

PROFESSIONAL LIABILITY UPDATE

November 15, 2004

Issue No. 199

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*Borisoff v. Taylor & Faust* (2004) 33 Cal.4<sup>th</sup> 523

*The California Supreme Court decides that the Probate Code gives a successor fiduciary standing to sue tax counsel retained by predecessor fiduciary.*

*Borisoff v. Taylor & Faust* (2004) When Veronica Smith died the court appointed Paul Springer as special administrator. He engaged Taylor & Faust to represent him and they prepared an allegedly improper estate tax return. In the course of the representation, Springer consulted Taylor & Faust about his own embezzlement from the estate. Taylor & Faust resigned as Springer's counsel, and Springer died several months later. The deadline to correct the estate tax return passed without action.

Several years later Borisoff was appointed executor of the estate. He filed an action against Taylor & Faust that the trial court dismissed based on his lack of standing. The Court of Appeal agreed, reasoning that the administrator of an estate represents the administrator, not the estate. [PL Update No. 123]

The Supreme Court disagreed, holding that the Probate Code's relevant provisions strongly supported the inference that a successor fiduciary does have standing to sue an attorney retained by a predecessor fiduciary to give tax

advice for the benefit of the estate. The code expressly authorizes a personal representative to retain tax counsel and to pay for such services from the estate. The code also provides that a successor personal representative has the powers and duties that the former personal representative would have had, including the power to commence and maintain actions to benefit the estate. This provision allows a fiduciary that retains a tax attorney to file a malpractice action to benefit the estate, and also allows a successor fiduciary to commence and maintain a malpractice action against a tax attorney retained by the predecessor fiduciary. The Legislature, by statute, invested the successor fiduciary with standing to sue despite the lack of privity.

The rule that beneficiaries of a trust do not have standing to assert malpractice claims against an attorney hired by the fiduciary follows from the general rule that an attorney owes a duty of care only to the client with whom the attorney stands in privity of contract. Exceptions are rare and occur only when specific

facts of the case show the plaintiff is an intended, third party beneficiary of the contract to provide legal services. However a successor fiduciary's rights are not equivalent to those of the beneficiaries because the Probate Code gives successor fiduciaries the same rights as predecessor fiduciaries.

A successor fiduciary must have standing to sue the predecessor's attorney if there is to be an effective remedy for legal malpractice that harms estates and trusts administered by successor fiduciaries. The power of the court to reduce attorney compensation only protects the estate to the extent of unpaid fees, not to the full extent of any loss. The ability of the successor fiduciary to surcharge the predecessor fiduciary who may assert a claim for malpractice incorrectly assumes the predecessor fiduciary is strictly liable for an attorney's malpractice. Under California law surcharge against a fiduciary is only available where the fiduciary has acted unreasonably. The probate court has no power to surcharge a negligent attorney retained by a fiduciary, this remedy lies only against fiduciaries.

Similarly the doctrine that a fiduciary's duties are not delegable, and that the fiduciary is strictly liable regardless of fault for all losses suffered by the trust, has never been fully embraced by California law. The code permits a fiduciary to delegate acts the fiduciary cannot reasonably be required personally to perform and permits courts to excuse from liability fiduciaries that have acted reasonably and in good faith. The only rule of nondelegability is where fiduciaries completely abdicate their duties by surrendering to the attorneys the entire administration of the estate.

The court rejected the argument that allowing the successor fiduciary standing to sue an attorney whose malpractice has harmed the estate would compromise the attorney's duty of loyalty. There is no conflict of interest in permitting a successor fiduciary to sue an attorney for malpractice that harms the estate. The predecessor and successor fiduciaries both have the power and duty to obtain competent legal representation for the purpose of fairly reporting the estate's tax liability.

A problem would only arise where an attorney represents a fiduciary in his personal and fiduciary capacities simultaneously, when that entails a conflict of interest. This is similar to a corporation's officer seeking personal advice from corporate counsel. Corporate counsel may not advise an embezzling officer how to avoid personal liability to the corporation without engaging in a conflict of interest with the corporation. An attorney retained to advise a fiduciary in his or her official capacity, who is asked by the fiduciary for assistance in avoiding detection of and liability for misappropriation, faces a potential conflict of interest and may have no choice but to withdraw. A fiduciary must distinguish his or her own interests from those of the beneficiaries; an attorney representing a fiduciary must observe the same distinction.

The duty of confidentiality is not compromised because a successor fiduciary becomes the holder of the attorney-client privilege only as to those confidential communications that occur when the predecessor seeks the attorney's advice for guidance in administering the trust. Conversely, a successor fiduciary does not become the

holder of the privilege for confidential communications that occur when a predecessor fiduciary seeks an attorney's advice in his or her personal capacity.

The Supreme Court noted that it was not deciding whether the fiduciary could maintain a cause of action against the attorneys for failing to take steps to protect the estate from the consequences of Springer's misappropriation.

*Comment:* The Supreme Court continues to recognize that an attorney's liability is limited to clients and intended beneficiaries. The exception in this case is based on specific provisions of the Probate Code authorizing a successor fiduciary's cause of action against an attorney whose services to the estate have harmed the estate. The Court specifically reserved for another day the question of whether a successor fiduciary has standing to sue an attorney whose services to a predecessor fiduciary in the fiduciary's personal capacity have harmed the estate.