



Showing of Proximate Cause Required in Transactional Legal Malpractice Claim

October 24, 2012

[Elmo v. Callahan, 2012 WL 3669010 \(D.N.H.\)](#)

Brief Summary

The U.S. District Court for New Hampshire held that to recover in a transactional legal malpractice claim, even assuming the existence of cause in fact, a plaintiff must prove that the defendant's actions were a substantial factor in bringing about the loss. Here, the court concluded that plaintiffs failed to demonstrate what caused their harm and whether the factors that may have done so should have been reasonably foreseeable to their attorney.

Complete Summary

A buyer approached plaintiffs, the owners of an emergency services equipment dealership, (the "sellers") about selling the company's assets as part of a merger of several other equipment dealers. Two of the sellers suggested that all sellers retain the services of a "common attorney for the process of a group purchase," and specifically recommended an attorney that the buyer had previously used for a similar transaction.

The sellers contacted the attorney and signed a retainer agreement, which included the following:

I would serve as legal counsel and liaison between not only your company, but also each of the other companies that intend to sell to [the expected buyer] Havens. As part of this process, I will assist with: (i) the negotiation and execution of a Letter of Intent; (ii) the negotiation and execution of a definitive purchase agreement; and (iii) assistance with the closing. . . .

On another matter, I need to disclose, and request your assent and acknowledgment, that, as you know, I am also serving as special counsel to other selling companies involved in this transaction. I also previously represented [another seller].

When the initial deal fell through, the buyer created a separate company to acquire the assets of the services dealers involved in the original merger. The attorney agreed to represent the separate company for a flat fee of \$110,000, with an additional payment of at most \$100,000, if the transaction closed. The attorney did not inform the sellers that he was representing the buyer's new company, or that he stood to make \$210,000 if the sale consummated.

Rather than receiving just cash for their company, the sellers received \$1.3 million of the purchase price in cash, \$1.8 million in subordinated debt, and other equity of the company. Shortly after the sale,



the purchasing company collapsed, which rendered the paper and notes acquired by the sellers worthless.

The sellers then sued the lawyer, claiming that he had breached the standard of care in numerous ways, including representing both the buyer and sellers, not disclosing the conflict of interests and his economic stake in the transaction, and not advising the sellers of the risk of receiving subordinated debt and equity rather than cash. The attorney moved for summary judgment, arguing that the sellers failed to provide evidence that the lawyer's acts were a legal, or proximate, cause of the loss.

Reasoning that a plaintiff must show the injury was a foreseeable consequence of the defendant's conduct, the court agreed, and dismissed the legal malpractice claims, the court stated:

Plaintiffs have, quite simply, not proffered any admissible evidence from which a reasonable jury could conclude that [the attorney's] conduct--whether it be characterized as malpractice, misrepresentation, breach of fiduciary duty, or breach of contract--could foreseeably have resulted in their loss. That loss occurred when [the purchasing company], within weeks of the sale, found itself unable to pay its debts and collapsed, leaving plaintiffs unable to collect on their promissory notes. But plaintiffs have presented no evidence as to why [the purchasing company] collapsed, let alone any evidence that [the purchasing company's] collapse or the reasons for it should have been foreseeable to [the attorney].

Had the sellers presented admissible evidence as to why the separate company failed, it might have been a very different case, according to the court. The court similarly rejected the sellers' argument that cause-in-fact and legal cause were a single analysis, therefore permitting sellers to recover on a showing that "but for" the attorney's negligence, he would have walked away from the deal and that as a result of walking away, he would have been in a better economic position than he was in fact under the terms of the deal as actually completed. The court noted that this type of analysis would make transactional lawyers into guarantors of their clients' financial success.

Significance of Opinion

This decision emphasizes a legal malpractice plaintiff's burden to prove not only cause-in-fact, but also proximate (or legal) cause. For transactional lawyers, it is a practical warning to thoroughly consider the risks before representing both buyers and sellers in a single transaction.

For further information, please contact [Terrence P. McAvoy](#).

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