

---

## Agents & Brokers

---

### Insurance Brokers May Not Owe Their Customer Fiduciary Duties as a Matter of Law or Universally as a Matter of Custom, but They Sometimes Do

---

#### *The Existence of Such a Duty Is a Question of Fact*

---

*Clark & Lavey Benefits Solutions, Inc. v. Educational Development Center, Inc.*, \_\_\_ A.2d \_\_\_, 2008 WL 1932968 (N.H., May 2, 2008)

#### Case at a Glance

An insurance intermediary may, in some circumstances, owe a fiduciary duty to an insurance purchaser. There was sufficient evidence to support the jury's conclusion that the intermediary in this case breached such a duty.

#### Summary of Decision

**Facts.** EDC was a non-profit organization devoted to applied research in the areas of education and public health awareness. C&L brokered group insurance policies for entities that offered employee benefits. EDC hired C&L in 1997, the year of the latter's founding, and C&L was paid solely from commissions built into premiums EDC paid insurers. In 2004, EDC's benefit manager concluded that C&L's commissions were higher than the standard rates paid by health and dental carriers. EDC set out to negotiate a recovery of the difference. EDC terminated C&L in 2005, apparently without recovering any of the allegedly excess commissions.

**Procedural History.** C&L sued EDC for breach of contract and negligent and intentional misrepresentation. EDC counterclaimed, alleging causes of action for breach of fiduciary duty, intentional misrepresentation, and violation of the Massachusetts Consumer Protection Act, Mass. Gen. Law ch 93A. (Presumably, some of the transaction underlying EDC's counterclaim took place in Massachusetts, although the court's opinion is silent on this point). The gravamen of all EDC's claims was the C&L breached a duty it

owed EDC by failing to disclose the standard commission rates.

The jury found C&L liable for both intentional misrepresentations and breaches of fiduciary duties, and it awarded EDC \$70,000. The jury also found EDC liable for intentional/negligent misrepresentations, and breach of contract, for which it awarded C&L \$112,000 in damages. After the trial ended, EDC sought forfeiture of all the commissions it had paid C&L, but the trial judge denied this request.

Both sides appealed, and the New Hampshire Supreme Court affirmed. The appeal raised three issues: (1) the validity of the trial court's instructions regarding what constitutes an unfair and deceptive trade practice under the Massachusetts Consumer Protection Act; (2) whether insurance intermediaries are ever the fiduciaries of their customers, justifying that the jury's conclusion that C&L breach a fiduciary duty; and (3) whether the trial judge properly denied EDC's post-trial request for restitution. The supreme court upheld the trial court on all three issues.

**"Rascality Analysis" and the Massachusetts Consumer Protection Act.** EDC claimed that the trial court erroneously instructed the trial court on the elements of its claim under the Massachusetts statute. The trial court's instruction consisted of two paragraphs. The first one followed the statute. The second contained a criteria for what it is for an actionable statement to violate the statute, and was the subject of EDC's challenge. Here it is: "In order to constitute an unfair and deceptive trade practice under the act, [C&L]'s conduct must obtain a level of rascality that would raise the eyebrow of someone insured to the rough and tumble world of commerce or be at least within the penumbra of some established concept of unfairness or whether it is immoral, unethical, oppressive, or unscrupulous." EDC argued that C&L's failure to disclose, in itself, violated the statute and thus reference to the Rascality Principle was unnecessary and erroneous because the Massachusetts Supreme Court had dropped this test.

The New Hampshire Supreme Court rejected EDC's argument, finding that EDC had not articulated a contemporaneous objection and so had waived any right object. Besides, the court said, the Massachusetts Supreme Judicial Court has expressed doubts and reservations about the Rascality Criteria for statutorily prohibited-and-actionable unfair locutions but it has not unequivocally abandoned it. All that

court said was that rascality analysis was “uninstructive.” *Massachusetts Employers Insurance Exchange v. Popac-Mass Inc.*, 648 N.E.2d 435, 438 (Mass. 1995). Moreover, despite the Massachusetts high court’s criticism of the rascality standards, other courts have continued to use it. Since Massachusetts law was unsettled, the court ruled that it was not plain error for the trial court to create an instruction which hinged on rascality analysis.

*Insurance Intermediaries and Fiduciary Duties.* C&L moved for directed verdict on the issue of whether it had fiduciary duties to EDC. The trial court denied the motion. C&L argued before both the trial court and the supreme court that brokers are not generally fiduciaries of their customers and that there was—as a matter of law—only an ordinary broker-customer relationship between C&L and EDC.

The New Hampshire Supreme Court explained that the nature of a fiduciary relationship in New Hampshire at some length, relying exclusively on *Brzica v. Trustees of Dartmouth College*, 791 A.2d 990 (N.H. 2002). In New Hampshire, the phrase “fiduciary relationship,” is defined “comprehensively,” and it “exists between two persons when one has gained the confidence of the other and purports to act or advise with the other’s interests in mind.” The duty contained in a fiduciary relationship and governing the fiduciary is violated “wherever influence has been acquired and abused or confidence has been reposed and betrayed.” “Once a person becomes a fiduciary, the law places him in the role of a moral person and pressures him to behave in a selfless fashion while contract law does not go beyond the morals of the marketplace where self-interest is the norm.”

The court found sufficient evidence to support the proposition that C&L was a fiduciary of EDC. First, C&L counsel conceded that C&L advertised itself as owing counsel admitted this too. Second, C&L’s president appeared as a witness; he characterized the company’s ads as precisely asserting that C&L was a fiduciary and therefore had its duties; most significantly, he also stated that C&L had placed the interests of EDC ahead of its own. Third, the former director of EDC’s human resources testified and stated that when he hired C&L, he understood it to be committed to placing EDC’s interests first. Hence, there was a valid jury issue.

*Restitution.* After the verdict came in, EDC asked

the judge to grant it forfeiture (i.e., restitution) of all the commissions it had ever paid C&L. EDC’s request was based on the principle that breaches of fiduciary duties are a foundation for restitution, and that remedy is equitable and so is to be granted by the judge. The New Hampshire high court affirmed the court below and gave several reasons. First, EDC’s pleadings did not mention the remedy. Second, during the trial EDC said that the damages it sought were the amount it had paid in commission over the standard rate. Third, this is what EDC’s counsel stated during closing argument. Fourth, given EDC’s handling of the case, C&L did not have notice of EDC’s seeking the remedy of forfeiture. Fifth, this view is supported by precedent. *Thompson v. C & C Research & Development*, 898 A.2d 495 (N.H. 2006).

#### Comment

As perfectly correct and well reasoned as this decision is with respect to insurance brokers having fiduciary duties to their customers sometimes, there are things in the opinion that warrant criticism. First, the court implies that every fiduciary relationship involves exactly two people. This idea is almost certainly wrong. That fact probably did not matter here, but it should have been corrected. Second, the court implies that the market permits immoral conduct. This is a highly doubtful idea. Third, the court overlooks another criticism of the use of rascality language in a jury charge—that the idea of a rascal is misleading. People often find rascals not only amusing, but to be guiltily envied and even (perhaps silently) admired. Of course, this point should have been made by EDC counsel in objecting. Finally, the court classifies the remedy of forfeiture, i.e., restitution, as a type of damages. As a conceptual matter of sound jurisprudence, that seems mistaken. It is an equitable remedy. Moreover, it is not clear why EDC should have had to mention seeking that remedy during the trial in front of the jury.

Finally, I am not at all clear that if the conduct of someone in commerce raises an eyebrow of an observer, then there has been a violation of a consumer protection statute. Surely, at least both eyebrows should go up. At the same time, I confess that I am intrigued by the extent to which matters of business ethics should come before a jury. This creates or affirms the use of philosophers in the realm of expert witnessing. // Quinn