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PROFESSIONALLY SPEAKING

NEWS & INSIGHTS

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Wilson Elser's newsletter features articles written by the firm's Professional Liability & Services Practice attorneys.

Professionally Speaking explores current topics of interest to general counsel, claims professionals and risk managers for various professional liability lines, including accountants, lawyers, design professionals, insurance brokers and others.

Listserv Posters Beware By **Mara Sackman**
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Listserv Posters Beware By Mara Sackman

Attorneys often find it helpful to test legal theories by presenting hypothetical or anonymized descriptions to consulting attorneys outside of their firms. Listservs* are a great way for attorneys to share information and knowledge. However, the use of listservs poses particular risks that must be considered before posting.

On May 8, 2024, the American Bar Association (ABA) issued Formal Opinion 511 (Opinion) explaining that attorneys may not post on listservs information relating to a representation that poses a "reasonable likelihood" that a recipient could "infer the identity of the lawyer's client or the situation involved" without their client's informed consent.

ABA Model Rule of Professional Conduct 1.6(1) (Rule 1.6) restricts attorneys from revealing even publicly available and non-privileged information relating to a representation that poses a "reasonable likelihood" that a recipient could "infer the identity of the lawyer's client or the situation involved" unless:

- The client has provided affirmative informed consent or
- The disclosure is impliedly authorized in order to carry out the representation.

BACKGROUND

A 1998 ABA formal opinion explained that a lawyer had implied authorization to disclose anonymized information to outside consulting attorneys "to obtain advice about a matter when the lawyer reasonably believes the disclosure will further the representation." Lawyers seeking to test legal theories or continue their professional development may disclose information related to a representation to an attorney outside of their firm without obtaining their client's informed consent. The disclosure is permissible "when such information is anonymized or presented as a hypothetical and the information is revealed under circumstances in which 'the information will not be further disclosed or otherwise used against the consulting lawyer's client.'"

Disclosure of anonymized information to a known attorney does not require client consent because the consulting attorneys are expected to ascertain whether there is a conflict of interest and maintain confidentiality even in the absence of an explicit confidentiality agreement.

In contrast, listserv participants are often anonymous to the poster. The disclosing lawyer cannot determine if the listserv participants have interests adverse to the client or can be trusted to maintain confidentiality. Even an opposing party's attorney may be a listserv participant. Indeed, posting on a listserv is inconsistent with the maintenance of confidentiality, and so, it is vital that no client confidential information is shared with a listserv community.

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SUMMARY

The Opinion does not foreclose (and in fact encourages) participation in listservs. However, special care should be taken when posting, especially when the post relates to an unusual fact pattern, a highly publicized matter, a limited geographic area or a specialized practice area. In addition to using anonymized hypotheticals, attorneys should consider whether to obtain their client's informed consent or refrain from posting if there is a reasonable concern that other members of the listserv may be able to identify the client or matter from the information provided.

* The term Listserv has been used to refer to electronic mailing list software applications in general, but is more properly applied to a few early instances of such software, which allows a sender to send one email to a list, which then transparently sends it on to the addresses of the subscribers to the list.

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Illinois Appellate Decisions Offer Guidance for Claims Against Real Estate Professionals

By **Robert F. Merlo**

It is no secret among professional liability defense attorneys that the sellers of residential real estate are not the only parties susceptible to lawsuits alleging insufficient disclosures. Illinois real estate brokers and their agents also routinely are named as defendants in these cases.

Negligent misrepresentation claims against real estate professionals are common and are often accompanied by claims under the Residential Real Property Disclosure Act (Disclosure Act) and Article 15 of the Real Estate Licensee Act (Licensee Act).

Claims against real estate professionals under these acts are becoming more common, and thus there has been significant discussion in the Illinois appellate courts interpreting – among other issues – the scope of a real estate agent's duties under these acts, and what evidence or allegations are sufficient for a plaintiff-buyer to prove the often-litigated issue of "reasonable reliance." Two recent appellate opinions offer some insight.

THE HAHN OPINION

The Illinois Second District Appellate Court opinion in *Hahn v. McElroy* addressed a case where the plaintiff-buyers claimed that they discovered mold and water damage shortly after moving into the property. The buyer sued the seller and the seller's agent, and the evidence revealed that the sellers previously had water problems, but that they were fixed in 2015, three years before the sale. Notably on this issue, the Second District held that previous problems the sellers reasonably believed were corrected need not be disclosed, and rejected the plaintiff's argument that circumstantial evidence to the contrary was sufficient to defeat the defendants' motion for directed verdict after a bench trial.

Further, the buyer argued that since the plaintiff knew about prior water problems, they should have investigated and confirmed that the disclosure form's representation of no water or mold issues was accurate. The Second District rejected this argument, noting that section 35 of the Disclosure Act does not require sellers to investigate and confirm their representations, nor does a seller's agent have such an obligation.

The *Hahn* opinion offers insight on two important points often litigated in these cases:

- Past defects that the seller reasonably believes have been fixed need not be disclosed.
- The Disclosure Act does not impose a duty on real estate agents to independently investigate the veracity of their clients' disclosures.

Continued

With respect to the former, the *Hahn* case offers clarity as to the Disclosure Act's scope; if sellers reasonably believe past problems have been fixed, neither they nor their agent is required to disclose those past problems and how they were remedied.

As to the latter, Hahn offers an important distinction between Disclosure Act claims against real estate agents versus negligent misrepresentation claims. Under the Disclosure Act, an agent has no obligation to investigate the seller's representations, whereas in a negligent misrepresentation claim, the agent has no obligation to independently investigate unless the agent could have discovered that the seller's representations were false through the exercise of ordinary care. See, e.g., *Harkala v. Wildwood Realty, Inc.*, 200 Ill. App. 3d 447, 454 (1st Dist. 1990).

Negligent misrepresentation and Disclosure Act claims against real estate professionals often rely on the same allegations; thus, the distinction set forth in *Hahn* is an important consideration.

THE REVITE OPINION

In an Illinois First District Appellate Court case, *Revite Corp. v. 2424 Chi., Inc.*, the court (in an unpublished Rule 23 opinion) affirmed the trial court's dismissal of various counts against the sellers and real estate agents in connection with the plaintiff's purchase of two residential and one commercial unit in an HOA building.

The *Revite* opinion offers insight into the scope of a real estate agent's duties under the Licensee Act, as well as what facts can defeat a plaintiff's claim of justified reliance.

The First District court rejected the plaintiff's claim that her agent violated his duty to exercise reasonable skill and care by failing to advise the plaintiff to bring an inspector to the day-of-closing walkthrough. The court noted that the agent (who was acting as a dual agent, governed by section 15-45 of the Licensee Act) was not mandated to advise the plaintiff to bring an inspector; the Licensee Act says that agents "can" help arrange for an inspection. Thus, the court held that the plaintiff "fails to explain how that advice violated duties under section 15-15(a)(3) to 'exercise reasonable skill and care in the performance of brokerage services.'"

While the *Revite* opinion is unpublished, it nonetheless may be persuasive in a claim that an agent breached their duties under the Licensee Act by failing to advise the buyer to bring an inspector to the final walkthrough.

Further, the *Revite* plaintiff – in support of her negligent misrepresentation claim against the realtor – argued that she reasonably relied on the realtor's statement that she could build a fence on the property. However, the court held that since the plaintiff's real estate attorney (at the plaintiff's direction prior to closing) specifically negotiated for the plaintiff to become part of the HOA – which subjected her to the HOA declaration that explained that the plaintiff would not be able to build a fence without the board's approval – the plaintiff could not prove justified reliance on the realtor's representation. The court thus affirmed the grant of summary judgment on that claim.

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The First District's discussion of reasonable reliance in Revite is notable because whether reliance on a statement is reasonable is typically a question of fact, precluding summary judgment. See, e.g. *Olson v. Hunter's Point Homes, LLC*, 2012 IL App (5th) 100506 (holding that even though public records may have revealed to the plaintiff-buyer the truth of the alleged misrepresentation, the complexity of interpreting those public records was sufficient to create a question of fact regarding whether reliance was justified). Thus, the Revite opinion discusses the reasonable/justified reliance element outside of the context of public records and provides guidance as to what other information available to the plaintiff-buyer can potentially eliminate their ability to claim justified reliance and avoid a question of fact.

Finally, it is notable that other appellate courts around the country recently addressed similar fact patterns, affirming lower courts' decisions in favor of a seller's real estate agent. See, e.g., *Douet v. Romero*, Tex. 14th App. Dist. (2022) (affirming summary judgment for seller's agent's because no evidence established that the agent knew or should have known that the seller's representation that no mold issues existed was false); see also, *Atlanta Partners Realty, LLC v. Wohlgemuth*, 365 Ga. App. 386, 393-96 (2022) (holding plaintiff-buyer's negligence claim against seller's agent failed because the plaintiff could have discovered the alleged defect by way of a reasonable inspection and, therefore, seller's agent could not be liable).

The plain language of Georgia's statute governing seller's agents' duties to buyers was dispositive as to the agent's scope of duty to the plaintiff and provides that if the alleged defect can be discovered by a reasonable inspection, the plaintiff cannot establish the element of justified/reasonable reliance); see also, *Young v. Era Advantage Realty*, 2022 MT 130 (Mont. Sup. Ct. 2022) (holding plaintiff-buyer's negligence and constructive fraud claims against seller's agent failed as a matter of law because plaintiff presented no evidence that seller's agent knew or should have known of the undisclosed defect [water intrusion], and holding that Montana's statute governing real estate agents' duties [MCA §37-51-313(3)(a)] controlled as to the scope of the seller's agent's duty to the plaintiff-buyer).

CONCLUSION

Buyers of residential real estate are increasingly using the same facts and allegations to bring claims for common law negligence and statutory claims against sellers' real estate agents. In Illinois specifically, negligent misrepresentation claims are often buttressed by Illinois Residential Real Property Disclosure Act and Real Estate Licenses Act claims.

The sheer number of these claims has led to much appellate review of the various issues presented, as well as what the plaintiff-buyers must bring forth in terms of evidence to satisfy the elements of their claims. As discussed, it is important that professional liability attorneys monitor these appellate decisions and appreciate the often-nuanced analysis of these claims. Specifically, it is important to know the extent to which statutes govern the scope of a seller's agent's duty to a buyer, and what sort of evidence may prove dispositive with regard to the plaintiff-buyer's ability to establish that they justifiably or reasonably relied on the agent's representations.

This area of the law is regularly evolving, and conducting discovery with the above-discussed considerations in mind can result in dispositive motion victories, saving real estate professionals the costs and risks associated with taking these cases all the way through a trial.

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Practical Strategies for Conflicts Involving Prospective Clients

By **Carole J. Buckner**

Contacts with prospective clients may limit a lawyer's ability to represent other parties involved with a prospective client's matters. For example, a client might contact a lawyer and provide confidential information in order to disqualify the lawyer from representation of the client's adversary. But lawyers may take reasonable measures to limit consultations with prospective clients to preserve the ability to represent other parties in connection with the same or related matters. ABA Formal Opinion 510, issued in March 2024, provides excellent practical guidance to lawyers in handling consultations with prospective clients, and lays out multiple measures lawyers may take to limit the risk of disqualification based on such consultations.

MAINTAIN CONTROL OF THE CONSULTATION

During the pre-engagement consultation, the lawyer must exercise discretion and limit the information obtained from the prospective client to what is "reasonably necessary to determine whether to represent that prospective client," rather than having a "free flowing" conversation. If the lawyer instead elicits extensive information without an express waiver from the prospective client, the lawyer will not be able to preserve the opportunity to represent the opposing party in connection with the same or a substantially related matter.

Informed Written Consent

Lawyers may request a prospective client's informed written consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the same or a related matter, and may request the prospective client's consent to the lawyers' later use of the information received from the prospective client.

Cautionary Language

A lawyer also can caution the client against providing any "prejudicial" information. When engaging in a consultation with a prospective client, a lawyer can warn the prospective client to limit the information shared to only what is "reasonably necessary" for the lawyer and client to decide whether to move forward with the representation. Perhaps most necessary in this initial discussion is the lawyer's receipt of information needed to determine whether a conflict of interest exists, or whether a conflict waiver would be required, including information regarding the identity of the parties, witnesses and counsel. Reconciling a conflict check may require additional information. Information relevant to the lawyer's business decision to take the case also may be "reasonably necessary," including the compensation, expenses and time frame, and whether the matter aligns with the lawyer's expertise.

Continued

Modest Inquiry
When taking on a new representation, it is reasonably necessary to make some inquiry into the facts of the matter to determine whether the prospective claim is frivolous, which the ABA's recent opinion posits can be determined based on a "modest inquiry," rather than an "extensive inquiry." Although a further inquiry might be desirable to ascertain the likely success on the merits, or the likely damages, the opinion indicates that such an inquiry may not be reasonably necessary.

Further Determinations
An inquiry designed to determine whether the client's proposed course of conduct is criminal or fraudulent also would be reasonably necessary for the lawyer to determine whether to represent the client. Such an inquiry would include the identity of the client and nature of the requested legal services, relevant jurisdictions involved (for example, whether a jurisdiction is considered high risk for money laundering or terrorist financing), and the identities of those depositing funds with the lawyer.

Prospective clients may engage in detailed discussions with lawyers about possible representation in litigation or transactional matters, with lawyers providing strategic insight based on the lawyers' expertise. While this is permissible, such exchanges likely go beyond what is "reasonably necessary" for the lawyer to determine whether to engage in the representation and are more likely related to the prospective client's decision as to whether to engage the lawyer.

ADDITIONAL CONSIDERATIONS

A law firm may implement a "timely" screen of the lawyers involved in the consultation with a prospective client when the firm learns that Rule 1.18 is implicated. On this point, the guidance is very practical. Erecting a screen for every potential client is not necessary and would create an unreasonable burden, so the Opinion provides that doing so is not required. Instead, implementing a screen once the firm learns that Rule 1.18 is implicated will suffice. For example, screening the disqualified attorney who had the prior consultation once plaintiff's counsel notified defendant's counsel of the prior consultation satisfies the "timely" screening requirement. ABA Formal Opinion 510 provides important practical guidance lawyers can implement to limit the risk of later disqualification based on consultations with prospective clients.

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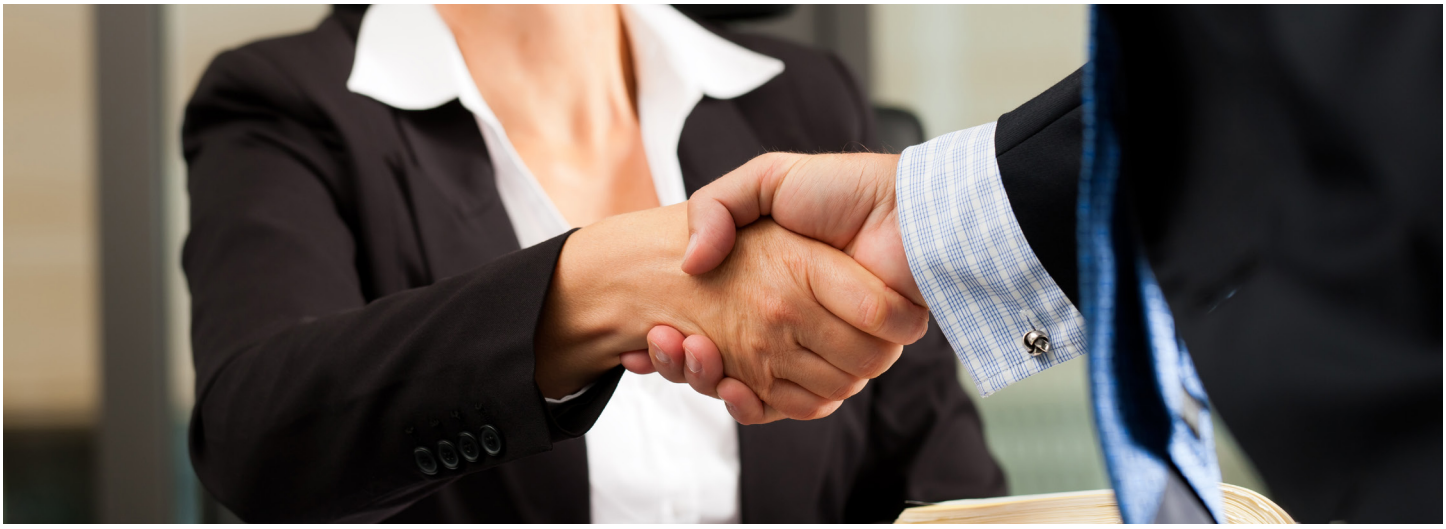

A New Twist on Aiding and Abetting Liability Involving Lawyers By **Daniel Tranen**

A lawyer's standard risk for liability exposure comes from a lawsuit brought by a client alleging that the lawyer has breached some duty to the client causing damages, typically seen as a legal malpractice claim. However, we sometimes see lawsuits brought by non-clients against opposing counsel. These actions are usually grounded in a claim that the lawyer (opposing counsel) caused or aided in some alleged misconduct of the lawyer's client, which caused the claimant to suffer damages. We often see these claims brought as the aiding and abetting of a breach of some fiduciary duty on the part of the claimant's opponent (the lawyer's client), with the lawyer and the client as named defendants.

We also see these claims in other contexts (i.e., bankruptcy proceedings), such as when a client's creditors accuse a lawyer of helping the client hide assets and, more recently, in a claim alleging a lawyer aided a debt collector in violating the Fair Debt Collection Practices Act (FDCPA). The general theory behind these claims is that while providing legal services, the lawyer helped a client perform some act that violated the law or the client's duties to another party.

A recent case out of Nevada highlights a new twist on aiding and abetting liability involving a lawyer. In that case, the lawyer, who was in-house counsel for a corporation, was accused of helping her client remove confidential information from a former client/corporation in a misappropriation of trade secrets dispute between two companies. The lawyer had previously worked in-house at the claimant corporation. The claimant corporation accused the lawyer of taking confidential information to her new job. To broaden the claim beyond the lawyer, the corporate claimant brought an aiding and abetting breach of fiduciary duty claim against certain officers of the defendant corporation, alleging the named individuals encouraged or aided the lawyer in taking the confidential information from her prior employer.

The court found that such a claim was cognizable under Nevada law. It determined that because the lawyer owes a fiduciary duty to the prior client, should the facts show that the officers aided the lawyer in breaching that fiduciary duty to her former client, they too could be liable, along with the lawyer, under this common law aiding and abetting tort claim.

From a practice standpoint, lawyers should remain cognizant of liability exposure based upon claims that their activities could lead to aiding and abetting liability, if those activities cause a client to breach some duty or violate some statute that impacts a third party. Lawyers should be equally mindful that this liability can flow both ways. If the lawyer's activities expose the lawyer to liability and could be perceived as having been aided by a client, that client also may face potential exposure through an aiding and abetting a common law tort claim.

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Are Insurance Brokers "Professionals" Under the Law?

By **Daniel Tranen**

Lawsuits against insurance brokers may arise from clients alleging that they depended upon the broker to procure insurance to cover a particular risk or provide prudent advice about what insurance they need to purchase. However, the duties owed by an insurance broker are not universal and vary widely by jurisdiction.

Those duties and other ancillary factors can be meaningful in determining whether an insurance broker is considered a "professional" under the law. For example, to be a "professional" under Florida law, a person must be licensed and hold a four-year undergraduate degree. While a broker is licensed, the educational requirement does not exist in Florida, so an insurance broker is not a "professional" occupation under common law in that state.

Meanwhile, in New Jersey, there is no question that an insurance broker is recognized as a "professional" occupation. In that state, the courts have held that the specialized knowledge insurance brokers possess creates a fiduciary duty on the part of the broker to properly advise and procure insurance for policyholders. A broker's mistake is considered "essentially one of professional malpractice."

In other states, the issue is less clear. This lack of clarity creates a fundamental question when instructing a jury on the proper standard of negligence to consider in a negligence lawsuit brought against an insurance broker. In particular, the issue is whether the jury should adjudge the question of the broker's negligence based upon a standard of ordinary care by any person or whether the jury should decide the question of the broker's negligence based upon a standard of care for a professional in the field. This determination becomes a key issue at trial for two reasons.

Continued

First, meeting an "ordinary care" standard may prove easier than meeting a professional care standard. Thus, using the proper standard could determine whether the broker breached a duty to the policyholder in a particular case. For example, under the lower standard, a broker may not have breached a duty of care to the policyholder if the broker used the reasonable care of an ordinary person. In comparison, it may be that the broker did not meet the higher standard of reasonable care required of someone in the insurance broker profession. Under this scenario, it would behoove the insurance broker to argue for the lower ordinary care standard for negligence rather than the professional care standard since it is easier to meet.

Second, under the higher professional care standard, expert testimony may be necessary to prove a case for professional negligence on the part of an insurance broker. If the higher standard of care is in play and the plaintiff fails to secure a liability expert, or if the liability expert chosen by the plaintiff is unqualified to opine regarding an insurance broker's standard of care, then the case against the broker could be thrown out on a summary judgment motion or result in a directed verdict at trial. Under this scenario, it would be wise for the insurance broker to argue for the higher professional standard of care against the negligence claim versus the ordinary care standard because of the need for adequate expert testimony.

Therefore, it is essential in an insurance broker negligence case to understand whether the law of the state where the claim is brought clearly determines whether the insurance broker is a professional. If there is no clear answer to the question, then in defending an insurance broker against a negligence claim, one ought to strategically determine whether or not it benefits the insurance broker to be considered a professional for purposes of the litigation.

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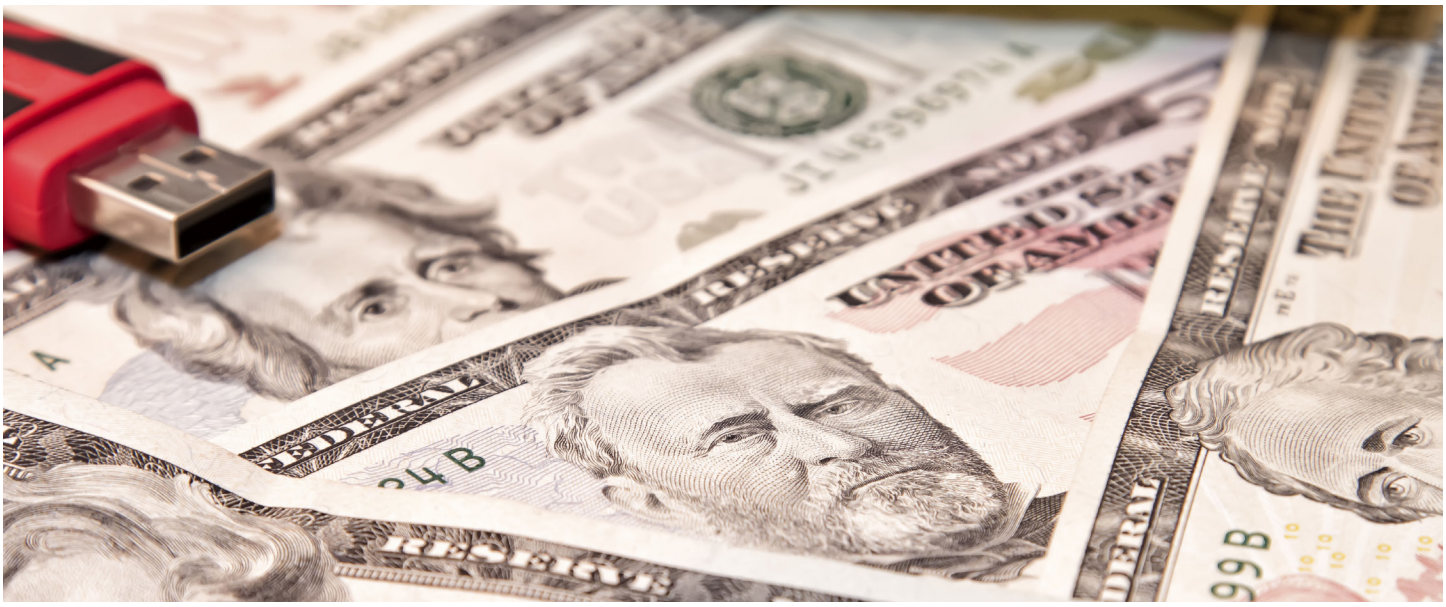
RICO — Not Just for Mob Lawyers

By **Michael Weisenbach**

Lawyers have long been largely immune from RICO liability, whether their client is engaged in nefarious behavior running afoul of the RICO Act or the lawyers themselves commit independent fraudulent acts. RICO liability is traditionally reserved for the "operation and management" of an enterprise engaged in prohibited behavior, and the provision of "legal services" has been the silver bullet for lawyers accused of RICO violations for the past three decades. In practice, lawyers advising racketeering organizations remain immune from criminal or civil RICO liability even if the racketeering organization follows the lawyer's legal advice regarding the racketeering scheme. As long as the lawyer is not directly engaged in the "operation or management" of the enterprise, RICO liability falls to the racketeering client alone.

A recent lawsuit filed against a national plaintiffs' asbestos firm in the United States District Court for the Northern District of Illinois seeks to sidestep the legal services defense and hold the law firm and its employees liable for conduct prohibited by the Rico statute. The lawsuit alleges that instead of advising a client engaged in RICO-prohibited conduct, the firm itself engaged in operational or management conduct violating the statute. This suit could have wide-ranging implications for lawyers representing clients in pattern litigation.

Asbestos litigation has historically relied heavily on a plaintiff's identification of a product containing asbestos. The more detailed and accurately the plaintiff describes an exposure to a particular asbestos-containing product, the more value the claim likely holds in settlement negotiations with the makers or distributors of that product. In addition, the more solvent defendants identified and named in a lawsuit, the higher the amount of money tends to be available to compensate the plaintiff. Thus, any plaintiff impacted is incentivized to identify as many asbestos defendants' products as possible to leverage the biggest payday. The lawsuit alleges that the temptation for the plaintiffs' law firm, which is paid a percentage of each recovery, to help the plaintiffs identify asbestos-containing products linked to named solvent defendants is exponentially increased.



So, in flipping the traditional RICO claims against lawyers upside down, the pending lawsuit in the Northern District of Illinois alleges that the law firm, rather than its clients, engaged in a racketeering enterprise to defraud asbestos defendants out of inflated settlements to increase the law firm's profits. In particular, the complaint outlines a scheme wherein the law firm and its employees coached clients only to describe products from solvent, named defendants to minimize exposure to bankrupt defendants and hide claims against bankruptcy trusts to inflate the value of a widespread number of cases. These are serious allegations and put at issue the attorney-client relationship between these lawyers and their clients.

Lawyers would be wise to keep tabs on this case as it progresses. It could open the door to more RICO suits against law firms – especially those representing clients in pattern litigation or other mass tort litigation. The discovery required in such cases will potentially dig deep into files, memoranda, and communications long believed securely cloaked under attorney-client privilege and work-product doctrine protections. And if those communications are put "at issue" in the litigation, this privilege may be waived. At a minimum, this case is likely to provide further guidance on the bounds of the longstanding "legal advice" protection to the "operation and management" standard in determining RICO liability.

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