



Alerts

Law Firm Katten Muchin Must Continue to Litigate Part of \$69 Million Malpractice Suit

August 7, 2019

Lawyers for the Profession®

McNamara v. Katten Muchin Rosenman LLP, Case No. 4:16-cv-01203-SRB (W. D. Mo. 2019)

Brief Summary

Katten Muchin Rosenman LLP ("Katten") was sued for legal malpractice and breach of fiduciary duty as a result of its alleged negligent advice to payday loan entities, which had been slapped with a \$69 million judgment for multiple violations of federal consumer protection laws. Katten moved for summary judgment on multiple grounds, but the U.S. District Court for the Western District of Missouri refused to grant Katten's motion in its entirety, meaning Katten must face at least part of the \$69 million legal malpractice claim.

Complete Summary

Background

Richard Moseley Sr. ("Moseley") was the owner and operator of a "payday loan" venture that provided short-term, small loans over the internet. Moseley's operation consisted of multiple lending entities, marketing entities, and customer service entities. The loan documents Moseley used failed to clearly state the terms of the loans, causing nearly all borrowers to incur exorbitant interest rates and multiple finance charges. At times, the lending entities deposited loans into borrowers' bank accounts without their authorization.

In August 2009, Katten began representing one of the lending entities. Katten's representation consisted of responding to inquiries from state regulators regarding the lending entities' activities and advising Moseley on the structure of the operations, as well as the loan documents that utilized. The relationship was terminated in 2012.

In September 2014, the Consumer Financial Protection Bureau (CFPB) filed a complaint against the payday lending entities, Moseley and others, alleging multiple violations of the Consumer Financial Protection Act (CFPA), the Truth in Lending Act (TILA), and the Electronic Fund Transfer Act (EFTA) – collectively, the "CFPB Case." The court in that case appointed a receiver, Thomas McNamara ("Receiver"), to manage and exercise control over the lending entities (the "Receivership Entities"). The case was stayed pending the outcome

Attorneys

Terrence P. McAvoy

Service Areas

Lawyers for the Profession®



of Moseley's criminal proceedings, and eventually settled for an amount in excess of \$69 million. The \$69 million judgment was suspended against the defendants upon satisfaction of certain conditions.

In June 2018, Moseley was sentenced to 10 years in jail after he was convicted on 6 counts of racketeering, wire fraud, aggravated identity theft, and false TILA disclosures related to his payday loan venture. The court also entered a \$49 million judgment against Moseley, which represented the amount of proceeds traceable to the offenses.

Legal Malpractice Lawsuit

After the judgment in the CFPB Case was entered, Receiver filed a legal malpractice action against Katten. Receiver alleged Katten breached its fiduciary duty to the Receivership Entities by failing to advise them they were legally bound by the TILA and the EFTA. In addition, Receiver alleged Katten should have advised the Receivership Entities that under the CFPA, the customer service entities were liable for any of the lending entities' violations. Receiver alleged Katten's negligent advice resulted in the Receivership Entities being jointly and severally liable for the \$69 million damage award in the CFPB Case.

Katten moved for summary judgment on the grounds that: 1) Moseley's criminal conviction collaterally estopped Receiver's malpractice claims; and 2) Katten did not act negligently and Receiver could not prove "but for" causation. In the alternative, Katten moved for partial summary judgment on the basis that their alleged negligence did not cause the Receivership Entities' *unauthorized* debits of consumers' bank accounts and the suspended \$69 million judgment is not a recoverable damage. In turn, Receiver moved for summary judgment on two of Katten's affirmative defenses: 1) *in pari delicto*; and 2) intervening cause.

With respect to its argument on collateral estoppel, Katten argued that Moseley and the Receivership Entities were in privity, and because Moseley was found to have acted knowingly and willfully in the criminal case, Katten could not be found to have negligently advised the Receivership Entities. However, the court reasoned the Receivership Entities' interests were distinct and dissimilar from Moseley's interests in his criminal case. Moreover, the court found the issue of Katten's alleged negligent advice was not the same as the issues in Moseley's criminal case, as the jury did not "actually litigate" Katten's actions or the effect of Katten's actions on the Receivership Entities' civil liability. Accordingly, Moseley's criminal case did not collaterally estop Receiver from suing Katten, and Katten's motion for summary judgment on collateral estoppel grounds was denied.

Katten also argued it was entitled to summary judgment because it did not breach its fiduciary duties to the Receivership Entities. Katten argued it advised Moseley on multiple occasions that the loan documents he was using created regulatory risk, and that it even provided Moseley with compliant loan documents to use instead. In response, Receiver argued Katten never explicitly told Moseley his loan documents actually violated the law. The court found for Receiver, reasoning that a jury could find Katten had not adequately informed Moseley that his loan documents violated the law.

The court further denied Katten's motion for partial summary judgment on the basis that the suspended judgment was not recoverable. The court differentiated between "suspended" and "uncollectible," and opined that the suspended judgment in no way affected Receiver's ability to collect on a malpractice claim.

With respect to Katten's *in pari delicto* affirmative defense, the court granted summary judgment in favor of Receiver. The court noted that the suspended judgment requires the defendants to turn over funds they receive from any source to help satisfy the judgment, so neither Moseley nor the Receivership Entities would benefit from any damages recovered in the legal malpractice case.

Finally, the court found Katten was entitled to summary judgment regarding the unauthorized loans. The court reasoned that because Katten's alleged negligence did not cause Moseley to issue unauthorized loans to consumers, it could not be held liable for any resulting damages. Neither Moseley nor the Receivership Entities informed Katten that the Receivership Entities were issuing unauthorized loans to borrowers, and the court characterized the issuance of these unauthorized loans as an intervening cause, for which Katten could not be held liable.



Significance of Opinion

Attorneys may not always be protected from legal malpractice claims by virtue of their client's own wrongdoing. However, when a client takes actions the lawyer was unaware of, the lawyer may not be held liable for the damages flowing from those acts.

For more information contact Terrence P. McAvoy or Shelley M. Bethune

Moseley was arrested in 2016 and convicted in November 2017 of multiple federal offenses.