THE FIDUCIARY BOMB

This paper is about fiduciary duties for design professionals, and has nothing to do with dirty words. But perhaps there is some similarity between these two concepts, because lobbing the Fiduciary Bomb into a group of design professionals (let alone their risk managers, lawyers, or insurers) can create every bit as much consternation as the F-Bomb.

As the reader probably knows, design professionals are required by law to meet the standard of care—they must perform their professional services with the degree of skill and care ordinarily exercised by their peers operating in the same locality and during the same time period. Failure to meet that standard is negligence, and the design professional will be liable for damages caused by its negligence.

But every once in a while, a case comes along suggesting that an architect or an engineer owes its client not just the ordinary standard of care, but the very highest standard of care—that is, a fiduciary duty. For example, in December 2010 the city of Victorville, California, won a $52.1 million jury verdict against a large engineering firm. The jury found that the firm misrepresented key facts on which the city relied in deciding to construct a new
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Fiduciary Duties: Not for Everyone

The term fiduciary comes from the Latin words for “faith” and “trust,” and that is appropriate since a fiduciary duty normally is imposed upon a party who is entrusted with property belonging to someone else. That party, in turn, places complete faith in the fiduciary’s judgment.

A classic example of a fiduciary relationship is that between a trustee and the beneficiary of the trust. The fiduciary has a duty to act for the benefit of the other party and is not allowed to have conflicting interests. Fiduciary relationships stand in stark contrast to normal “arm’s length” business dealings, in which the parties are assumed to be acting in their own best interests.

Courts are fussy about giving fiduciary status to business relationships. They generally will not impose fiduciary duties on dealings between two sophisticated business people, even if one party has professional expertise and is trusted by the other. Many courts have applied this reasoning to find that an architect or engineer does not stand in a fiduciary relationship to its client, as in this Minnesota decision:

A fiduciary relationship is characterized by a “fiduciary” who enjoys a superior position in terms of knowledge and authority and in whom the other party places a high level of trust and confidence. Such a relationship transcends the ordinary business relationship, which, if it involves reliance on a professional, surely involves a certain degree of trust and a duty of good faith and yet is not classified as “fiduciary.” Minnesota has declined to classify even the physician-patient relationship as fiduciary.

power plant, and found the firm liable for breach of fiduciary duty (as well as professional negligence, negligent misrepresentation, breach of contract, and breach of express warranty).

The notion that design professionals might owe a fiduciary duty to their clients sends shock waves through the design professional community, both because of concerns about an elevated standard of care and concerns about insurability. Let’s look more closely at the problem and figure out what you can do about it.
Thus, absent binding authority to the contrary, and none has been shown here, we hold that the relationship of architect and client is not a fiduciary one. However, whether a fiduciary relationship exists is a fact question. *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324 (citation omitted), review denied 2007 Minn. LEXIS 524 (Minn. Aug. 21, 2007).

The relationship between a design professional and client does, and should, involve “a certain degree of trust and a duty of good faith.” But it is rarely, if ever, a relationship in which the design professional calls all the shots and the client meekly nods agreement. It is difficult (but fun) to imagine a client who instructs the architect or engineer, “Just design me a ______ and let me know when you’re done.” Design is, and is meant to be, an iterative process, not an exercise in blind faith in an architect or engineer. Clients can and do exert influence and control over the ultimate design of the project. Under these circumstances, it is not appropriate to impose a fiduciary duty on the design professional.
Falling on the Fiduciary Bomb

None of this is to say that a fiduciary relationship could not exist between a design professional and a client. In the case cited previously, where the court found that the architect did not owe a fiduciary duty, it was careful to note that whether or not a fiduciary relationship exists depends on the facts of the particular case.

A design professional could, for example, agree by contract to act as a fiduciary to the client. This is neither wise nor particularly insurable (more on this later), but it is possible. For example, ConsensusDOCS 240 (Standard Agreement between Owner and Design Professional) uses very “fiduciary-ish” language to describe the relationship between design professional and owner:

*The Design Professional accepts a relationship of trust and confidence with the Owner for this Agreement and will cooperate and exercise the skill and judgment required above in furthering the interests of the Owner. (ConsensusDOCS 240, §2.2, emphasis supplied).*

Many design professionals will shy away from objecting to contractual provisions like this one. After all, shouldn’t the owner be able to “trust” the design professional and have “confidence” in his or her abilities? Won’t the design professional try to help the owner “further his or her interests”? Yes, of course.

But with these few simple words, the design professional risks taking on extra contractual duties and responsibilities for which it did not bargain, and which it lacks realistic means to fulfill. For example, a design professional might be held to have a fiduciary duty to ensure that the project is constructed in strict conformance with the construction documents, despite the fact that the contract makes it quite clear that the contractor, and not the design professional, is responsible for means and methods, and for following the plans.

We can anticipate that some clients will be alert to the advantages of making the design professional the de facto insurer of the project’s success and the client’s happiness, and insist on contract language that creates a fiduciary relationship. We can also predict that plaintiffs will continue to advance arguments that design professionals are fiduciaries to their clients, whether or not their contracts say so.

So occasionally, some court somewhere will end up saying that a design professional owes a fiduciary duty to a client. What if that design professional is you?

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Blowing up Coverage

Tossing around the Fiduciary Bomb makes design professionals nervous about blowing up their professional liability insurance coverage and their business, and they are right to be concerned.

Professional liability insurance provides coverage for a design professional’s negligence—the failure to use ordinary care in the performance of their professional services. For that reason, construction lawyers and insurance brokers have long counseled design professionals to reject contract language requiring “the highest standard of care,” or calling for guarantees, warranties, and certifications of anything but known facts, in the hopes of keeping claims, if and when they come, within the coverage grant of the policy.

So what happens when a court decides that a design professional owes a fiduciary duty—by definition, the very highest standard of care? Is there coverage? The unsatisfying (but correct) answer is that it depends on the terms and conditions of the policy. If the policy only affords coverage for negligence, a higher duty may not be covered. There may be problems with coverage for punitive damages, as well. Of course, it is quite likely that the complaint will allege some covered counts (negligence) as well as uncovered counts, and, if so, the design professional will probably be entitled to a defense under the policy. But this is cold comfort to the design professional firm that faces the prospect of a potentially enormous uncovered verdict or settlement.

“What if that design professional is you?”
Defusing the Fiduciary Bomb

Although it would be overstating the case to say that “design professional as fiduciary” is a trend, the potential for large and uncovered loss if the Fiduciary Bomb blows up on you is scary enough to warrant taking defensive measures.

First, make sure your contracts are not setting you up as a fiduciary. The ConsensusDOCS contract identified above is just one example of language that sounds innocuous, but could lay the groundwork for a claim that you owed a fiduciary duty to your client. Do not accept such language without a fight. The conversation you need to have with your client may not be as uncomfortable as you fear. You will want to raise the following issues:

- **Professionalism**—Just because you will not accept fiduciary status does not mean you are out to cheat your client. All contracting parties have a duty of good faith and fair dealing, and the professional services contract is no exception. Design professionals are also bound by their code of ethics, licensing laws, and, perhaps most powerfully, their own sense of professionalism.

- **Collaboration**—Fiduciary status is for those who have complete authority to act for another party (or, if you prefer, to “call the shots”). This is fine for a trustee who manages funds on behalf of the trust’s beneficiary, but not for a design professional who will collaborate with the client on design, and ultimately entrust the building of the project to a contractor. Under these circumstances, you cannot and should not be expected to guarantee the outcome of the project.

- **Insurance**—It is highly unlikely that professional liability insurance provides coverage for a claim that you breached a fiduciary duty to your client. Because professional liability insurance provides financial security to you and your client, both parties have a strong interest in signing an insurable agreement.
Secondly, you may want to propose contract language expressly stating that nothing in the agreement or otherwise is intended to create a fiduciary duty between the parties. This may yield an uncomfortable discussion (see previous), but you and your client ultimately must agree about the scope and nature of your duties to the client. Proceeding without this “meeting of the minds” is a direct route to disappointed clients, broken relationships, and costly claims.

Finally, be mindful of the first principle of risk management: Risk should be borne by the party most able to control the risk. Anytime you are being asked to warrant the project’s performance, ensure that the contractor builds the project according to plan, or guarantee that the project can be built within the budget, you are taking responsibility for factors you don’t and can’t control. You may be stepping outside of the coverage grant of your professional liability policy as well, since most policies exclude coverage for express warranties and guarantees. You may also be vulnerable to claims that you had a fiduciary duty to the client. Either way, you lose, in a game that was rigged against you from the start.

Like dirty words, the Fiduciary Bomb is all too easy to throw, and can create serious problems for you and your practice once it is launched. Take steps to defuse the Fiduciary Bomb, if it lands on you, and keep an eye out for sneak attacks in the form of innocent-seeming contract language.

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Our Goal

To be the best place to do business and to work