

No. 24-2000

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

YOON DOELGER AND PETER DOELGER,

Plaintiffs-Appellants/Counter Defendants,

v.

JPMORGAN CHASE BANK, NA., ET AL.

Defendant-Appellee/Counter Plaintiff,

On Appeal from the United States District Court
for the District of Massachusetts

**BRIEF OF AMICUS CURIAE PUBLIC INVESTORS ADVOCATE
BAR ASSOCIATION IN SUPPORT OF PLAINTIFF- APPELLANT**

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DISCLOSURE STATEMENT

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

PIABA is a bar association comprised primarily of attorneys who represent members of the investing public. Its mission is to promote the interests of, and to help protect the investing public. PIABA also advocates for public education regarding investment fraud and industry misconduct. PIABA often issues comment letters regarding FINRA rule changes, provides testimony to government agencies and Congress, and files *amicus* briefs on a variety of issues relating to the protection of the investing public—the very people and businesses who provide corporations with the capital needed to drive economic activity in the United States. Particularly relevant here, PIABA members often represent people harmed by low-quality financial advice.

No party's counsel has authored this brief in whole or in part, or contributed money which was intended to fund preparing or submitting this brief. This brief was funded solely by PIABA.

SUMMARY OF THE ARGUMENT

Trust undergirds the relationship between financial and investment advisers and their clients. Clients trust—and must be able to trust—their adviser’s judgment and advice. The advisory industry depends on it. This trust, which is evidenced by the relinquishment of control over one’s finances, and inevitably one’s future, coupled with the generally high payment of fees for services rendered, requires the entrusted class to be held to higher standards. And so by statute and common law, these professionals owe fiduciary duties which include, among others, the duties of care, loyalty, and good faith. The law imposes these duties on financial and investment advisers for the protection of investors like the Doelgers.

A fiduciary’s duties cannot be contractually thwarted, avoided, or diminished. But that is exactly what the decision below allows. This Court therefore should hold that the district court erred in finding that Appellees could disavow these duties to Appellants.

ARGUMENT

I. JPMC and Chickasaw Owe the Doelgers Common Law and Statutory Fiduciary Duties.

Despite acknowledging that JPMorgan Chase Bank, N.A. (“JPMC”) and Chickasaw Capital Management, LLC (“Chickasaw”) owe fiduciary duties to the Doelgers, ADD70, ADD85 n.8, ADD98, the district court improperly confined these fiduciary duties to those prescribed by the Advisory Agreements, Agreement for

Investment Management Services (“AIMS”), and the term sheet for the Advisory Account (“2015 Term Sheet”).¹ *See, e.g.*, ADD86 (finding that “Plaintiffs have not established any duties separate and apart from the [agreements at issue], which govern the relationship between Plaintiffs and Chickasaw”) (cleaned up). The district court’s failure to recognize that JPMC and Chickasaw’s fiduciary duties exist independently of the contractual agreements was an error of law which gravely threatens investor protection.

JPMC, as a financial advisor, and Chickasaw, as a Registered Investment Adviser under federal law, both owed the Doelgers a fiduciary duty irrespective of any contract. “Fiduciary duties may arise wherever ‘faith, confidence, and trust’ is reposed by one party ‘in another’s judgment and advice’.” *UBS Fin. Servs., Inc. v. Aliberti*, 133 N.E.3d 277, 290 (Mass. 2019) (quoting *Doe v. Harbor Sch., Inc.*, 843 N.E.2d 1058 (2006)); *see also Zorbas v. U.S. Tr. Co.*, 48 F. Supp. 3d 464, 479 (E.D.N.Y. 2014) (noting “a fiduciary duty may be found notwithstanding the existence of a contract—specifically, when there is a relationship of higher trust than would arise from the agreement alone”) (cleaned up). “[I]n Massachusetts a relationship between a stockbroker and a customer may be either a fiduciary or an ordinary business relationship,” depending on “the manner in which investment

¹ The Doelgers were not signatories to the AIMS or the 2015 Term Sheet. JA487–502, JA594–596.

decisions have been reached and transactions executed for the account.” *Patsos v. First Albany Corp.*, 741 N.E.2d 841, 848 (Mass. 2001). Furnishing investment advice can give rise to a common law fiduciary duty. *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, No. 000751F, 2001 WL 1249303, at *4 (Mass. Super. Ct. July 26, 2001). And importantly given the posture of this case, consideration of the factors for whether a financial advisor is a fiduciary are for the jury. *Id.*

Fiduciary duties extend to all matters that the client has entrusted to the fiduciary. *United States v. Santoro*, 302 F.3d 76, 81 (2d Cir. 2002) (noting that “[w]hile [defendant] lacked discretionary investment authority, he exercised ‘substantial discretionary judgment’ in choosing stocks to recommend to his clients, thereby assuming a position of trust with respect to those recommendations”).

Since brokers are traditionally compensated by commissions in direct proportion to purchases and sales, the opportunity to take advantage of the client is always present. To ensure that the broker fulfills his fiduciary duty, and to protect against frauds upon the customer, the broker and his employer are made subject to a series of obligations, the fraudulent breach of which may render them liable to the investor in damages.

Rolf v. Blyth Eastman Dillon & Co., 424 F. Supp. 1021, 1036 (S.D.N.Y. 1977), *aff’d and remanded*, 570 F.2d 38 (2d Cir. 1978), *amended sub nom. Rolf v. Blyth Eastman Dillon & Co.*, No. 77-7104, 1978 WL 4098 (2d Cir. May 22, 1978). Financial advisors and similar professionals, like JPMC here, therefore owe their clients fiduciary duties when fulfilling advisory roles. *See Maybank v. BB&T Corp.*, No.

6:12-cv-00214-JMC, 2012 WL 3157006, at *3 (D.S.C. Aug. 3, 2012); *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40-41, 340 S.E.2d 786, 790 (1986); *see also Prodigious Ventures, Inc. v. YBE Hosp. Grp., LLC*, No. 5:14-CV-433-F, 2017 WL 9478487, at *5 (E.D.N.C. Feb. 23, 2017); *McGraw v. Wachovia Sec., LLC*, 756 F. Supp. 2d 1053, 1078 (N.D. Iowa 2010); *Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 351 F. Supp. 2d 79, 102 (S.D.N.Y. 2004); *SEC v. Rauscher Pierce Refsnes, Inc.*, 17 F. Supp. 2d 985, 992 (D. Ariz. 1998); *In re Gillett Holdings, Inc.*, 137 B.R. 452, 458 (Bankr. D. Colo. 1991).

This duty also extends to investment advisers like Chickasaw who, “because of their trusted advisory role, generally must comply with the full complement of fiduciary duties of utmost good faith, and full and fair disclosure of all material facts, and shoulder an affirmative obligation to employ reasonable care to avoid misleading clients.” *Robinhood Fin. LLC v. Sec’y of Commonwealth*, 214 N.E.3d 1058, 1064 (Mass. 2023) (cleaned up); *see also* SEC, Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248; File No. S7-07-18 (June 5, 2019) (“*Commission Interpretation*”). The Investment Advisers Act of 1940 (“Advisers Act”), 15 U.S.C. § 80b-6, statutorily imposes fiduciary duties on them. *See Robare Grp., Ltd. v. Sec. & Exch. Comm’n*, 922 F.3d 468, 472 (D.C. Cir. 2019) (“The Investment Advisers Act was intended to achieve a high standard of business ethics in the securities industry. Accordingly, the Act establishes federal

fiduciary standards to govern the conduct of investment advisers, imposing on them an affirmative duty of utmost good faith, and full and fair disclosure of all material facts.”) (cleaned up). Congress intended to treat investment advisers as fiduciaries under the Advisers Act “to protect both ‘unsophisticated investors’ and ‘bona fide investment counsel.’” *Goldenson v. Steffens*, No. 2:10-CV-00440-JAW, 2014 WL 12788001, at *88 (D. Me. Mar. 7, 2014) (citing *Sec. & Exch. Comm’n v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 191 (1963)). These statutory protections complement an adviser’s common law duties. *See Chiarella v. United States*, 445 U.S. 222, 248 (1980) (Blackmun, J., dissenting) (“The Court has observed that the securities laws were not intended to replicate the law of fiduciary relations. Rather, their purpose is to ensure the fair and honest functioning of impersonal national securities markets where common-law protections have proved inadequate.”) (internal citation omitted).

The fiduciary duties of financial and investment advisors include a duty of care which imposes an affirmative obligation to provide advice that is in the best interest of the client based on a reasonable understanding of the client’s objectives. *Commission Interpretation* at 4 (noting that this “is a critical component of the duty of care”). “The basis for such a reasonable understanding generally would include, for retail clients, an understanding of the investment profile, or for institutional clients, an understanding of the investment mandate.” *Id.* They also owe a “duty to

provide investment advice that is in the best interest of the client, including a duty to provide advice that is suitable for the client.” *Id.* Inherent in this is the duty to disclose all relevant information, including the fiduciary’s commissions from certain investment strategies, *Santoro*, 302 F.3d at 80, and the duty to obtain information about the client to determine that the investment strategy is suitable, *Rolf*, 424 F. Supp. at 1042–43.

Importantly, these fiduciary duties are conferred through statutory and common law, each of which is independent of any contractual agreements. *See, e.g., Commission Interpretation* at 9; *Sec. & Exch. Comm’n v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 286, 301 n.7 (E.D. Pa. 2021) (acknowledging fiduciary duties “existed in the common law and applied to all forms of principal-agent relationships long before the Advisers Act made investment advisers into fiduciaries. The common law reflected the understanding that principals generally seek to maximize their own economic gain and engage agents to further that purpose. Accordingly, the common law required agents to act in a manner that maximized the principal’s economic gain.”) (internal citations omitted). The heightened fiduciary duty which exists as a matter of law, no matter what a contract says, provides a critical check on financial and investment advisers who defraud their clients. *See Sec. & Exch. Comm’n v. Capital Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 201 (1963) (recognizing that an investment adviser has a “fiduciary relationship to his clients”).

Finding that Chickasaw’s and JPMC’s fiduciary duties arose solely through the contractual agreements is directly contrary to law. The district court therefore erred.

II. JPMC’s and Chickasaw’s Fiduciary Duties Cannot be Waived or Limited.

The basic public policy behind fiduciary relationships would be thwarted by permitting indemnification or contractual waiver of a fiduciary’s duties.

The extent of contractual tailoring of fiduciary duties implicates two competing policies:

First, in a legal order founded on liberal values, individuals should in general be free to set the normative terms on which they interact. This points in favor of permitting opt outs, so long as relevant legal and other requirements are satisfied. On the other hand, the mediating function of social roles depends on stability in the normative constitution of these roles; where this is lost, roles may lose their traction as normative resources and people may stop organizing their affairs with reference to them. *Where fiduciary law too readily permits opt outs, there is a risk that fiduciary roles might cease to be comprehensible to those whose actions engage with them, and this might generate costs.*

New Enter. Assocs. 14, L.P. v. Rich, 295 A.3d 520, 544–45 (Del. Ch. 2023) (cleaned up) (emphasis added). The SEC, in furthering its mission to protect *investors*, reiterated the importance of fiduciary duties under the Advisers Act by stating that “[a]n adviser’s federal fiduciary duty may not be waived.” *In the Matter of Clearpath Cap. Partners, LLC*, Release No. 6672, at *4 (Sept. 3, 2024). While its “application may be shaped,” “advisory agreements may not misrepresent, or contain misleading

statements regarding, the scope of an adviser’s unwaivable fiduciary duty.” *Id.* And the Advisers Act is not the sole authority prohibiting impermissible waivers of fiduciary duties. JPMC is unable to limit its fiduciary duties just because it is excluded from the Advisers Act’s protections. *Cf. United Artists Theatre Co. v. Walton*, 315 F.3d 217, 227 (3d Cir. 2003) (“Debtors and their professionals cannot exempt themselves from liability to non-consenting parties merely by saying the word.”).

A. An indemnity agreement constitutes an impermissible limitation of an investment fiduciary’s statutory and common law duties.

The district court found that the clause limiting JPMC’s liability with regards to JPMC’s Master Limited Partnership & Energy Infrastructure (“MLPEI”) portfolio strategy did not constitute an impermissible limitation of liability because it only sought “to indemnify JPMC from any ‘confirmations, statements, or agreements’ made by [the Doelgers],” whereas the Advisers Act only speaks to limitations on liability.² *See* ADD81 n.6. In doing so, the district court not only ignores its own later finding that as a bank, JPMC is not subject to the Advisers Act, ADD88 n. 10, but it draws a false distinction between an impermissible hedge clause and a permissible indemnification clause by ignoring case law and public policy disfavoring indemnification clauses in fiduciary relationships.

² The court did not find that the MLPEI applies to Chickasaw. But even if it does apply to Chickasaw, the result is the same.

“There is strong public policy against permitting indemnity in security fraud cases.” *Goldberg v. Touche Ross & Co.*, 531 F. Supp. 86, 88 (S.D.N.Y. 1982); *Globus v. L. Rsch. Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969) (finding that tolerating indemnity when there is actual knowledge of misstatements or wanton indifference of obligations “would encourage flouting the policy of the common law and the Securities Act”); *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979) (“Whereas contribution supports the policy of securities legislation, indemnification tends to frustrate and defeat it.”). “Massachusetts public policy is protective of investors.” *Crown v. Kobrick Offshore Fund, Ltd.*, 8 N.E.3d 281, 294 (Mass. App. Ct. 2014). “[W]here the effect of contract language in an agreement that is not of [a partnership agreement’s] charter or foundational character is to eliminate or discard fiduciary obligations wholesale, the law will not so abide.” *Greenleaf Arms Realty Tr. I, LLC v. New Bos. Fund, Inc.*, 962 N.E.2d 221, 230 (Mass. App. Ct. 2012).³ This is because “the degree of trust of invited and reasonably reposed in the fiduciary can dispel any duty of self-protection by the principal” to negate a written disclaimer. *Carr v. CIGNA Sec., Inc.*, 95 F.3d 544, 548 (7th Cir. 1996); *Brezden v. Associated Sec. Corp.*, No. CV 09-2771AGRNBX, 2009 WL 1531850, at *4 (C.D. Cal. June 1, 2009).

³ Notably, the district court cited *Greenleaf Arms* for support that fiduciary duties can be limited, ADD88, but failed to account for the important differences between a partnership’s fiduciary duties and that of an investment adviser and client. Partners relate to each other as equals within a partnership. A financial adviser is an agent for a client.

B. Limiting financial and investment advisers' liability to gross negligence immunizes them from breaches of their fiduciary duties.

The district court also erred in finding that the following clause from the Advisory Agreements—which the court ultimately found, albeit inconsistently with other parts of its order, applies to both JPMC and Chickasaw, ADD86–ADD87—did not violate the Advisers Act or otherwise eliminate fiduciary duties:

Except as otherwise provided by law, JPMC's sole liability and that of Morgan Affiliates to the Doelgers shall be any direct damages Plaintiffs incur because of JPMC or Morgan Affiliates' gross negligence or willful misconduct.

ADD87. Contrary to the court's belief, the phrase "except as otherwise provided by law" is an impermissible saving clause, and cabining liability to only gross negligence or willful misconduct limits an investor's ability to recover for harms caused by breaches of fiduciary's duties.

The SEC has expressly cautioned against the use of these "saving clauses":

The Advisers Act establishes a federal fiduciary duty for investment advisers. An adviser's federal fiduciary duty may not be waived, though its application may be shaped by agreement. Moreover, advisory agreements may not misrepresent, or contain misleading statements regarding, the scope of an adviser's unwaivable fiduciary duty that could lead a client to believe incorrectly that the client has waived a non-waivable cause of action against the adviser provided by state or federal law. This is true even if there is a disclaimer (sometimes known as a "savings clause" or "non-waiver" disclosure) stating that compliance with the state or federal securities laws is not waivable.

Clearpath at 4. The SEC has made clear that "the statement that '[defendants] will be liable only for their own acts of gross negligence or willful misconduct' is an

inaccurate statement of the liability standards under the federal securities laws as they apply to investment advisers.” *In the Matter of Comprehensive Cap. Mgmt., Inc.*, Release No. 5943, at 5 (Jan. 11, 2022). Yet this is the exact clause the district court permitted here. *See* ADD87 (noting that the clause at issue in the General Terms provides, “except as otherwise provided by law, JPMC’s sole liability and that of Morgan Affiliates to the Doelgers . . . shall be any direct damages Plaintiffs incur because of JPMC or Morgan Affiliates’ gross negligence or willful misconduct”) (cleaned up).

This exculpatory language is at odds with an investment adviser’s fiduciary duties under statutory and common law and thus cannot be contracted around. It does not merely “limit the scope” of a fiduciary duty, as the district court suggested. ADD88. It excises a substantial portion of it in direct contravention of the law. As a general matter, the cases which the district court relies on to uphold the limitation of liability for Defendants’ negligence concern fiduciary relationships arising solely out of contract, not by general or statutory fiduciary principles. “Where a fiduciary relationship arises out of a contract, the obligations are defined and limited by the terms of that contract, not by general fiduciary principles.” *Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V. v. Whitehead Inst. for Biomedical Rsch.*, No. CIV.A. 09-11116-PBS, 2010 WL 2900340, at *1 (D. Mass. July 26, 2010). But as

explained above, Defendants' fiduciary duties are not limited to their contractual agreements.

Under common and statutory law, a breach of fiduciary duty does not require finding gross negligence. *See, e.g., In the Matter of VCP Fin. LLC*, Release No. 6819 (Jan. 14, 2025) ("The language of the Letter is inconsistent with an adviser's fiduciary duty because it may mislead VCP Financial's client into not exercising its non-waivable legal rights."); *see also SEC v. Steadman*, 967 F.2d 636, 643 n.5 (D.C. Cir. 1992) ("[A] violation of § 206(2) of the Investment Advisers Act may rest on a finding of simple negligence."). Excluding liability for negligence in a fiduciary relationship like the one here is counter to the securities law and public policy:

Logically, the ordinary negligence standard does not give professionals an incentive to be either aggressive or cautious, because it is equally possible to be negligent if one is either unduly bold or unduly conservative. As a matter of policy, the rules of liability should be designed to encourage advisors, not to be bold or conservative in all cases, but rather to use their best efforts to give advice which is right for the particular client and circumstances.

In re Aloha Airgroup, Inc., No. 04-3063, 2005 WL 1156092, at *1 (Bankr. D. Haw. Feb. 24, 2005); *see also Sec. & Exch. Comm'n v. Criterion Wealth Mgmt. Servs., Inc.*, 599 F. Supp. 3d 932, 956 (C.D. Cal. 2022) ("[It] appears axiomatic; a fiduciary's breach of fiduciary duty is equivalent to a negligent act on the part of the fiduciary because a negligent fiduciary is simply one who failed to meet the applicable standard of care, which, for a fiduciary, is the fiduciary standard."); *U.S. Telesis, Inc.*

v. Ende, 64 F. Supp. 3d 65, 68 (D.D.C. 2014) (“[C]laims for negligence and breach of fiduciary duty are evaluated similarly because they are governed by the same standard of care.”).

Likewise, the distinction between ordinary negligence and gross negligence “remains hazy.” *Id.*; see also *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 231 (3d Cir. 2003) (noting that “gradations of negligence” are not a clear means of analysis when looking at the actions of financial advisors). And “the universe of fiduciary misconduct is not limited to either disloyalty in the classic sense (*i.e.*, preferring the adverse self interest of the fiduciary or of a related person to the interest of the corporation) or gross negligence.” *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006).

The importance of a fiduciary duty where there is an advisory relationship cannot be overstated. Investments advisers and other financial professionals cannot get paid for advice and then avoid full responsibility for their actions. Sanctioning that result undermines the foundations of the fiduciary relationship and the legal protections which exist for investors. The only ones who come out ahead are the advisers, who can stay silent and allow transactions they know to be harmful to proceed, while investor rights are eroded and the investing public shoulder the losses. And because many individual investor cases are decided by arbitration without published opinions and not in the court system, judicial guidance is

paramount. A decision from this Court which explains that financial advisors, investment advisers, and others who manage client assets cannot avoid their responsibilities will provide crucial direction.

CONCLUSION

PIABA supports the Doelgers in urging this Court to reverse the district court's order regarding JPMC and Chickasaw's fiduciary duties.

Respectfully submitted,

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March 21, 2025

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(5), I hereby certify that this brief uses 14-Point Times New Roman, a proportionally-spaced font. Pursuant to Fed. R. App. P. 32 (a)(7)(B), I certify that the brief was prepared using Microsoft Word, and contains 3,476 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(i), and according to that system's word count function.

Date: March 21, 2025

/s/ R. Walker Humphrey, II

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2025, I have electronically filed the foregoing brief with the United States Court of Appeals for the First Circuit by the CM/ECF system, which will then send notification of such filing to all counsel of record.

Date: March 21, 2025

/s/ R. Walker Humphrey, II