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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1260

Workers' Compensation Reinsurance Association, et al.,
Respondents,

vs.

Wells Fargo Bank, N.A.,
Appellant,
Robert G. Smith,
Defendant.

Filed April 16, 2012
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. 62CV0810825

Michael V. Ciresi, Roberta B. Walburn, Thomas L. Hamlin, Munir R. Meghjee, Robins, Kaplan, Miller & Ciresi, L.L.P., Minneapolis, Minnesota (for respondents)

Lawrence T. Hofmann, Richard M. Hagstrom, Michael R. Cashman, Michael E. Jacobs, Zelle, Hofmann, Voelbel & Mason, L.L.P., Minneapolis, Minnesota; and

David F. Herr, Maslon, Edelman, Borman & Brand, L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and Cleary, Judge.

U N P U B L I S H E D   O P I N I O N

STONEBURNER, Judge

Appellant bank challenges the judgment entered against it following a jury trial, arguing that (1) the district court erred by finding that, as a matter of law, the bank owed fiduciary duties to respondents, who were participants in the bank's securities-lending program; (2) the jury's finding that the bank breached fiduciary duties owed to respondents is inconsistent with and precluded by the jury's other findings; (3) the district court erred by submitting a claim for violation of the Minnesota Consumer Fraud Act (CFA) to the jury because respondents failed to establish that they were entitled to assert a CFA claim; (4) the district court erred by finding, as a matter of law, that the bank, without good faith or reasonable mistake, converted funds from one of the respondent's bond fund, entitling that respondent to damages, which were not reduced by what the bank claims were related benefits; (5) the district court erred by ordering a scaled fee forfeiture as an equitable remedy for breach of fiduciary duties; and (6) the district court erred by calculating prejudgment interest at the rate of ten percent from the date of service of the complaint in 2008 through August 1, 2009, which was the effective date of the statute that increased the interest rate to ten percent. We affirm.

FACTS

Appellant Wells Fargo Bank, N.A., is a provider of banking, mortgage, investment, credit card, insurance, and consumer and commercial financial services. Wells Fargo offers banking services in 39 states and in the District of Columbia. For purposes of this opinion, references to Wells Fargo include its predecessor, Norwest Bank, Minnesota.

Wells Fargo established a securities-lending program (SLP) in 1982. In a securities-lending program, a lender loans securities to a borrower and the borrower provides collateral for the securities, usually in the form of cash. The amount of collateral is usually greater than the value of the securities, which is one of the reasons that securities lending is generally considered a safe investment. An intermediary, in this case Wells Fargo, holds the securities in a custody account to be transferred to the borrower and may also hold and invest the collateral. The lender earns interest on investments of the collateral. The intermediary earns fees from both the lender and the borrower and retains a portion of the interest from investment of the collateral.

The Worker's Compensation Reinsurance Association (WCRA), The Minnesota Medical Foundation (MMF), The Minneapolis Foundation (TMF), and The Robins, Kaplan, Miller & Ciresi Foundation for Children (RKMCF) (collectively respondents) are non-profits with relatively large investment portfolios. WCRA, MMF and TMF have staff who oversee administrative affairs, including financial affairs. At all times relevant, respondents had securities in Wells Fargo custodial accounts under written custodial agreements. TMF opened its custodial account in 1987; MMF in 1991; WCRA in 1995; and RKMCF in 2000. Each respondent was approached by Wells Fargo's SLP staff and was encouraged to participate in the SLP. TMF joined the SLP in 1996; WCRA in 1995; RCMCF in 2000; and MMF in 2003.

On joining the SLP, each respondent entered into a securities-lending agreement (SLA) with Wells Fargo and turned over the majority of its custodial accounts to the SLP. Some SLA terms varied among participants in the SLP, but all provided:

> Participant has appointed Bank under [custodial agreements] as custodian of certain assets (herein "Account"). Such agreements authorize Participant to appoint an agent to lend securities from the Account. Participant hereby appoints [Wells Fargo] as Agent for the purpose of lending securities from its Account under the [Wells Fargo] Securities Lending Program.

In addition, all SLAs authorize Wells Fargo, as agent, to enter into borrower-securities-loan agreements (BSLAs) with borrowers on behalf of SLP participants. All SLAs provide that SLP participants are bound by the terms of the BSLAs, including the terms regarding termination of loans. The BSLAs provide, in relevant part, that on termination of a loan of securities, the "Borrower shall…transfer the Loaned Securities to Lender; provided, however, that upon such transfer by Borrower, Lender shall transfer the Collateral … to Borrower." Under the SLAs, the participants agree to "assume[] all risk of loss arising out of Borrower defaults on return of lent securities, collateral deficiencies or collateral investment loss."

In October 2000, Wells Fargo, as trustee, established a business trust (the Trust) under Maryland law as a vehicle for investing the cash collateral posted by the borrowers. The Trust holds the SLP collateral in three pools (Enhanced Yield Fund, CI Trust, and CI Term). The Declaration of Trust (Declaration) is the governing document for the Trust.

In June 2001, defendant Robert G. Smith, Senior Marketing Director for the SLP, sent letters to respondents and other SLP participants regarding the Trust. In that letter

Smith marketed the Trust as "an unregistered mutual fund allowing [Wells Fargo] to improve the accounting for all transactions while providing a new asset allocation platform." Smith's letter stated that Wells Fargo would serve as the trustee for the Trust and maintain responsibility for investing its assets.

Each entity solicited by Wells Fargo to participate in the Trust received a "Confidential Memorandum," describing identical investment objectives for each pool in the Trust.

> The [name of pool] seeks to achieve a positive return compared to the daily Fed Funds rate by investing in high-quality United States dollar denominated securities where the prime considerations for such investments are safety of principal and daily liquidity requirements.
>
> The [name of pool] will endeavor to maintain a stable $10.00 price per Share, although no assurance can be given that it will achieve its investment objective or maintain a stable Share value.

The Confidential Memorandum also provides that the investment manager is authorized to invest assets in investments described in the Investment Guidelines (guidelines) and states that "[a] maximum of 15% of the [pool's] total assets may be invested in illiquid securities as that term is defined in the SEC's Rule 2a-7" and that the maximum maturity of a security would be five years. The guidelines state:

> An obligation must be rated in the highest short-term rating category by one of two Nationally Recognized Statistical Reporting Organizations (NRSRO) [i.e., S&P, Moody's]. If the obligor is rated by more than one NRSRO, each rating must meet the minimum rating criteria. In the event the obligor does not have a short-term rating, its long-term debt rating must be within the 'A' or better category.

The guidelines also identify the types of investments from which the Trust could select, including U.S. Treasury- and Government-sponsored obligations, money-market funds, mortgage-backed securities, asset-backed securities, corporate notes, bonds, and debentures.

The documents assure that the Trust will rely on Wells Capital Management (a Wells Fargo subsidiary) and Galliard Capital Management to identify safe issuers of securities. Wells Capital Management's principal focus is on managing mutual funds and fixed-income portfolios.

Respondents and others in the SLP moved their assets to the Trust by signing a "Subscription Agreement," which provides, in relevant part, that each subscriber

> adopts, accepts, and acknowledges that it shall be bound by all the terms and conditions of the [Declaration] . . . [and u]pon acceptance of this subscription by the Trustee on behalf of the Trust and payment in full of the subscription price by the Subscriber, the Subscriber shall become a Shareholder for all purposes of the [Declaration].

The Declaration, which was not mailed to participants but was available to them on request, provides that the trustee has "full, exclusive and complete power and discretion to manage and control the business and affairs of the Trust, and to make all decisions affecting the business and affairs of the Trust" as well as "full power and authority to make any investments which it, in its sole discretion, deems proper to accomplish the purposes of the Trust. . . ." Further, Article Eight of the Declaration provides, in relevant part:

> **Section 8.1 Limitation of Liability: . . .** No Covered Person [Trustee, Trust officers, employees, or agents] shall be

> liable to the Trust or to any Shareholder for any loss, damage or claim incurred by reason of any act performed or omitted by such Covered Person in good faith on behalf of the Trust . . . and in a manner reasonably believed to be within the scope of authority conferred on such Covered Person by this Declaration, except that a Covered Person shall be liable for any loss, damage or claim incurred by reason of such Covered Person's bad faith, gross negligence, willful misconduct or reckless disregard of the duties involved in the conduct of his or her office.
>
> . . . .
>
> **Section 8.4 Contractual Modification of Duties.** To the extent that, at law or equity, a Covered Person has duties (including fiduciary duties) and liabilities relating to the Trust . . . or to any Shareholder, any such Covered Person acting under this Declaration shall not be liable to the Trust . . . or to any Shareholder for the Covered Person's good faith reliance on the provisions of this Declaration. The provisions of this Declaration, to the extent that they restrict or limit the duties and liabilities of a Covered Person otherwise existing at law or in equity, are agreed by the parties hereto to replace such other duties and liabilities of such Covered Person.

MMF signed Subscription Agreements in 2004 and 2006; WCRA in 2005; TMF and RKMCF in 2006. By August 2007, Wells Fargo had approximately $27 billion in securities involved in the SLP, including respondents' securities. From 2007 to 2008, WCRA possessed an investment portfolio of approximately $1.5 billion. MMF's assets under management ranged from $260 million to more than $320 million.

The Trust invested cash collateral from the loaned securities with several issuers, including many "Structured Investment Vehicles" (SIVs) issued by Cheyne Finance LLC, Stanfield Victoria Ltd., and Lehman Brothers Holdings, Inc. Respondents presented evidence at trial that, prior to the 2008 recession, Wells Fargo was aware that investing in SIVs created "enormous risks" and that Wells Capital Management invested the assets it managed only very cautiously in SIVs to minimize risks. Even after the 2008 recession, only one rule 2a7 money-market fund managed by Wells Capital Management failed. Wells Fargo presented evidence that SIVs had always been "successful investments" in the past and asserted that such investments were within the Trust's investment guidelines when purchased.

In June 2007, the stated value in the CI Term Trust (one of the pools) dropped below the stated objective net-asset value (NAV) of $10, but Trust shareholders were not advised of the drop in value. Respondents' financial expert witness, Christopher C. Geczy, testified that the NAV dropping below $10 is a "catastrophic event" and something of which shareholders should have been advised.

Before September 20, 2007, Cheyne entered receivership, and in October it was officially declared insolvent. But on September 20, 2007, during a Wells Fargo Portfolio Management Committee Meeting, Smith requested that no one discuss Cheyne "outside the group." In late September 2007, Public Safety of Arizona (PSA), one of the largest shareholders in the Trust, withdrew. According to SLP manager Michael Hogan, PSA "went in and out at $10.00 even though fair value when they left was about $9.97." PSA withdrew approximately $1.9 billion, which, according to Hogan, created a "$6 [million] negative equity . . . [which] has been put in the capital accounts of the remaining limited partners (other clients)."

On November 6, 2007, an e-mail between Wells Capital Management staff noted that the SLP "portfolio is exposed to a much higher default risk than any [mutual] fund we manage," resulting in an "8266 credit score which is 826% of the maximum credit score allowable in any [mutual] fund we manage." In an internal Wells Fargo memo, one Wells Fargo executive noted that the $25 billion SLP was being run "on a shoestring."

The Trust first notified participants that something was wrong in a letter dated November 20, 2007. The letter explains that Cheyne had gone into receivership and Wells Fargo had hired outside legal counsel to represent the interests of its clients. The letter states that, "with the small exposure we have overall to asset-backed securities, we also believe our investment portfolios will be less impacted in the future[.]" But in a Wells Fargo internal e-mail regarding the SLP on November 27, 2007, the following statements were made concerning Trust investments: (1) "All notes they have invested in are trading below par"; (2) "They're still not seeing an unthawing of illiquidity in the short paper market and especially still no bids on SIV's"; and (3) "It seems the patient approach is the one that will benefit the Trust and all the holders. If there's a rush for the door, all will be damaged."

On November 30, 2007, after a meeting with SLP managers, David Sylvester from Wells Capital Management reported that "I am not sure that anyone really knows what the book losses are in these portfolios yet[,]" "I saw two bonds right away that are way off[,]" and "there is no third party liquidity support or underlying layer of independent capital or subordination to protect the participants in the pool. They have NAV at 99.31. I'd bet it's lower."

Respondents began demanding the return of their loaned securities. TMF and RKMCF sent letters requesting the return of their securities in February 2008, WCRA in June 2008, and MMF in August 2008. Because there was negative equity in the pools after the PSA withdrawal, there was a collateral deficiency, and the Trust did not have sufficient cash collateral to pay borrowers for the return of the securities. In March 2008, the SLP created a new protocol for "small client exits," which included distributing remaining securities in-kind.

On June 4, 2008, David Sylvester, in an internal e-mail related to questions TMF wanted answered in a meeting with Wells Fargo, stated that it "should be a tough meeting" and "I think Lehman's in trouble. Long exposures in sec. lending pools." A Wells Fargo internal memo dated July 28, 2008, alerted Smith, Hogan, and others that Wells Fargo's "central credit team" had downgraded Lehman's asset quality rating and, noting "our ongoing positive relationship with Lehman," a valued "trading counter party," stated that "[w]e are not 'advertising or emphasizing' this change to anyone outside our company."

In September 2008, the Trust was disaggregated with each participant receiving a pro-rata share of the remaining collateral. An internal Wells Fargo memo, communicating this decision and the process for communicating it to clients, states:

> We convinced Mike H that we will be "blowing up the trust" – meaning the complete disaggregation of the three business trusts. We had a great deal of conversation about this in Feb/Mar/April/May then abandoned the process because of too much work, too much whining etc. . . . .
>
> Here are several e-mails with info about the disaggregation (sounds like a kinder term than "blow up"). Your mission . . . is to write the client communication about why this is the most wonderful idea. It will be mailed on Monday. Perhaps the best one to start with is the last item attached above – I think it is a one page prose piece with the irrefutable facts (not a Q&A format). The May version of

> this process is that clients would be given the “choice” to carve out or not – the reviewers at that time couldn’t agree on how much lipstick to put on either pig! (some thought there was too much gloss or support for one version; other readers thought the prose supported the opposite conclusion . . . .)[.]”

In order to secure the return of all their loaned securities, WCRA paid $62 million in collateral shortfalls. Wells Fargo unilaterally raided RKMCF’s bond fund, a fund that was unrelated to the SLP, to pay borrowers $1.6 million in collateral shortfalls for the return of RKMCF’s loaned securities. MMF and TMF did not withdraw their securities from the program.

In October 2008, respondents sued Wells Fargo,[1] asserting numerous causes of action. The case has a long procedural history not related to this appeal. A jury trial was held from April 21 through May 24, 2010, on claims of breach of fiduciary duty, breach of contract, conversion, intentional fraud, negligent misrepresentation, and violation of the CFA. The jury returned a special verdict, finding that Wells Fargo breached a fiduciary duty to each respondent, causing damages to WCRA in the amount of $8,036,240; MMF in the amount of $1,946,890; TMF in the amount of $3,972,156; and RKMCF in the amount of $147,641. The jury also found that Wells Fargo violated the CFA and awarded $4 million to each respondent for CFA violations. The jury found no breach of contract, no conversion, and no intentional fraud. In a separate proceeding, the jury declined to award punitive damages.

In post-trial proceedings, the district court granted respondents’ motion for a new trial on the conversion claim as it relates to Wells Fargo’s use of RKMCF’s bond fund

[1] Robert Smith was also sued individually but has been dismissed from the lawsuit.

and granted respondents' motion for equitable relief for breach of fiduciary duty in the form of a scaled fee forfeiture. The parties subsequently entered into a stipulation to avoid a new trial on the conversion claim. The stipulation permitted entry of judgment as a matter of law that conversion occurred without justification and that Wells Fargo is not entitled to setoff for any money that RKMCF later received from maturing securities distributed to it. The district court awarded prejudgment interest at the rate of ten percent from the date of service of the complaint in 2008, and final judgment was entered. This appeal followed.

D E C I S I O N

I. The district court did not err in holding that Wells Fargo owed fiduciary duties as a matter of law to respondents.

Wells Fargo moved for judgment as a matter of law dismissing respondents' breach-of-fiduciary-duty claims. The district court denied the motion and held that, as a matter of law, Wells Fargo owed fiduciary duties to respondents. This court reviews de novo a district court's denial of a motion for judgment as a matter of law. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). Whether a fiduciary relationship exists is generally a fact question. *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985). The existence of a fiduciary duty is a question of law, which we review de novo. *In re Trusts A&B of Devine*, 672 N.W.2d 912, 918 (Minn. App. 2004).

Before jury deliberations, the district court held that Wells Fargo was in a fiduciary relationship with respondents in its capacities as (1) custodian of securities deposited by respondents; (2) agent with respect to the SLAs; and (3) trustee under the

Declaration. The district court rejected Wells Fargo's argument that all of its duties to respondents were either encompassed in contracts or largely eliminated by the Declaration, such that the only issue for trial was whether Wells Fargo breached its contractual duties.

The district court did not directly address Wells Fargo's assertion that the Declaration eliminated any fiduciary duty that could have been breached in this case. The Declaration purports to limit the liability of the trustee for breach of fiduciary duties traditionally associated with trusts, and Wells Fargo makes much of the fact that the Trust is a business trust, defined in Maryland law as not including testamentary trusts that traditionally give rise to fiduciary duties. But the district court, noting that Wells Fargo was a custodian, agent, and trustee with regard to respondents, implicitly held that the Declaration was ineffective to eliminate the fiduciary duties to respondents that arose from the many roles Wells Fargo assumed in the SLP. And internal documents introduced as exhibits at trial support the district court's finding that the roles were not discrete: communications by Wells Fargo officials reflect recognition within various departments and levels of Wells Fargo of conflicts of interests and high risks created by its "shoestring" management of the SLP, which varied greatly from its handling of other asset-management programs.

In a similar case currently pending in Colorado, applying Minnesota law, a federal district court recently denied Wells Fargo's motion for summary judgment based on the argument that the Declaration limits its liability and that Wells Fargo owes no fiduciary duties to SLP participants in that case. *Copic Ins. Co. v. Wells Fargo Bank, N.A.*, 767 F.

Supp. 2d 1191, 1211-12 (D. Colo. 2011). The federal district court concluded that there are factual questions about whether Wells Fargo's investment of collateral in risky securities, in express conflict with the investment objectives elsewhere promised to shareholders, could fall under the exclusion of liability for an act performed by a covered person "in a manner reasonably believed to be within the scope of authority conferred . . . by [the] Declaration." *Id.* at 1207.

Here, the district court implicitly held as a matter of law that Wells Fargo's conduct did not fall under the exclusion of liability contained in the Declaration. And our painstaking review of the record leads us to conclude that the district court did not err by making this ruling as a matter of law. Wells Fargo promised stability and liquidity to the SLP participants and Trust shareholders. Even if each individual investment was from the approved list at the time of investment, no reasonable jury could have found that the overall investment strategy, which made the Trust investments 826% more risky than mutual-fund investments, represented investing in a manner that could have been reasonably believed to be within the scope of authority conferred by the Declaration. Additionally, internal memos demonstrate that Wells Fargo (1) was well aware of the problems created for remaining shareholders by allowing PSA to withdraw from the trust without assuming any of the losses, (2) actively sought to protect its relationship with failing entities Cheyne and Lehman to the detriment of Trust shareholders, and (3) actively misled shareholders about the risks of remaining in the Trust.

Respondents, citing 12 C.F.R. § 9.2(e) (2011) ("Reg 9"), assert that, under federal law, a bank is a fiduciary when it acts as "trustee . . . transfer agent, . . . [or in] any capacity in which the bank possesses investment discretion on behalf of another." Respondents also cite the definition of "fiduciaries" in the context of securities lending by the Office of Comptroller of the Currency in Bank Circular 196: "A lender institution which exercises discretion in offering securities on behalf of and for the benefit of customer-owners is acting as a fiduciary . . . . [T]he underlying relationship may be as agent, trustee, or custodian." Respondents also cite a number of Wells Fargo documents and the testimony of Wells Fargo officials describing the bank as in a fiduciary relationship with the Trust and its participants. We conclude that the record plainly supports the district court's implicit finding that the Declaration did not eliminate or modify Wells Fargo's fiduciary duties and also supports a determination that a fiduciary relationship arose from sources other than the contracts between respondents and Wells Fargo.

The district court instructed the jury:

> A fiduciary duty is the duty to act in the best interest of another person. A fiduciary duty only applies to activities encompassed by the nature of the duty. Minnesota law imposes on a fiduciary the highest obligation of good faith, loyalty, fidelity, integrity, and fair dealing. A fiduciary must act solely for the benefit of its principal. A fiduciary is not permitted to put himself in an antagonistic relation to his principal. A fiduciary may not engage in self-dealing. Where there are multiple clients, a fiduciary must not favor one client over another; in other words, the fiduciary must treat each client impartially. A fiduciary owes its clients a duty of full disclosure. A fiduciary has a duty to communicate to its client all material (or important) facts within the scope of the fiduciary relationship of which the fiduciary has knowledge and which affects the client's important rights or interests. A fiduciary has this duty to disclose such facts whether or not the client requested that information.

Wells Fargo argues that the jury instructions on fiduciary duty, like the district court's orders on the issue of fiduciary duty, were "infected with the same improper focus—some non-descript fiduciary duties, undefined in scope and *not* causally connected to any claimed loss." We disagree. The special verdict form required the jury to determine, as damages for breach of fiduciary duty, whether there were damages *directly caused by the breach of fiduciary duty.* And the evidence demonstrated, among other things, that Wells Fargo officials were aware that (1) trust assets, even though invested with "approved" investors, were not invested to provide the promised "stability and liquidity"; (2) respondents were not provided with material information that would have allowed a more timely withdrawal from the trust; (3) preferential treatment afforded to a major client created a shortfall in trust assets for remaining participants; and (4) the same risk-management applied to other funds managed by Wells Fargo was not applied to the Trust, which was allowed to maintain what Wells Fargo officials identified as a dangerously high risk level.

In its memorandum attached to post-trial orders, the district court listed some examples of fiduciary duties that it concluded were breached by Wells Fargo, including the duty of full disclosure, the duty of impartiality, and the duty of loyalty, representing the district court's implicit holding that no reasonable jury could have found that Wells Fargo acted in a manner reasonably believed to be within the scope of authority conferred by the Declaration. Although review of the issue of Wells Fargo's fiduciary duties would have been aided by a clearer delineation of the source and scope of Wells Fargo's extracontractual fiduciary duties to respondents, we conclude that the voluminous record adequately supports the district court's holding that as a matter of law Wells Fargo owed fiduciary duties to respondents. And the record more than adequately supports the jury's finding of breach of fiduciary duties. Despite the jury's apparent acceptance of Wells Fargo's arguments that it did not breach the letter of the contract, the jury plainly found that the facts support respondents' claim that Wells Fargo breached the spirit of the contract encompassed in its fiduciary duties to respondents.

Wells Fargo also argues that all noncontract claims were barred under the "independent duty rule" established in *Wild v. Rarig*, 234 N.W.2d 775, 789-90 (Minn. 1975). In *Wild*, the plaintiff sought both contract and tort damages for breach of contract. The Minnesota Supreme Court held that, "when a plaintiff seeks to recover damages for an alleged breach of contract he is limited to damages flowing only from such breach except in exceptional cases where the defendant's breach of contract constitutes or is accompanied by an independent tort." *Id.* at 789. Wells Fargo argues that there is no independent tort in this case to support an award of tort damages in addition to breach-of-contract damages, pointing out respondents' concession that the damages sought for breach of contract are the same damages sought for breach of fiduciary duties.

Respondents, unlike the plaintiff in *Wild*, did not seek tort damages in addition to breach-of-contract damages. Respondents merely asserted two legal theories for the recovery of the same damages. We recently addressed a similar situation in *Columbia Cas. Co. v. 3M*, ____ N.W.2d ____ (Minn. App. 2012) (distinguishing the pleading of alternative theories of recovery for the same damages from the facts of *Wild* and, citing

Minn. R. Civ. P. 8.05 (b), permitting a party to assert alternative theories of breach of contract and breach of implied-covenant of good faith based on the same conduct). We find no merit in Wells Fargo's claims that the independent-duty rule announced in *Wild* required dismissal of the breach-of-fiduciary-duty claims in this case.

II. The district court did not err in allowing recovery of damages and attorney fees under the CFA.

Whether the CFA applies to a particular transaction is a question of statutory construction. *Hibbing Educ. Ass'n v. Pub. Emp't Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985). Construction of a statute is a question of law, which we review de novo. *Id.* "Consumer protection statutes are remedial in nature and are to be liberally construed in favor of protecting consumers." *Boubelik v. Liberty State Bank*, 553 N.W.2d 393, 402 (Minn. 1996). The CFA, Minn. Stat. § 325F.69 (2010), provides, in relevant part:

> The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable[.]

"Merchandise" is defined in the CFA to include intangibles, loans, and services. Minn. Stat. § 325F.68, subd. 2 (2010).

Minn. Stat. § 8.31, subd. 3a (2010), provides, in relevant part:

> [A]ny person injured by a violation of [the CFA] may bring a civil action and recover damages, together with costs and disbursements, including the costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court.

To state a claim under Minn. Stat. § 8.31, subd. 3a, a "plaintiff need only plead that the defendant engaged in conduct prohibited by the [CFA] and that the plaintiff was damaged thereby." *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 12 (Minn. 2001). And the statute applies "only to those claimants who demonstrate that their cause of action benefits the public." *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) (declining to apply the statute to a one-on-one transaction involving fraudulent misrepresentation).

Wells Fargo, relying on an unpublished case from this court, argues that respondents are "sophisticated investors" not protected by the CFA. In denying Wells Fargo's motion for summary judgment on the CFA claim, the district court held that the issue of whether respondents are entitled to protection under the CFA is one of fact for the jury. The jury was instructed that "[a] Plaintiff may recover damages for consumer fraud, if: 1. The Plaintiff relied and acted on the false information or deceptive practice, or the false information or deceptive practice had a substantial part in bringing about the Plaintiff's injury, and 2. the false information or deceptive practice harmed the Plaintiff."[2] Because the jurors found that false information or deceptive practices of Wells Fargo caused damages to each respondent, we can only conclude that the jurors

[2] Wells Fargo argues that the first element of a CFA claim includes an element of common law fraud such that the jury's finding that Wells Fargo did not "falsely represent by statement or concealment, one or more past or present material facts" precludes the CFA claim. But, as respondents note, the CFA sweeps broader than common law fraud, encompassing any "deceptive practice." Minn. Stat. § 325.69, subd. 1; *LeSage v. Norwest Bank Calhoun-Isles, N.A.*, 409 N.W.2d 536, 539 (Minn. App. 1987) (rejecting the argument that summary judgment dismissing a common law fraud claim precluded a CFA claim, stating that "[t]he Consumer Fraud Act is broader than common law fraud").

rejected Wells Fargo's argument that each respondent was a sophisticated investor precluded from relying or acting on the challenged conduct. "An answer to a special verdict question should be set aside only if it is perverse and palpably contrary to the evidence, or where the evidence is so clear as to leave no room for differences among reasonable persons." *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 888 (Minn. 2010) (quotation omitted). On this record, there is no basis to set aside the jury's finding.

Wells Fargo also argues that the CFA claims must fail because there was no fraud in connection with a sale of merchandise.[3] Wells Fargo asserts that respondents failed to show any misrepresentation at the time they signed the SLAs and conceded that there were no misrepresentations until late 2007. Wells Fargo cites *Cooperman v. R.G. Barry Corp.*, 775 F. Supp. 1211, 1213 (D. Minn. 1991), for the proposition that a misrepresentation under the CFA can occur only at the initial sale and not during an ongoing relationship for there to be the required nexus between the misrepresentation and the sale. But *Cooperman* rejected the plaintiff's CFA claim because it was related to his status as defendant's sales representative rather than to a sale of merchandise. *Id*. at 1213-14. *Cooperman* irrelevant to the issue of whether Wells Fargo misrepresented the true nature of the risk of services involving daily investments of cash collateral sold to respondents. And we agree with respondents that, because the subscription agreements

[3] Wells Fargo argues that, as "an intermediary or agent" acting for the benefit of a principal pursuant to a contract, it did not "sell merchandise" under the CFA. But the subscription agreements signed by respondents specifically refer to a subscription fee required to become a shareholder in the Trust, and Wells Fargo charged fees for all services provided. We find no merit in the argument that Wells Fargo did not sell services.

were signed less than six years before this action was brought, in addition to the continuing nature of the misrepresentations, the claim is taken out of the statute of limitations urged by Wells Fargo.

Wells Fargo argues that, despite the district court's holding to the contrary, respondents are not entitled to pursue a CFA claim because they failed to establish that this cause of action benefits the public. In *Collins v. Minn. Sch. of Bus.*, the supreme court, interpreting the public-benefit standard articulated in *Ly*, 615 N.W.2d at 314, concluded that the plaintiffs, who sued a school, alleging that the school made false, misleading, and confusing statements about one of its programs, satisfied the public-benefit standard even though students were suing for private damages and the school had stopped the challenged advertising and changed its curriculum after suit was filed. 636 N.W.2d 816, 821 (Minn. App. 2001). This case is distinguishable because, unlike the school involved in *Collins*, Wells Fargo marketed the SLP to selected entities rather than to the public at large; but because the SLP involved billions of dollars, the impact of the challenged practices on the public is plainly much broader than the impact of the school's conduct in *Collins*.

The district court found that respondents met the public-benefit requirement because they brought the information about misrepresentations in the SLP to the attention of the "highest levels" at Wells Fargo, regulatory authorities, and the general public, noting that misconduct by a major financial institution "poses a significant public hazard." Without attempting to definitively delineate what factors are necessary to establish a public benefit, we conclude that, even though Wells Fargo marketed its services only to certain investors rather than to the public at large, and respondents sought damages rather than injunctive relief, neither fact precludes a finding of public benefit in respondents' challenge to practices that had a substantial financial impact far beyond damages to respondents. The record demonstrates that the Trust contained 401K funds as well as respondents' charitable funds. We conclude that the district court did not err by holding that an action seeking to hold a major financial institution accountable for violating contractual and fiduciary duties falls within the definition of conferring a public benefit.

Wells Fargo's argument that the respondents failed to establish any nexus between the damages awarded and alleged misrepresentations or deceptive practices in connection with selling the securities lending program has merit. We are at a loss to understand how the jury arrived at an award of $4 million in damages for each respondent caused by Wells Fargo's violations of the CFA. But "the assessment of damages is the peculiar province of the jury." *Schindele v. Ulrich*, 268 N.W.2d 547, 552 (Minn. 1978).

In their brief on appeal, respondents speculate about how the jury may have determined damages and note that the total damages awarded are within amounts presented to the jury at trial. A reviewing court should not set aside a jury verdict on damages "unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (internal quotation omitted). Because the total damages are within amounts presented to the jury, we decline to reverse the jury's findings regarding damages caused by violations of the CFA, despite being mystified about the rationale for the jury's division of damages between breach of fiduciary duty and CFA violations.[4]

III. The district court did not err by holding as a matter of law that Wells Fargo converted RKMCF's bond fund without good faith or reasonable mistake.

The district court granted RKMCF a new trial to determine whether Wells Fargo's action in taking approximately $1.6 million from its bond fund, which was unrelated to the SLP, to pay brokers for the return of securities, constituted conversion. But the parties stipulated that the final judgment would include the following language:

> Plaintiffs made a *prima facie* case that Wells Fargo seized the unrelated RKMCF bond account. Wells Fargo presented no evidence suggesting that it, Wells Fargo *itself*, had a direct claim against RKMCF giving rise to a right of setoff. The bond fund, unlike the loaned securities, was not part of the securities lending program, and therefore, it was not open to the jury to conclude on the evidence before it that RKMCF's right to possession of the bond fund was subject to some unsatisfied contractual pre-condition.

The parties further stipulated that the district court found as a matter of law that the conversion was without good faith or reasonable mistake, such that Wells Fargo is not entitled to a setoff against the amount converted for the amounts RKMCF ultimately received from maturity of illiquid assets it received on disaggregation of the Trust.

Wells Fargo argues that, under the BSLAs it entered into with brokers on behalf of SLP participants, it could honor RKMCF's demand for return of its securities only by returning cash collateral to the brokers in exchange for the securities. And because there

[4] Respondents argue that the damages for each theory of recovery were identical. But the jury apportioned the damages between breach of fiduciary duty and the CFA violations. Reversing the damages for the CFA violations would require a remand for new trial on fiduciary-duty damages because the jury plainly intended the total recovery awarded.

was insufficient cash in the Trust and RKMCF declined to provide the necessary cash, it was authorized to use RKMCF's bond fund, which it held entirely separate from the SLP, to obtain return of the securities. Wells Fargo asserts that, because its action is based on the BSLAs (contracts with brokers), the district court "ignored the independent duty rule, which prohibits contractual disputes from being re-cast as conversion claims." We disagree. The BSLAs may have made RKMCF liable to pay for the return of securities, but there is nothing in the record to establish that the BSLAs authorized Wells Fargo to seize assets unrelated to the SLP to pay for the return of securities. The conversion claim arises out of Wells Fargo's seizure of the bond fund, not out of its contracts with brokers.[5]

Wells Fargo's primary argument on this issue is that the district court erred by failing to offset the amount taken from RKMCF's bond fund with $1,458,915 that RKMCF eventually realized from maturity of illiquid assets distributed from the Trust. Wells Fargo relies on an unpublished federal case to assert that under the "benefit rule" any benefits received be offset against the amount converted. Wells Fargo appears to be arguing that it was entitled to convert the bond fund as an advance on eventual maturity of the illiquid assets distributed to RKMCF. We do not follow the logic of this argument.

[5] RKMCF argued at trial and again argues on appeal that, after Wells Fargo stated that loaned securities could not be returned unless it provided approximately $1.6 million in addition to its funds in the Trust, it modified its demand to request the return of only securities not out on loan; but despite this instruction, Wells Fargo recalled all loaned securities using RKMCF's bond funds to pay the brokers. This claim is not addressed in the parties' stipulation or in the district court's decision.

Conversion is complete at the time it takes place. *Carpenter v. Am. Bldg. & Loan Ass'n*, 54 Minn. 403, 410, 56 N.W. 95, 96 (1893); *see also Sutton v. Great N. Ry. Co.*, 99 Minn. 376, 379, 109 N.W. 815, 816 (1906) (stating that "[a] conversion cannot be purged"). Generally, "[t]he measure of damages for conversion is the fair market value of the . . . goods at the time of the conversion, plus interest from that date." *Bloomquist v. First Nat'l Bank of Elk River*, 378 N.W.2d 81, 86 (Minn. App. 1985), *review denied* (Minn. Jan. 31, 1986). "The benefits rule provides that if a defendant's tortious conduct confers a benefit, as well as a harm, upon the plaintiff, the jury may weigh the value of the benefit against the claimed harm." *Gits v. Norwest Bank Minneapolis*, 390 N.W.2d 835, 837-38 (Minn. App. 1986) (citing Restatement (Second) of Torts § 920 (1977)). In this case, Wells Fargo argues that the "benefit" came from the maturity of illiquid assets distributed from the trust, but that "benefit" is totally unrelated to the conversion of the bond funds and was not bestowed by the conversion. We find no error in the district court's disallowance of the setoff claimed by Wells Fargo.

IV. The district court did not err by awarding the equitable relief of the fee forfeiture.

The district court granted respondents' post-trial motion for an order forfeiting fees as an equitable remedy for breach of fiduciary duty. This court reviews the district court's determination of the appropriate equitable remedy for breach of a fiduciary duty for an abuse of discretion. *Bolander v. Bolander*, 703 N.W.2d 529, 548 (Minn. App. 2005). "[T]he purpose of the equitable remedy of fee forfeiture is distinct from that of an actual-damages award." *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 778 (Minn. App. 2006).

Wells Fargo argues that granting a fee forfeiture constitutes a double recovery for respondents. We disagree. Money damages are awarded as compensation for an actual loss or injury, "while a fee forfeiture is awarded to vindicate a client's 'absolute right' to loyalty, regardless of actual damages sustained." *Id.* (citing *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984) (*Perl II*)). A fee forfeiture is analogous to punitive or nominal damages. *Id.* at 778-79 (citing *Gilchrist v. Perl*, 387 N.W.2d 412, 416 (Minn. 1986) (*Perl III*)).

There are two different rules for determining what type of fee forfeiture is appropriate, a total-fee forfeiture or a scaled-fee forfeiture. *Id* at 779. The total-fee-forfeiture rule, requiring forfeiture of all compensation received by a fiduciary, is appropriate when a fiduciary's breach of duties involves actual fraud, bad faith, and actual harm to the client. *Id.* The scaled-fee-forfeiture rule, allowing the amount of fee forfeiture to be scaled to the degree of fiduciary misconduct, is more appropriate when the breach involves no actual fraud or bad faith and when the client sustains no actual harm, particularly when there are multiple potential plaintiffs. *Id.*

After finding that Wells Fargo had not acted in "bad faith," and taking into consideration the factors in Minn. Stat. § 549.20, subd. 3, and *Perl III,* the district court concluded that "the appropriate scaled fee forfeiture here is all fees received by Wells Fargo pertaining or relating to [respondents'] participation in the [SLP] from February 2008 to the present." In reaching that conclusion, the district court also concluded that the custodial activities "were, and are, an integral part of the program." As an equitable remedy for breach of fiduciary duty, the district court ordered a forfeiture of fees in the following amounts: WCRA - $273,656; MMF - $188; TMF - $335,036; and RKMCF - $47,845.

Relying on *Trenti, Saxhaug, Berger, Roche, Stephenson, Richards & Aluni, Ltd. v. Nartnik*, 439 N.W.2d 418 (Minn. App. 1989), *review denied* (Minn. July 12, 1989), Wells Fargo argues that the fees that arose out of the SLAs and the custody agreements should not be subject to forfeiture because they were "fees reasonably earned for services on other matters." In *Trenti*, this court affirmed a district court's award of the reasonable value of an attorney's services in a personal-injury matter. *Id.* at 419. The attorney also handled an unrelated felony-theft charge and unrelated misdemeanor charges that were brought against the client during the period of time that the personal-injury matter was pending. *Id.* The client discharged the attorney from the personal-injury matter and retained other counsel. *Id.* at 420. The attorney sued to recover fees for work on the personal-injury case and the misdemeanor charges. *Id.* The client claimed that the attorney had breached his fiduciary duty by failing to disclose a possible conflict of interest in the felony proceeding and that, as a result of the breach of fiduciary duty, the attorney was required to forfeit all fees for work performed on the personal-injury claim and misdemeanor defense. *Id.* at 421. Based on the facts of the case, this court concluded that the attorney did not breach any fiduciary duty to the client in the felony representation, but we noted "as an aside . . . that even if there had been a breach of fiduciary duty on the felony matter, . . . we find no law stating that a breach on an unrelated matter spills over and prevents an attorney from collecting fees reasonably earned for services on other matters that were properly performed." *Id.* at 422.

This case is distinguishable from *Trenti* because here the district court found that all of the fees were related to the SLP, not for discreet, distinct, unrelated services. The district court found that respondents

> established that Wells Fargo made profound errors and mistakes in the conduct of its [SLP] resulting, I conclude, from years of unreasonable management complacency, if not hubris. The evidence demonstrates that Wells Fargo's management considered the program a business backwater. As a result, the program was ignored. Once things went wrong, the program's line managers either did not call for help or, when they did, their superiors' reactions were less than decisive.

We conclude that the district court did not abuse its discretion by awarding a scaled-fee forfeiture as an equitable remedy in addition to the jury's award of compensatory damages for breach of fiduciary duty.

V. The district court did not err in using the interest rate contained in Minn. Stat. § 549.09, subd. 1(c)(2) (2010), to calculate prejudgment interest.

Wells Fargo argues that the district court incorrectly applied the ten-percent pre-judgment interest contained in Minn. Stat. § 549.09, subd. 1(c)(2), from the date the action started in 2008, to calculate the award of pre-judgment interest. Wells Fargo argues that the statute is not retroactive and that prejudgment interest should be calculated using four percent from October 15, 2008 to July 31, 2009, and applying ten percent only from August 1, 2009 (the effective date of the statute increasing the rate to ten percent) through the date of the verdict. The district court cited the language in the law that amended subdivision 1: “This section is effective August 1, 2009, *and applies to judgments and awards finally entered on or after that date.”* 2009 Laws ch. 83, art. 2, § 35 at 1055 (emphasis added). The district court concluded that, “[i]f the legislature intended for the old 4% interest rate to apply to judgments entered in pending matters for the period prior to August 1st, it would have said as much.” We agree and conclude that the district court correctly applied the plain language of the law.

Affirmed.