



## Alerts

### Fifth Circuit Declines to Broaden Exceptions to Attorney Immunity in Stanford Ponzi Scheme Litigation

April 29, 2019

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*Troice v. Greenberg Traurig, L.L.P., No. 17-11464 (4/17/19 5th Cir. 2019)*

#### Brief Summary

The Fifth Circuit recently declined to recognize exceptions to the general rule of attorney immunity to non-clients for (1) non-litigation practice, (2) criminal acts, and (3) violations of the Texas Securities Act. Accordingly, Greenberg Traurig, LLP ("Greenberg") was not liable to victims of the Stanford Ponzi scheme due to one of its attorney's participation in the scheme.

#### Complete Summary

##### Background Facts

The Stanford Ponzi Scheme was centered on the sale of certificates of deposit through Stanford International Bank, Ltd. The scheme worked by taking the funds raised from the CD sales and reissuing them to purchasers as if they were returns from investments. Ultimately, the scheme collapsed, and the government and others brought both criminal prosecutions and civil suits against Stanford and others.

The receiver for the Estate—the Official Stanford Investors Committee and three defrauded investors—sued Greenberg under the theory of respondeat superior. The plaintiffs alleged that a Greenberg attorney conspired with Stanford to further the fraud.

The district court granted Greenberg's motion for judgment on the pleadings on the grounds that attorney immunity under Texas law precluded plaintiffs' claims. Plaintiffs were not Greenberg's clients and no exception to this immunity for liability to non-clients existed. Plaintiffs appealed and also moved for the Fifth Circuit to certify the state law questions to the Texas Supreme Court.

##### Fifth Circuit Ruling on Appeal

The Fifth Circuit declined to certify the state law questions to the Texas Supreme Court. Although the Texas Supreme Court had not directly answered questions presented in this case, the Texas Court of Appeals has presented sufficient guidance about what the supreme court would hold. Therefore, the

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Fifth Circuit was able to make a "principled rather than conjectural conclusion" on questions of state law.

On appeal, plaintiffs argued that despite the comprehensive affirmative defense of attorney immunity that protects attorneys from liability to non-clients, Texas law provides for three exceptions that permit such liability: (1) acts outside the litigation context, (2) criminal acts and (3) acts that violate the Texas Securities Act (TSA). The Fifth Circuit affirmed that none of these exceptions existed here.

With regard to attorney immunity in the non-litigation context, the Fifth Circuit declined to limit attorney immunity to only the litigation context. Plaintiffs did not cite any opinions in their favor. Plaintiffs' reliance on a dissent to a Texas Supreme Court decision was not sufficient to overcome the history of Texas courts of appeal applying the immunity broadly to allow attorneys to practice their profession without making themselves liable to non-clients.

The Fifth Circuit also acknowledged that criminal conduct can negate attorney immunity, but does not necessarily do so. For example, an attorney who assaults opposing counsel is not acting within the scope of representation. Therefore, attorney immunity would not protect such an act from prosecution and liability. The Fifth Circuit examined Texas appellate court decisions discussing conduct that was "criminal," but was also "squarely within the scope of representation." The court recognized that while criminal conduct does not automatically negate immunity, in the usual case, it will be outside the scope of representation. However, in this action, plaintiffs did not argue that Greenberg's acts were outside the scope of representation, so the court did not address that factual question.

Finally, the Fifth Circuit analyzed whether the TSA creates an exception to immunity for liability to non-clients. Under Texas law, statutes that purportedly create liability unknown to the common law must be strictly construed. The Fifth Circuit found that the TSA contains no explicit abrogation of immunity. Although the Texas Supreme Court has held that the TSA should be "given the widest possible scope," the Texas courts of appeal have applied immunity to bar claims under the similar Texas Deceptive Trade Practices Act. Further, there is no indication that the "purpose of the TSA would be impeded if attorneys are immunized while they work within the scope of their representation of clients." Therefore, the TSA does not provide an exception to the general rule of attorney immunity to non-clients.

## Significance of Opinion

The Fifth Circuit declined to broaden the exceptions to the Texas rule of attorney immunity with respect to liability to non-clients in the non-litigation context, for criminal acts, or for violations of the Texas Securities Act. Therefore, the law firm that employed an attorney who allegedly may have participated and aided a fraudulent Ponzi scheme was not liable to non-client victims of the scheme.

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