

PROFESSIONAL LIABILITY UPDATE

ATTORNEY CLIENT CONSPIRACY

By Jennifer A. Becker

Klotz v. Milbank Tweed (2015) 238 Cal.App.4th 1339

The Second District holds the pre-filing gatekeeping statute against civil conspiracy claims alleging an attorney conspired with a client applied to bar non-client claims against an attorney.

Adam Klotz, Richard Spitz, and Stephen Bruce formed SageMill LLC (SageMill) to craft tailored, short-term investment strategies and provide investment advice. SageMill's operating agreement provided a member could not withdraw without the consent of SageMill's managers, and prohibited Klotz, Spitz and Bruce from engaging in competitive services.

Klotz and Spitz claimed a lucrative transaction was not consummated because Bruce breached his fiduciary duties to them, aided and abetted by SageMill's attorney Deborah Festa and her law firm Milbank, Tweed, Hadley & McCloy LLP ("Milbank"). Festa gave Bruce advice about how to terminate his obligations to SageMill, without making disclosures to Klotz and Spitz or obtaining their written consent.

Klotz and Spitz as individuals pled an implied attorney-client relationship between themselves and the attorneys. Festa expressly represented she was the attorney for SageMill, and had privileged attorney-client communications directly with Bruce, Klotz and Spitz that benefitted them individually. Klotz and Spitz believed that neither Festa nor her firm would take a position that was adverse to them individually, or to SageMill.

The trial court denied Festa and Milbanks' motion to strike Klotz and Spitz's individual claims based on the pre-filing attorney-client conspiracy allegation requirements of C.C.P. § 1714.10. Festa and Milbank argued that despite labels, all claims were conspiracy claims by non-clients and did not fall within any exceptions to the pre-filing requirements. The attorneys owed no independent legal duty to Klotz or Spitz as individuals, and did not act for personal gain.

The Court of Appeal reversed. C.C.P. § 1714.10 requires a plaintiff obtain a prior court order before suing an attorney that includes a claim for civil conspiracy with a client arising from any attempt to contest or settle a claim while representing the client. The statute performs a gatekeeping function and requires a plaintiff to establish a reasonable probability of prevailing before being allowed to pursue the claim. Rather than require the attorney to defeat the claim by showing it is legally meritless, plaintiff must make a prima facie showing before he can assert the claim. Precedent established that if a claim falls under one of the exceptions to the statute -- that an attorney breached an independent duty to a third-party, or the attorney acted for personal financial gain

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beyond the receipt of fees for services -- the pre-filing requirement does not apply because the conspiracy claim is properly pled.

The court will examine the entire complaint, without regard to the labels attached to the causes of action or whether the word “conspiracy” appears. If there are allegations of a union of conduct between attorney and client arising out of the legal representation; the absence of allegations to support an independent attorney duty to a third-party; and the incorporation of conspiracy allegations into every cause of action, all are subject to a § 1714.10 analysis.

The independent duty exception speaks to a relationship beyond that of attorney-client. If an attorney engages in conduct that exceeds the role of a legal representative -- participating with the client to harm a non-client -- the attorney is exposed to a host of tort claims including a cause of action for attorney-client conspiracy. An attorney has an independent legal duty to not defraud non-clients, such as concealing threatened litigation from potential investors, or misrepresenting policy limits.

The second exception applies where an attorney takes actions for personal financial gain over and above monetary compensation received in exchange for professional services. This exception does not apply to receipt of fees for legal services, even when a plaintiff alleges the fees were excessive or the services unnecessary. Otherwise the exception would be rendered meaningless through artful pleading.

The Court of Appeal was not persuaded Klotz and Spitz established their individual attorney-client relationships with Festa. They alleged no attorney duty beyond those customary in rendering services to a client. The attorneys’ conduct comprised an alleged conflict of interest and did not arise out of the breach of any duty independent of the attorney client relationship. The conduct arose with the settlement of a claim

or dispute: Bruce’s withdrawal from the partnership and request for advice on a new business opportunity that potentially conflicted with SageMill’s interests. These allegations do not go beyond legal services to violate an independent duty.

There was no allegation of personal financial gain sufficient to evade the bar of § 1714.10. The attorneys’ alleged desire to secure a more lucrative client does not constitute financial gain within the meaning of the statute.

Comment: Festa represented Bruce individually before advising SageMill. She never formalized her relationship with SageMill, or clarified who she was representing. In the heat of a deal, it is common for attorneys to neglect these important ethical steps, which can later lead to misunderstandings and claims.