

**2784 BREACH OF FIDUCIARY DUTY**

Special Verdict Questions Nos. \_\_\_\_\_ relate to the breach of fiduciary duty (claim) (claims) made by (plaintiff). To prevail on a claim for breach of fiduciary duty, (plaintiff) must prove the following three elements: first, (defendant) owed (plaintiff) a fiduciary duty; second, (defendant) breached that duty; and third, the breach of duty caused injury to (plaintiff).<sup>1</sup>

**Fiduciary Duty–Definition**

A fiduciary is a person who has undertaken a special position with regard to another. Because of their special position, a fiduciary is required to act for the benefit of another person on all matters within the scope of their relationship. This obligation is characterized as one of fidelity and loyalty, requiring the fiduciary to act solely for the benefit of the other person in all matters connected with the relationship, even at the expense of the fiduciary's own interests.<sup>2</sup>

[Insert nature of relationship and basis for alleged fiduciary duty]

[Corporate officers and directors are fiduciaries and owe duties of loyalty, good faith, and fair dealing in conducting corporate business and in dealing with shareholders.<sup>3</sup> Officers and directors may not use their position of trust to further a private interest. An officer or director is precluded from exploiting their position for personal gain when the benefit or gain belongs to the corporation.<sup>4</sup>]

[Additionally, majority shareholders have a fiduciary duty to avoid conduct that

unfairly benefits the majority shareholders at the expense of the minority shareholders.<sup>5]</sup>

[A fiduciary relationship may be created by contract, such as the relationship between a trust and trustee. When the fiduciary is a trustee, generally the tasks that the trustee is agreeing to undertake are set out in the trust agreement. A trustee is under a duty of undivided loyalty to the beneficiaries of the trust. As a result, a trustee may not profit personally from their position as a trustee apart from their agreed-upon compensation. A trustee has an affirmative duty to make full disclosure of all facts relevant to the transaction the beneficiary is about to undertake.]<sup>6</sup>

[Attorneys owe a fiduciary duty of loyalty to their clients. An attorney may breach that duty of loyalty if the attorney enters into a transaction with the client without fully informing the client that the transaction will potentially benefit the attorney and potentially disadvantage the client.<sup>7]</sup>

[In a (general partnership) (LLC), each (partner) (member) (manager) owes fiduciary duties of loyalty and good faith to the others and to the enterprise. They must not profit at the expense of (their co-owners) (the entity) and must deal fairly and in good faith.]<sup>8</sup>

## NOTES

1. Berner Cheese Corp. v. Krug, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800. This decision confirmed that a breach of fiduciary duty claim in Wisconsin requires proof of three elements: (1) the existence of a fiduciary duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3)

resulting measurable harm to the plaintiff. This had earlier been recognized in Reget v. Paige, 2001 WI App 73, ¶12, 242 Wis. 2d 278, 626 N.W.2d 302. See also Estate of Sheppard ex rel. McMorrow v. Specht, 2012 WI App 124, ¶5, 344 Wis. 2d 696, 824 N.W.2d 907.

2. Zastrow v. Journal Communications, Inc., 2006 WI 72, ¶¶ 28-31, 291 Wis. 2d 426, 718 N.W.2d 51. In Zastrow, the Wisconsin Supreme Court defined a fiduciary relationship as one voluntarily assumed through a “special position” that constrains the fiduciary’s ability to pursue personal interests. This constraint is primarily expressed through the duty of loyalty, which may also include duties of confidentiality and full disclosure. The Court emphasized that a breach of fiduciary duty constitutes an act of “disloyalty or infidelity,” reflecting a state of mind that exceeds mere negligence. It reaffirmed that Wisconsin law requires a fiduciary to act solely in the interest of the beneficiary, even to the fiduciary’s own detriment.

3. Modern Materials, Inc. v. Advanced Tooling Specialists, Inc., 206 Wis. 2d 435, 442, 557 N.W.2d 835 (Ct. App. 1996). In Modern Materials, the court reaffirmed that corporate officers and directors owe a fiduciary duty of loyalty, good faith, and fair dealing in the conduct of corporate affairs. Applying that principle, the court held that the defendant, a plant manager who was neither designated as an officer nor vested with policy-making authority, did not owe a fiduciary duty to Modern Materials. Accordingly, the court concluded that summary judgment in favor of the defendant was appropriate.

4. Jorgensen v. Water Works, 2001 WI App 135, ¶ 10, 246 Wis. 2d 614, 630 N.W.2d 230; Rose v. Schantz, 56 Wis. 2d 222, 228, 201 N.W.2d 593, 597 (1972); Grognet v. Fox Valley Trucking Serv., 45 Wis. 2d 235, 242, 172 N.W.2d 812, 816 (1969). Reget v. Paige, 2001 WI App 73, ¶12, 242 Wis. 2d 278, 626 N.W.2d 302.

Wisconsin law recognizes a fiduciary duty owed by majority shareholders to minority shareholders. However, this duty does not extend to nonmajority shareholders; therefore, a 50-percent co-owner does not owe a fiduciary duty based solely on shareholder status unless they exercise domination or control over the corporation.

If a fiduciary duty is alleged on another basis—such as duties arising from officer or director status, or a separately established special relationship—the instruction should be tailored to reflect the parties’ ownership interests and actual control. The Committee recommends clearly identifying the specific theory of duty and instructing the jury accordingly. See Estate of Sheppard ex rel. McMorrow v. Specht, 2012 WI App 124, ¶7, 344 Wis. 2d 696, 824 N.W.2d 907; see also id. ¶8 (addressing fiduciary duties of directors).

5. Jorgensen v. Water Works, Inc., 218 Wis. 2d 761, 783, 582 N.W.2d 98 (Ct. App. 1998) (Jorgensen I); Grognet v. Fox Valley Trucking Service, 45 Wis. 2d 235, 172 N.W.2d 812 (1969).

6. Zastrow, supra, at 2006 WI 72, ¶¶ 32-34. The Wisconsin Supreme Court in Zastrow explained that a fiduciary relationship may arise either by contract—such as in a trustee-beneficiary relationship—or through a formal legal status, such as attorney-client or guardian-ward. When the fiduciary is a trustee, the scope of the trustee’s obligations is defined by the trust instrument, which sets forth the specific tasks the trustee has agreed to undertake. The trustee’s duty of undivided loyalty prohibits personal profit and imposes an affirmative obligation to disclose all facts material to any transaction the beneficiary is considering.

7. Berner Cheese, supra, at ¶41; Zastrow, supra, at ¶30; Groshek v. Trewin, 2010 WI 51, ¶¶15, 18.

8. Marx v. Morris, 2019 WI 34, ¶35, 386 Wis. 2d 122, 925 N.W.2d 112 (“Members of an LLC... owe each other the fiduciary duties of loyalty and care as a matter of Wisconsin common law”). Holman v. Kircher, 201 Wis. 2d 474, 480, 548 N.W.2d 718 (Ct. App. 1996) (partners in joint venture owe “fiduciary duties of the utmost good faith and loyalty”).

#### COMMENT

This instruction and comment were approved in October 2025.

Many jurisdictions have promulgated jury instructions for claims associated with the breach of fiduciary duty. Prior to the Committee adopting these instructions, it considered first the question whether breach of fiduciary duty claims are properly submitted to a jury or rather should be tried to the court as quasi-equitable claims. Research established that many appellate cases reviewed jury verdicts as well as bench verdicts without any definitive statement approving of trying such cases to a jury. The Supreme Court has made clear, however, that breaches of fiduciary duties constitute intentional torts. Zastrow v. Journal Communications, Inc., 2006 WI 72, ¶¶35-40, 291 Wis. 2d 426, 718 N.W.2d 51.

The Wisconsin Constitution guarantees the right to a trial by jury for “all cases at law without regard to the amount in controversy.” Wis. Const., Art. I, § 5. A tort claim is a “case at law” for which a plaintiff has a right to a jury trial. *E.g.*, Stuart v. Stuart, 140 Wis. 2d 455, 460, 410 N.W.2d 632 (Ct. App. 1987) (recognizing that parties in tort actions are entitled to a jury trial), abrogated on other grounds by Kruckenberg v. Harvey, 279 Wis. 2d 520, 694 N.W.2d 879 (2005).

**Burden of Proof.** The Committee believes the burden of proof to establish a breach of fiduciary duty is the middle burden. See Wis JI-Civil 205. As noted above, a breach of fiduciary duty is an intentional tort and intentional torts require proof based on the middle burden, or proof by clear and convincing evidence. Kuehler v. Kuehler, 11 Wis. 2d 15, 26-30, 104 N.W.2d 138 (1960). It is recommended that the court give Wis JI-Civil 205 (Clear, Satisfactory, and Convincing Evidence) immediately after this instruction.