By Michael A. Geibelson

Conspirators, special agents and other bad actors: Refining allegations of vicarious liability

While the days of pickpockets have not passed, stealing and other forms of unfair competition have become far more complex. And the statutes and commercial torts that remedy these acts impose complex issues of proof. As a result, whether a case can be made often depends upon whether there is anyone left holding the bag, or holding *a* bag from which restitution can be had. These principals are equally important where insurance covering personal injuries is insufficient, or absent.

Despite a wealth of cases discussing the scope of vicarious liability for co-conspirators, joint venturers, fiduciaries and special agents, complaints often misapply settled concepts of vicarious liability, leaving the plaintiff open to pleading challenges and proof problems at trial. With attention to the details at the outset, these hurdles can be avoided or, at a minimum, overcome.

Conspiracy is not a cause of action, but is a basis for broad vicarious liability

Despite long-standing caselaw, numerous plaintiffs still improperly plead conspiracy as a separate cause of action. But under California law, there is no such thing as a separate cause of action for civil conspiracy. (See e.g., *Applied Equip. Corp., v. Litton Saudi Arabia Ltd.*, (1994) 7 Cal. 4th 503, 510-511, 513, [28 Cal.Rptr. 2d 475] ("[a] conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve") (quoting *McMartin v. Children's Institute International*, (1989) 212 Cal.App.3d 1393, 1406, [261 Cal.Rptr. 437]); *Wyatt v. Union Mortgage Co.*, (1979) 24 Cal.3d 773, 784, [157 Cal.Rptr. 392]; *Kidron v. Movie*

Acquisition Corp., (1995) 40 Cal.App.4th 1571, 1581 [47 Cal.Rptr.2d 752] ("as is well established, civil conspiracy is not an independent tort"); *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, [269 Cal.Rptr. 337]).

Plaintiffs' persistence in pleading a cause of action for conspiracy is perhaps attributable to the Court of Appeal's holding in *Wise v. Southern Pacific Co.* (1963) 223 Cal.App.2d 50, 71-72, [35 Cal.Rptr. 652], that one contracting party, by use of a conspiracy theory, could impose liability on another for the tort of interference with that contract. However, the Court of Appeal in *Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 262, [45 Cal.Rptr.2d 100-101], recognized that *Wise* was accepted and followed in a number of appellate cases, but was never adopted by the Supreme Court. *Applied Equipment* firmly rejected the *Wise* rule for two reasons:

> (1) [i]t illogically expands the doctrine of civil conspiracy by imposing tort liability for an alleged wrong – interference with a contract – that the purported tortfeasor is legally incapable of committing; and (2) it obliterates vital and established distinctions between contract and tort theories of liability by effectively allowing the recovery of tort damages for an ordinary breach of contract." (*Applied Equipment, supra,* 7 Cal.4th. at 510).

> In order to maintain an action for conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage.

(*Berg & Berg Enterprises v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, [38 Cal.Rptr.3d 325] (citing *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47 [77 Cal.Rptr.2d 709]). Thus, a plaintiff must allege some wrong committed pursuant to the claimed conspiracy. (*e.g., Applied Equip. Corp., supra,* 7 Cal.4th at 510-511.) The pleaded facts must show that "something was done which, without the conspiracy, would give rise to a right of action." (*Lyons v. Security Pacific Nat. Bank*, (1995) 40 Cal.App.4th 1001, 1019, [48 Cal.Rptr.2d 174], (quoting *Agnew v. Parks*, (1959) 172 Cal.App. 2d 756, 762, [343 P.2d 118].) And even when in artfully pled as conspiracy, a cause of action will be dismissed where the underlying cause of action is defective or not shown. (*See, e.g., Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 75-76, [269 Cal.Rptr. 337], (conspiracy claim dismissed due to dismissal of fraud claim on which it was based).)

Assuming some other cause of action can be pled, vicarious liability based upon a conspiracy is easy to plead because it can be alleged conclusorily, and with little detail. For instance, the California Supreme Court in *Quelimane Co. v. Stewart Title Guaranty Co., supra,* at 7-48, explained that even in the case of a claim for fraud, no greater specificity is required than to allege (1) the formation or operation of the conspiracy, (2) the wrongful acts done pursuant to it, and (3) the resulting damages.

The liability resulting from a conspiracy is broad. In *People v. Bestline Products, Inc.* (1976) 61 Cal.App.3d 879, 918 [132 Cal.Rptr. 767], the court explained:

> All parties to a conspiracy to defraud are directly liable for all misrepresentations made pursuant to such conspiracy and anyone who knowingly aids and abets fraud or furnishes the means for its accomplishment is liable equally with those who actually make the misrepresentations.

The web of liability is not without its limits, however. For instance,

> Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1089, [32 Cal.Rptr.3d 483] (internal quotations omitted).)

This limitation also applies where only a small subset of the potentially liable parties are bound by the duty that was violated. For instance, notwithstanding an alleged conspiracy, an insurer's agent is not liable where the "duty is imposed by statute solely upon persons engaged in the business of insurance." (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 45 [260 Cal.Rptr. 183.)

Aiders and abettors, compared

Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. (*Casey v. United States Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145, fn. 2 [26 Cal.Rptr.3d 401]; see also *Neilson v. Union Bank of California, N.A.* (C.D.Cal. 2003) 290 F.Supp.2d 1101, 1132-1137; cf. *In re County of Orange* (Bankr. C.D.Cal. 1996) 203 B.R. 983, affd. in part & revd. in part on other grounds (Bankr. C.D.Cal. 1997) 245 B.R. 138.)

> Aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct. [¶] ... [W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. A plaintiff's object in asserting such a theory is to hold those who aid and abet in the wrongful act responsible as joint tortfeasors for all damages ensuing from the wrong. (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 748-749 [3 Cal.Rptr.2d 575].)

The aider and abettor's conduct need not, as "separately considered," constitute a breach of duty. (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846 [33 Cal.Rptr.2d 438]; see also Restatement (2d) of Torts, § 876.)

Unfaithful fiduciaries

Practitioners regularly, and improperly, limit the concept of a fiduciary to one who holds or manages another's money or assets. While such a person can be a fiduciary, thinking of fiduciaries in this way unduly narrows the types of relationships that will give rise to a fiduciary duty, and its breach. Although, the existence of a contract does not, by itself, create a fiduciary relationship. However, numerous types of contracts do create such relationships (A fiduciary relationship is imposed in any relation existing between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other party. (See, e.g. *Wolf V. Superior Court* (2003) 107 Cal App.4th 25, 29).) A trust imposing fiduciary duties can also be created by conduct. (Cal. Prob. Code § 15200(b).)

A fiduciary relationship is created whenever a person reposes trust and confidence in another who obtains control over the first person's affairs in some way. (*Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 809, [22 Cal.Rptr.2d 636]. See also *GAB Business Services v. Lindsey & Newson Claim Services. Inc.* (2000) 83 Ca1.App.4th 409, 417, [99 Ca1.Rptr.2d 665] (a fiduciary relationship arises where one voluntarily assumes a position of trust and confidence).) Many different relationships may be fiduciary

or confidential in nature; the existence of such a relationship depends on the circumstances of each case and "is a question of fact for the trier of fact." (*Kudokas, v. Balkus* (1972) 26 Cal.App.3d 744, 750, [103 Cal.Rptr. 318].)

A fiduciary duty may arise out of an agreement. (*GAB Business Services*, 83 Ca1.App.4th at 417.) But fiduciary duties are not solely derived from formalized trust relationships, nor do they necessarily require a contract. (*See, Gill v. Johnson* (1932) 125 Cal.App. 296, [13 P.2d 857], *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, [29 Cal.Rptr. 201]; *Tri-Growth Centre City Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, [265 Cal.Rptr. 330] (law firm owed duty to non-client because a fiduciary relationship arises whenever confidence is reposed by persons in the integrity of another).)

The diverse kinds of relationships that have been determined by the courts to be fiduciary or confidential in nature include, among others: Trustee - Beneficiary (*Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 621 [79 Cal.Rptr.2d 146]); Bank-Depositor (*Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, [229 Cal.Rptr. 16]); Corporate Directors - Controlling Shareholders (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108-109 [81 Cal.Rptr. 592] [controlling shareholder of corporation], *Efron v. Kalmanovitz* (1964) 226 Cal.App.2d 546, [38 Cal.Rptr. 148]); Guardian-Ward (*Robins v. Hope* (1881) 57 Cal. 493; Associates in a Common Enterprise (*Black v. Shearson, Hammill & Co.* (1968) 266 Cal.App.2d 362, [72 Cal.Rptr. 157]; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 818-819 [195 Cal.Rptr. 421] [joint venturers]; Agent-Principal (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1580 [36 Cal.Rptr.2d 343].)

Where a party is required to account to the other in some way, a fiduciary relationship may also be found, particularly where the other has no independent ability to monitor the work subject to the accounting. Absent any ability to monitor, trust and confidence must necessarily be reposed. (*See Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 631, [32 Cal.Rptr.3d 266]; *Stevens v. Marco* (1956) 147 Cal.App.2d 357, 363, [305 P.2d 669].) At a minimum, such responsibilities create an agency for which the agent accepts a duty of undivided loyalty. (*Kennard v. Glick*, (1960) 183 Cal.App.2d 246, 250-251 [7 Cal.Rptr. 88].) That is, agents can also be considered fiduciaries depending upon the nature of their agency. For instance, *Kennard v. Glick*, explains that an agent entrusted with the duty of receiving and disbursing moneys and keeping accurate records of transactions is a fiduciary. (*Id.*, 183 Cal.App.2d at 250-251.)

One category of fiduciaries commonly overlooked is employees. An employee is a fiduciary to his employer if he participates in management and has discretion in managing the employer's affairs. (See *GAB Business Services*, 83 Ca1.App.4th at 419-421. See also *Daniel Orifice Fitting Co. v. Whalen* (1962) 198 Cal.App.2d 791, 797, [18 Ca1.Rptr. 659].)

For instance, the solicitation of employees may be enough to constitute a breach of fiduciary duty, even where solicitation is otherwise generally permitted. (*Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327.) An employee breaches his fiduciary duty to his employer by using insider knowledge of employee skills and salaries to recruit valued employees away from the employer, and into jobs with the employer's competitor. (See *Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 350-52 [49 Cal.Rptr. 825]; *GAB Business Services*, 83 Ca1.App.4th at 423-25).) He also breaches it by soliciting those employees for the competitor. (*Ibid. See also Alexander & Alexander Benefits Services, Inc: v. Benefit Brokers & Consultants, Inc.*,

See Vicarious liability, Page 44

Vicarious liability — continued from Page 42

756 F.Supp. 1408, 1411-1412 (D.Or. 1991) (preliminary injunction granted; plaintiff demonstrated a probability that it would prevail on the merits of its claim that its former employee breached his fiduciary duty to it by encouraging other employees of plaintiff's to join him in a competing firm).)

Another common breach occurs when a person goes to work at a competitor, or starts his own competing business. Where trade secrets have been misappropriated to do so, an additional cause of action for breach of fiduciary duty necessarily follows. Given the limited definition of what constitutes a trade secret, (Cal. Civ. Code. § 3426.1(d)), the difficulty of proving that the thing taken was a trade secret can be fatal to a misappropriation claim. But because the employee's fiduciary status imposes a heightened duty of loyalty, it does not (necessarily) require proof that the information used in the new business was a trade secret. (*See e.g. Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 354-55.) An employee or former employee breaches his fiduciary duty by stealing a business or corporate opportunity of his employer or former employer for his own benefit. (*Kelegian v. Mgrdichian* (1995) 33 Cal.App.4th 982, 988, [39 Cal.Rptr.2d 390], *accord Robinson, Leatham & Nelson, Inc. v. Nelson*, (9th Cir. 1997) 109 F.3d 1388, 1392. See *Alexander, supra*, 756 F.Supp. at 1415 (diversion of corporate opportunities); *Imi-Tech Corp. v. Gagliani* (S.D.Cal. 1986) 691 F.Supp. 214, 230 (former employees owed fiduciary obligations to former employer to keep secret technical and marketing information learned or created in their employments, as each was a management employee and in view of the employer's efforts to maintain secrecy and their knowledge and participation in those efforts); *Klamath-Orleans Lumber, Inc. v. Miller*, (1978) 87 Cal.App.3d 458, 464, [151 Cal.Rptr. 118] (misuse of former employer's customer information constituted an abuse of the trust).)

Fiduciary relationships also exist when one party reposes trust and confidence in another's ability to care for someone's physical condition. For example, the appellate court in *Wohlgemuth v. Meyer* (1956) 139 Cal.App.2d 326 [293 P.2d 816], held that the defendants there, as owners and operators of a convalescent hospital, were the fiduciaries of the plaintiff and her husband. *Id.* at 331.

The doctor-patient relationship is a fiduciary one which requires the doctor to reveal all pertinent information to his patient, or the spouse of a deceased patient (e.g. concerning the cause of

See Vicarious liability, Page 49

Vicarious liability — continued from Page 44

death) for that matter. (See *Stafford v. Shultz* (1954) 42 Cal.2d 767, 777, [270 P.2d 1]; *Bowman v. McPheeters* (1947) 77 Cal.App.2d 795, 800, [176 P.2d 745].) Withholding information would, in a sense, amount to misrepresentation or concealment. (*Wohlgemuth v. Meyer* (1956) 139 Cal.App.2d at 331. Under the circumstances, such concealment can extend the statute of limitations. (Cal. Code Civ. Proc. §340.5.)

This duty is expanded by the California Supreme Court's decision in *Delaney v. Baker* (1999) 20 Cal.4th 23 [82 Cal.Rptr.2d 610], where the Court recognized that the purpose of the Elder and Dependent Adult Civil Protection Act (the elder abuse statute) is "to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Id.* at 33.) The purposes of this statute combined with the recognition of a fiduciary duty in the provision of medical care imposes a fiduciary relationship upon all those who care for the elderly and dependent adults. As a result, organizations like nursing facilities have fiduciary obligations to their residents. In *Klein v. BIA Hotel Corp.* (1996) 41 Cal.App.4th 1133, 1142, [49 Cal.Rptr.2d 60], the Court of Appeal held that a facility caring for an elderly resident "assumed a special relationship with decedent when it agreed to have her as a resident in its facility for the care of the elderly." The *Klein* Court's conclusion was founded upon a breadth of statutory duties imposed upon skilled nursing facilities. (*Id.*, at pp. 1136-37.)

The lesson of *Klein*, however, is that where there are statutes which impose nondelegable duties, the nature of those duties may create a fiduciary duty and not just a duty of ordinary care.

Joint venturers ... on their own adventure

Far more significant than mere agents, joint venturers are also considered to be fiduciaries. (See, e.g., *April Enterprises, Inc. v. KTTV*, (1983) 147 Cal.App.3d 805, 818-819 [195 Cal.Rptr. 421]; *Michelson v. Hamada*, (1994) 29 Cal.App.4th 1566, 1580 [36 Cal.Rptr.2d 343].) Even if not formally organized as such, a joint venture can be proven from the parties' respective obligations and opportunities. As the *April Enterprises* Court explained:

> A joint venture ... is an undertaking by two or more persons jointly to carry out a single business enterprise for profit." (*Nelson v. Abraham* (1947) 29 Cal.2d 745, 749 [177 P.2d 931].) The elements necessary for its creation are: (1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control. (*County of Riverside v. Loma Linda University* (1981) 118 Cal.App.3d 300, 313 [173 Cal.Rptr. 371]; *Holtz v. United Plumbing & Heating Co.* (1957) 49 Cal.2d 501, 506-507 [319 P.2d 617].) "Such a venture or undertaking may be formed by parol agreement [citations], or it may be assumed as a reasonable deduction from the acts and declarations of the parties [citations]. (*Nelson v. Abraham, supra*, 29 Cal.2d 745, 749-750.)" (*Id.*, 147 Cal.App.3d at pp. 819-20.)

However, the contributions of each party need not be equal in amount or kind in order to establish the existence of a joint venture. For instance, the fact that one contributed capital and the other services does not alter the conclusion that they were joint venturers. (*Ibid.*)

Nor are the parties required to realize profits and losses in the same way for a joint venture to exist. For instance, *Krantz v. BT Visual Images, L.L.C.*, (2001) 89 Cal.App.4th 164, [107 Cal.Rptr.2d 209], accepted Witkin's reiteration of the Supreme Court's holding in *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 Cal.2d 751, [128 P.2d 665], that a relationship exists "akin to that of joint adventurers" even where a manufacturer is to develop a new press and a distributor is to demonstrate and attempt to negotiate sales for a percentage. "The mode of participation in the fruits of the undertaking may be left to the agreement of parties." (*Krantz*, 89 Cal.App.4th at 178 (quoting 9 Witkin, Summary of Cal. Law (9th ed. 1989) Partnership, § 18, pp. 417-418).)

It should be noted that even if a fiduciary duty is accepted only by one member of a conspiracy, the other members of the conspiracy are also charged with the duty. (*Gray v. Sutherland* (1954) 124 Cal.App.2d 280, 290, [268 P.2d 754];

Bancroft-Whitney Co. v. Glen (1966) 64 Cal.2d 327, 353, [49 Cal.Rptr. 825]; *Certified Grocers of California, Ltd. v. San Gabriel Valley Bank* (1983) 150 Cal.App.3d 281, [197 Cal.Rptr. 710].)

Special agents, and not so special ones

In reality, there is nothing sinister about appointing someone a special agent; i.e., an agent only for a particular purpose. However, there is seldom enough specificity in the appointment of a person as an agent to limit their responsibilities. In the absence of such specificity, the appointee is considered a general agent. Civil Code section 2297 explains that, "An agent for a particular act or transaction is called a special agent. All others are general agents." Thus, a principal who does not specify the scope of an agency exposes himself to liability for all of the acts of the agent conducted for the benefit or purpose of the principal.

In the usual case, there is only one act (or perhaps a few acts) which are alleged to have caused the harm. But plaintiffs often ignore the narrow proof required to show an agent's authority for the harm-causing acts, and impose an unnecessarily heightened burden on themselves to prove a general agency. In some circumstances, that proof may be unavailable, or simply weaker than proving that the agent was appointed for a special purpose only. This is because "An agency is proved by evidence that the person for whom the work was performed had the right to control the activities of the alleged agent." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241].) Where a plaintiff can only prove a right to control a particular act, it need not prove more than that. Conversely, a defendant can limit its exposure by proving a tortfeasor was appointed only as a special agent.

It is also appropriate to narrow the scope of the claimed agency where the plaintiff attempts to prove an agency by approval, adoption or ratification. The narrower the agency the principal is required to approve, adopt, or ratify, the more likely the evidence will suffice to establish the agent's authority. For instance, authority can be shown by a failure to discharge the purported agent – i.e. continuing to employ or assign the agent for the harm causing act. (*Allied Mutual Ins. Co. v. Webb* (2001) 91 Cal.App.4th 1190, 1194, [111 Cal.Rptr.2d 426].) In such a circumstance, the "only reasonable interpretation of the principal's conduct is consistent with approval or adoption." (*Ibid.*) That interpretation becomes more difficult where a broader agency is alleged or attempted to be proven. That is, there may be lots of reasons not to discharge someone if he is performing a variety of other limited tasks for the principal.

The principal's liability does not stop at a failure to specify the scope of the agency, because there are two kinds of agency: actual and ostensible. (Cal. Code Civ. Proc. § 2298.) "An agency is actual when the agent is really employed by the principal." (Cal. Code Civ. Proc. § 2299). Even if a person is appointed as a special agent – an actual agency for a limited purpose – a principal can still be held liable for acts outside the scope of the special agency on a theory of ostensible agency. (Cal. Civ. Code § 2298). An ostensible agency is created when "the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Cal. Code Civ. Proc. § 2300). Of course, to hold a principal liable for the acts of his agent, the agent must be acting within the scope of his actual or ostensible agency, that is, within the agent's authority (Cal. Code Civ. Proc. § 2338).

Said another way, "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, *allows the agent to believe* himself to possess." (Cal. Code Civ. Proc. § 2316 (emphasis added).) "Ostensible authority is such as a principal, intentionally or by want of ordinary care, *causes or allows a third person to believe* the agent to possess." (Cal. Code Civ. Proc. § 2317 (emphasis added).)

All of these are matters of proof, which are crucial upon motions for summary judgment and at trial. However, they should not have to be debated on objections to the pleadings. Despite some courts' insistence that evidentiary facts be pled, "the general allegation of agency is one of ultimate fact, sufficient against a demurrer." (*Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 230, [192 Cal.Rptr. 492] (intentional tort); see also *Garton v. Title Ins. And Trust Co.* (1980) 106 Cal.App.3d 365, 376, [165 Cal.Rptr. 449] (fraud, deceit, and misrepresentation).)

Conclusion

Regardless of whether the goal is to increase the number of potentially liable parties, or focus the liability on one of them, the interplay of vicarious liability principles must be understood. Only then can unnecessary law and motion be avoided, and liability placed on the proper parties.

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