchange of information among companies contemplating a transaction did not waive attorney-client privilege, despite extra-judicial nature of the exchange, even if these communications concerned allegedly diverted corporate opportunities); *Geaslen v. Berkson, Borov & Levin, Ltd.*, 155 Ill. 2d 223, 225 613 N.E.2d 702, 703 (1993) (attorney opinion on behalf of purchaser stating to seller that the attorney had no reason to believe any of the purchaser’s representations and warranties were untrue).

306. *See, e.g.*, Schaller, *supra*, note 27, at 42–52.

307. *See, e.g.*, *Mueller Indus., Inc. v. Berkman*, 399 Ill. App. 3d 456, 469–73, 927 N.E.2d 794, 807–10 (2d Dist. 2010) (discussing crime-fraud exception to attorney-client privilege in connection with advise of attorney who represented seller Berkman and then represented the buyer post-sale while still representing Berkman in connection with Berkman’s secret, post-sale competitive activities against the buyer).

308. *See Salaymeh v. Interqual, Inc.*, 155 Ill. App. 3d 1040, 1046, 508 N.E.2d 1155, 1159–60 (5th Dist. 1987) (attorney’s good faith advice to client does not subject attorney to third party liability, even if attorney’s advice is incorrect and may subject client to liability to third party).

defenses and procedures, as amply if not vividly demonstrated by the sex, confidential information disclosure, self-dealing transaction, and other conflict of interest cases discussed above. The discrete, personal gain sought by doctors or lawyers marks loyalty cases and implicates the patient's or client's rights even when they have suffered no injury.

The same is largely true of the relationship between fiduciary duties and contract law. In emphasizing fiduciary duty law's "unique character" as an amalgam of "agency, contract and equity" in cases like *Kinzer* and *Armstrong*, the Illinois Supreme Court has taken a very traditional view, albeit one fairly unfamiliar from a law student's perspective. And *Armstrong* makes it clear that fiduciary duties, while implied in many contractual arrangements like agency relationships, are separate and independent from those contracts. The fiduciary duties of good faith, confidence, full disclosure and non-competition – all subsumed within the duty of loyalty – can be modified by contract, but they are not easily waived or limited. Unfortunately, the relationship between fiduciary duties and contracts in the professional malpractice context was not at issue in *Neade* and *Pippen*, so clarification of this issue will have to wait for another day.