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NEWSLETTER

MARCH 2013

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Breach of Fiduciary Duty: a Cause of Action in Maryland?

by Kevin F. Arthur Kramon & Graham, PA.

Does Maryland recognize an independent cause of action for breach of fiduciary duty? The courts disagree amongst themselves. The Court of Appeals of Maryland has made seemingly contradictory statements on the subject, at times calling for a case-by-case analysis,¹ but at other times making the blanket assertion that “Maryland does not recognize a separate tort action for breach of fiduciary duty.”² The lower courts have exhibited a similar degree of confusion, with some frankly acknowledging “varied” interpretations in the conflicting opinions.³ Litigants can cite controlling and persuasive authority on both sides, and busy and beleaguered jurists reach irreconcilable conclusions. It stands to reason that at least some of these conflicting opinions must be incorrect.

I submit that the conflict and confusion have come about because courts and litigants are asking the wrong question. It is incorrect, and potentially misleading, to ask whether Maryland recognizes “a” cause of action for breach of fiduciary duty. This is because Maryland does not have a single, discrete cause of action for all breaches of all fiduciary duties; instead, it has several (perhaps even many) different causes of action, with different essential characteristics, depending upon the nature of the fiduciary relationship in question and the remedies that historically have been available to address a breach of that fiduciary relationship.

At the outset, it is essential to recognize that, notwithstanding the numerous cases that say that Maryland recognizes no cause of action for breach of fiduciary duty,⁴ the Court of Appeals has repeatedly upheld specific claims for specific breaches of specific fiduciary duties in specific contexts:

- In *Ins. Co. of N. Am. v. Miller*,⁵ the court permitted an insurer to assert a common-law breach of fiduciary duty claim against a disloyal agent.
- In *Della Ratta v. Larkin*,⁶ the court affirmed a circuit court’s factual findings that a general partner had “breached his fiduciary duty and acted in bad faith.”
- In *Clancy v. King*,⁷ the court remanded for a new trial on claims that a partner had breached his fiduciary duty and his duty of good faith and fair dealing.
- In *Shenker v. Laureate Educ. Inc.*,⁸ the court held that in a cash-out merger transaction, where the decision to sell the corporation already has been made, shareholders may pursue direct claims against directors for the breach of their common-law fiduciary duties of candor and maximization of shareholder value.

1 *Kann v. Kann*, 344 Md. 689, 713 (1997); *Ins. Co. of N. Am. v. Miller*, 362 Md. 361, 379 (2001).

2 *Int’l Bhd. of Teamsters v. Willis Corroon Corp. of Md.*, 369 Md. 724, 727 n.1 (2002).

3 *Tobacco Tech., Inc. v. Taiga Int’l N.V.*, No. CCB-06-0563, 2007 WL 644463, at *7 (D. Md. Feb. 26, 2007); see also *BEP, Inc. v. Atkinson*, 174 F. Supp. 2d 400, 405 (D. Md. 2001) (“Maryland’s appellate courts, and on occasion this Court, have not been consistent in ruling on this question”); *Froelich v. Erickson*, 96 F. Supp. 2d 507, 526 n.22 (D. Md. 2000) *aff’d sub nom. Froelich v. Senior Campus Living, LLC*, 5 F. App’x 287 (4th Cir. 2001) (“[A] split of authority has developed as to whether the Court of Appeals rejected breach of fiduciary duty as an independent tort”).

4 See, e.g., *Int’l Bhd. of Teamsters*, 369 Md. at 727 n.1; *Vinogradova v. Suntrust Bank, Inc.*, 162 Md. App. 495, 510 (2005); *Swedish Civil Aviation Admin. v. Project Mgmt. Enters.*, 190 F. Supp. 2d 785, 801 (D. Md. 2002); *G.M. Pusey and Assocs. v. Britt/Paulk Ins. Agency*, Civil Action No. RDB-07-3229, 2008 WL 2003747, at *6 (D. Md. May 6, 2008); *McGovern v. Deutsche Post Global Mail, Ltd.*, Civil Action No. JFM-04-0060, 2004 WL 1764088, at *11-12 (D. Md. Aug. 4, 2004).

5 362 Md. 361, 387-88 (2001).

6 382 Md. 553, 577 (2004).

7 405 Md. 541, 565-72 (2008).

8 411 Md. 317, 351 (2009).

In view of these repeated decisions by the State's court of last resort, it is simply untenable to assert, categorically, that Maryland recognizes no cause of action (or no "independent" cause of action) for breach of fiduciary duty.

When courts or litigants make that untenable assertion, they frequently begin with a citation to the Court of Appeals' opinion in *Kann v. Kann*.⁹ *Kann*, however, stands for no such proposition.

Kann concerned whether the beneficiary of a trust could assert a common-law claim for breach of fiduciary duty, with a right to a jury trial and noneconomic and punitive damages, against her trustee. In concluding that the beneficiary could not assert such a claim, Judge Rodowsky, writing for the court, uttered the oft-quoted statement that Maryland recognizes "no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries."¹⁰ In the very next sentence, however, the court added that "[t]his does not mean that there is no claim or cause of action available for breach of fiduciary duty."¹¹ In fact, while the *Kann* court rejected the beneficiary's attempt to bring a common-law action for breach of the trustee's fiduciary duty, it made clear that the beneficiary nonetheless had a remedy for the trustee's fiduciary breach – albeit a remedy in equity, without a right to a jury trial or punitive damages.¹²

Furthermore, in a passage that is frequently overlooked, the *Kann* court instructed courts and litigants about how to determine whether a party could assert a claim for breach of fiduciary duty:

Our holding means that identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion. Counsel are required to identify the particular fiduciary relationship involved, identify how it was breached, consider the remedies available, and select those remedies appropriate to the client's problem. Whether the cause or causes of action selected carry the right to a jury trial will have to be determined by an historical analysis.¹³

This is the process that the court employed in *Kann*. The court looked, at length, at the history of claims by beneficiaries against trustees, observing that they had sounded only in equity.¹⁴ The court also looked at the statutory remedies for breach of fiduciary duty by a trustee. Finally, the court observed that, by statute, trusts are subject to the "general superintending power" of "[a] court having equity jurisdiction."¹⁵ Thus, whatever rights the beneficiary had at equity, the *Kann* court held that she could not assert them in an action at law.

9 344 Md. 689 (1997). The author of this article was one of the attorneys for one of the defendants in *Kann*.

10 *Kann*, 344 Md. at 713. A few sentences later, the court rephrased that proposition, stating that "[c]ounsel do not have available for use in any and all cases a unisex action, triable to a jury." *Id.* In rejecting a sort of one-size-fits-all tort, *Kann* "disapproved" of *Hartlove v. Md. Sch. for the Blind*, 111 Md. App. 310 (1996), in which the Court of Special Appeals had recognized a common-law tort of breach of fiduciary duty that was based on § 874 of the Restatement (Second) of Torts.

11 *Id.*

12 See *id.* at 703-04.

13 *Id.* at 713.

14 *Id.* at 703-04.

15 *Id.* at 713 (quoting Md. Code Ann., Est. & Trusts, § 14-101).

Kann implicitly recognizes that there are many different types of fiduciary relationships, of different intensity, and with different characteristics. They include:

- trustee to trust beneficiary;
- personal representative (or administrator) to beneficiary of estate
- guardian to ward;
- attorney to client (at least with respect to client funds and confidences);
- general partner to general or limited partner;
- corporate fiduciary (director or officer) to corporation, shareholder, or creditor;
- majority shareholder to minority shareholder or corporation;
- member of LLC to other members or to LLC;
- stockbroker or investment advisor to client;
- employee to employer (duty not to compete while employed); and
- agent to principal (duty of loyalty not to compete).

United States Attorney Rod Rosenstein and Federal Public Defender Jim Wyda Jointly Honored with 2012 DiRito Award

On June 6, 2012, at a ceremony in the Baltimore Courthouse, the Chapter presented the 2012 Peter A. DiRito award jointly to United States Attorney Rod Rosenstein and Federal Public Defender Jim Wyda. Peter A. DiRito was a president of the Maryland Chapter and was a member of the Board of Governors for many years. To honor his memory and in recognition of his dedicated service and leadership, the Maryland Chapter makes an annual award in his name to recognize public service that furthers the FBA's goals: the enhancement of the federal legal profession, the advancement of justice, and the betterment of society.

The 2012 award recipients were recognized for their outstanding leadership, professionalism and service. Rod Rosenstein was recognized for his leadership in enforcing the law with fairness and impartiality. Jim Wyda was recognized for his leadership and dedication in assuring representation to clients accused of federal crimes who otherwise would lack legal representation.

The Chapter congratulates once again both Rod and Jim for their contributions to justice.

Kann's message is that it makes little sense to equate all of these obligations. Instead, according to *Kann*, a court should identify the nature of the fiduciary relationship in question, the manner in which it was breached, and the remedies that historically have been available to address the breach. While different breaches may have different remedies (some at law, some in equity, and some concurrent),¹⁶ *Kann* neither stated nor implied that there was no independent cause of action for breach of fiduciary duty. In fact, it said exactly the opposite.¹⁷

In *Ins. Co. of N. Am.*,¹⁸ the Court of Appeals followed *Kann* in holding that an insurer had established a claim for breach of fiduciary duty against an agent who had diverted insurance premiums to himself. Tracking the required analysis in *Kann*, the court held that the insurer:

(1) identified the particular principal-agent fiduciary relationship created in the case at bar; (2) identified that it was breached by [the agent] participating in the double[-] financing scheme, not forwarding premiums, and not informing [the insurer] that the premiums were out-of-trust; (3) considered the remedies available; and (4) selected those remedies appropriate to the client's problem.¹⁹

The court, accordingly, reversed the circuit court's conclusion that the insurer had failed to prove a breach of fiduciary duty²⁰ and remanded for a determination of damages.²¹

¹⁶ *Id.* at 711.

¹⁷ *Id.*

¹⁸ 362 Md. 361 (2001)

¹⁹ *Id.* at 379.

²⁰ *Id.* at 385.

²¹ *Id.* at 388. The reference to damages evidences the court's recognition that in this case the plaintiff possessed a claim at common law for breach of fiduciary duty.

²² 992 F. Supp. 787 (D. Md. 1998).

²³ *Id.* at 803.

²⁴ *Id.*

²⁵ See, e.g., *Faller v. Faller*, Civil Action No. DKC 09-0889, 2010 WL 1141202 (D. Md. Mar. 22, 2010); *G.M. Pusey and Assocs.*, 2008 WL 2003747 (D. Md. May 6, 2008); *McGovern*, 2004 WL 1764088 (D. Md. Aug. 4, 2004); *Swedish Civil Aviation Admin.*, 190 F. Supp.2d 785 (D. Md. 2002).

²⁶ 190 F. Supp.2d 785 (D. Md. 2002).

²⁷ *Id.* at 801 (quoting *Kerby*, 992 F. Supp. at 803).

²⁸ *Id.* The court's reading of the cases included the Court of Special Appeals' opinion in *Bresnahan v. Bresnahan*, 115 Md. App. 226, cert. denied, 346 Md. 629 (1997), which was decided three weeks after *Kann*. *Bresnahan* made a number of uncontroversial statements about *Kann*, all of which were dicta, because the appellant had failed to preserve an objection to a claim for breach of fiduciary duty. *Bresnahan*, 115 Md. App. at 230 n.1.

²⁹ *Id.*

³⁰ See, e.g., *Int'l Bhd. of Teamsters*, 369 Md. at 727 n.1 (2002); *Vinogradova*, 162 Md. App. at 510.

³¹ See, e.g., *Latty v. St. Joseph's Soc. of Sacred Heart, Inc.*, 198 Md. App. 254 (2011).

³² Civil Action No. DKC 09-0889, 2010 WL 1141202 (D. Md. Mar. 22, 2010). The author of this article was one of the attorneys for the plaintiff in *Faller*.

³³ Md. Code Ann., Corps. & Ass'ns § 9A-404(b)(c).

³⁴ *Id.*, § 9A-405(b)(2)(i).

If it is so clear that Maryland does recognize a claim or claims for breach of fiduciary duty, why do so many cases hold otherwise? The short answer is that the courts began by misreading *Kann* and then compounded the error by citing and re-citing the erroneous decisions.

In the leading case of *Kerby v. Mortg. Funding Corp.*,²² the court dismissed a customer's claims against a mortgage broker who was alleged to have falsely promised to obtain the lowest possible mortgage rate.²³ In its brief explanation of its decision, the court cited *Kann* for the proposition that "Maryland recognizes no 'universal or omnibus tort for the redress of breach of fiduciary duty,' at least in a situation where other remedies exist."²⁴ The court did not cite any passage in *Kann* in which the Court of Appeals indicated that the presence of other remedies would nullify a claim for breach of fiduciary duty. Since then, however, many courts have quoted and followed *Kerby's* dictum that a claim for breach of fiduciary duty will not lie where other remedies exist.²⁵

For example, in *Swedish Civil Aviation Admin.*,²⁶ the court began by citing *Kerby's* misinterpretation of *Kann*, under which a party could assert no claim for the redress of breach of fiduciary duty, "at least in a situation where other remedies exist."²⁷ The court briefly entertained the possibility that in some circumstances it might recognize a tort for breach of fiduciary duty, but promptly added that, under a "careful reading" of the cases, "breach of fiduciary duty would continue to be part of other causes of action."²⁸ Thus, reasoning that "there is no independent tort for breach of fiduciary duty in Maryland, especially in light of the multiple alternative remedies involving the alleged breach available," the court dismissed a claim alleging (among other things) an agent's misuse of confidential information.²⁹

In some of the cases in which courts have stated that Maryland recognizes no claim for breach of fiduciary duty, they may have reached the correct result even if their reasoning was flawed. This is because lawyers overplead. They often attempt to enliven dull commercial disputes with allegations of malfeasance and fiduciary breach. They may include tenuous allegations of fiduciary breach out of concern that they themselves may become the target of such allegations if they omit them. Particularly where the alleged breach of fiduciary duty is really just a breach of the duty of care (i.e., negligence)³⁰ or where the defendant is not a fiduciary in the first place,³¹ courts are correct in dismissing those allegations even if their broader language, about the absence of any such cause of action, is incorrect.

On the other hand, in some cases, the "no independent tort" position has yielded conclusions that are plainly at odds with the result that would follow under the case-by-case analysis that *Kann* instructed courts to employ. Most notably, in *Faller*³² one partner sued another for breach of fiduciary duty under the Revised Uniform Partnership Act, which explicitly recognizes fiduciary duties between partners³³ and empowers a partner to "maintain an action against . . . another partner for legal or equitable relief . . . to [e]nforce the partner's rights."³⁴ Under a routine application of *Kann*, the court should have allowed the claim to proceed, because the plaintiff had identified the statutory source of the fiduciary relationship, the manner in which the fiduciary duty was breached, and the specific statutory remedies that the law allowed. Citing *Swedish Civil Aviation Admin.* and other similar decisions, however, the court hewed to the view that "fiduciary duties are recognized and can be enforced,

but not through independent actions.”³⁵ In so holding, the court effectively wrote the statutory right and remedy out of the code.³⁶

Notwithstanding the numerous cases that claim to allow no “independent” claim for breach of fiduciary duty, other courts have sometimes recognized that that position is untenable. That recognition most commonly occurs in cases concerning whether departing employees have breached the duty not to compete with their employer while still employed – a duty that Maryland courts have characterized as a fiduciary duty of loyalty.³⁷ In those circumstances, courts have repeatedly held that the plaintiff (the employer)

³⁵ *Faller*, 2010 WL 1141202 at *5.

³⁶ By contrast, in *Alloy v. Wills Family Trust*, 179 Md. App. 255, cert. denied, 405 Md. 291, 289-90 (2008), the Court of Special Appeals held that the circuit court had properly permitted the jury to consider whether the general partners had breached their fiduciary duties in failing to disclose conflicts of interest and partnership opportunities. In addition, the court held that the circuit court had erred in refusing to permit the jury to consider whether the general partners had breached their fiduciary duties and had acted in bad faith in engaging in “financially coercive tactics” (*id.* at 301) with the aim of squeezing out the limited partners. See *id.* at 301-14. While *Alloy* arose under District of Columbia law, the applicable statute is *in pari materia* with the Maryland statute, as both derive from the Revised Uniform Partnership Act. See *id.* at 279-81.

³⁷ *Md. Metals, Inc. v. Metzner*, 282 Md. 31, 39 (1978).

³⁸ See, e.g., *Tobacco Tech., Inc.*, 2007 WL 644463, at *7 (D. Md. Feb. 26, 2007) (concluding that a company had stated a “valid cause of action” for breach of fiduciary duty by its agents); *BEP Inc.*, 174 F. Supp. 2d at 405-06 (concluding that plaintiff had properly asserted claim of breach of fiduciary duty under Maryland law, where defendant was “a high level management employee of plaintiff” who had diverted business from plaintiff to himself); *Planmatics, Inc. v. Showers*, 137 F. Supp. 2d 616, 625 (D. Md. 2001) (holding that an employer stated a claim for breach of fiduciary duty against an employee who allegedly advanced his own self-interest to the employer’s detriment). In another, similar case, the court would not allow an employer to assert a claim for breach of fiduciary duty, but allowed it to proceed with a claim for breach of the duty of loyalty. *McGovern*, 2004 WL 1764088, at *12 (D. Md. Aug. 4, 2004). The distinction was purely semantic, as the duty of loyalty is a fiduciary duty.

³⁹ See, e.g., *Tobacco Tech.*, 2007 WL 644463, at *7 (“Subsequent Maryland courts confronting the issue, arguably including this court, have varied in their interpretation of *Kann*”); *BEP*, 174 F. Supp. 2d at 405-06 (“Maryland’s appellate courts, and on occasion this Court, have not been consistent in ruling on this question in cases involving various different factual scenarios”).

⁴⁰ 194 Md. App. 431 (2010), cert. denied, 417 Md. 502 (2011).

⁴¹ *Id.* at 452-56.

⁴² See *id.* at 456; *id.* at 466.

⁴³ 197 Md. App. 586 (2011). Citing *Wasserman*, one court stated that, “In the aftermath of *Kann*, Maryland courts have limited independent causes of action for breach of fiduciary duty to those seeking equitable relief.” *Allstate Ins. Co. v. Warns*, Civil No. CCB-11-1846, 2012 WL 681792, at *7 (D. Md. Feb. 29, 2012). The statement is impossible to reconcile with, among other things, the Court of Appeals’ decision in *Miller*, in which it upheld a claim for breach of fiduciary duty and remanded for further proceedings concerning damages. See *supra* n. 21.

⁴⁴ *Id.* at 631-32.

⁴⁵ 198 Md. App. 254 (2011).

⁴⁶ *Id.* at 271.

⁴⁷ *Kann*, 344 Md. at 713 (emphasis added).

⁴⁸ *Id.* at 710.

has a valid claim for breach of fiduciary duty.³⁸ In the process, the courts have expressly recognized the inconsistent decisions on the subject of fiduciary breach, while implicitly criticizing the inflexible position that Maryland recognizes no “independent” cause of action for breach of fiduciary duty.³⁹

In one recent decision, the Court of Special Appeals disregarded the erroneous assertion that Maryland recognizes no “independent” cause of action and illustrated precisely how, under *Kann*, a court should determine whether a party has a viable claim for fiduciary breach. In *Lassater v. Guttman*⁴⁰ a wife claimed that her husband had breached a fiduciary duty to manage marital funds because he had squandered marital assets. In deciding the wife’s claim, the court analyzed the nature of the alleged fiduciary relationship and looked to the remedies, if any, that were available.⁴¹ It concluded that the wife could not assert a claim for a breach of fiduciary duty, not because no such claim existed, but because it held that the relationship of husband and wife is not a fiduciary relationship.⁴²

Unfortunately, the judicial process does not always lead swiftly and directly to the correct result. Too frequently, busy courts rely on lawyers, who are cowed by the abundance of cases that state, rigidly but erroneously, that Maryland recognizes no “independent” cause of action for breach of fiduciary duty. Thus, for example, in its otherwise excellent opinion in *Wasserman v. Kay*,⁴³ the Court of Special Appeals cited several “no independent cause of action” cases before reaching the anomalous conclusion that Maryland may recognize an equitable claim for breach of fiduciary duty, but does not recognize one at law.⁴⁴ Similarly, in *Latty*,⁴⁵ the court correctly held that the defendant had no fiduciary obligation to the plaintiffs, but then proceeded to cite *Wasserman* and other cases for the proposition that a party cannot assert a claim at law for breach of fiduciary duty.⁴⁶ That statement was both unnecessary and erroneous.

This confusion will continue as long as courts and litigants persist in their misreading of *Kann*. Notwithstanding the many cases to the contrary, *Kann* does not hold that Maryland recognizes no “independent” cause of action for breach of fiduciary duty; it expressly disavows any such holding, stating instead that the decision “does not mean that there is no claim or cause of action available for breach of fiduciary duty.”⁴⁷ Nor does *Kann* limit the claim for breach of fiduciary duty to equitable cases; to the contrary, it expressly states that “[f]or some breaches the remedy may be at law, for others it may be exclusively in equity, and for still others there may be concurrent remedies.”⁴⁸ Nor, finally, does *Kann* say that the claim lies only in cases where a party has no other remedies or that the claim can, at most, form a part of other claims; those statements are a gloss or embellishment that lower courts have added.

Kann rejects any rigid, formulaic approach to breach of fiduciary duty, because it recognizes the multiple varieties of fiduciary duties. Accordingly, *Kann* directs us to conduct a case-by-case analysis. As a result of that analysis, some claims will lie in tort, others will lie in equity, and in others no claim will lie at all (because the defendant either owed or breached no duty). Until courts and litigants regularly employ the case-by-case analysis that *Kann* requires, we will continue to have warring and irreconcilable opinions on the question of whether Maryland recognizes a claim for breach of fiduciary duty.