



## Alerts

### Plaintiff Stated a Cause of Action After Defendants' Advice Led to Her Deportation

July 17, 2013

*Lawyers for the Profession® Alert*

*Delgado v. Bretz & Coven, LLP*, \_\_\_ N.Y.S.2d \_\_\_, 2013 WL 3064609 (N.Y.A.D. 1 Dept. 2013)

#### Brief Summary

The New York State Supreme Court, Appellate Division, First Department held that plaintiff client, an illegal alien, alleged sufficient facts to state a cause of action for legal malpractice, and that defendant attorney's alleged negligence was a proximate cause of her removal from the United States.

#### Complete Summary

The client was a native of Ecuador. In 1999, she first attempted to enter the United States by falsely presenting herself as a returning resident alien, using a visa belonging to her cousin. The client was removed and returned to Ecuador, but in December 2000 re-entered the United States without inspection by crossing the Mexican border. As an alien previously ordered removed who thereafter entered the United States without permission, the client was deemed "inadmissible" pursuant to the Immigration and Nationality Act (INA), and by statute could not apply for readmission until 10 years had passed from the date of her last departure from the United States.

On January 8, 2006, the client married a U.S. citizen. On February 23, 2006, she retained defendant law firm to represent her before the U.S. Citizenship and Immigration Service (CIS) in order to obtain legal residency in the United States. The client alleged that defendant attorney, a partner at the firm, determined that she could apply for adjustment of status without leaving the United States, based on Ninth Circuit precedent, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 788–89 (9th Cir. 2004).

On July 11, 2006, the law firm filed several immigration forms with CIS, including a petition for adjustment of status to lawful permanent resident. On October 26, 2006, the client and her husband appeared with the lawyer and the law firm for an interview at CIS, which denied her requests that day. CIS found her ineligible for adjustment of her status because she had entered the United States without permission after having been removed. CIS found that the client did not qualify for a waiver of inadmissibility because 10 years had not yet passed from the date of her last departure from the United States, and she did

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not seek permission for readmission before she reentered in December 2000. The client was arrested on the same day by immigration authorities, who reinstated her expedited removal order of May 5, 1999. They released her from detention the same day pursuant to an agreement reached with her lawyers, but the reinstatement order remained in effect.

The petition filed by the lawyer and law firm on the client's behalf relied on *Perez–Gonzalez*, which had already been rejected by seven sister circuits and abrogated by the Board of Immigration Appeals (BIA) in *Matter of Torres–Garcia* (23 I & N Dec 866, 873–76 [BIA 2006]). On November 7, 2007, the U.S. Court of Appeals for the Ninth Circuit overruled *Perez–Gonzalez*, announcing that it was bound by the BIA's decision in *Torres–Garcia* (see *Gonzalez v. Department of Homeland Sec.*, 508 F.3d 1227, 1242 (2007)).

On January 12, 2008, the client terminated the services of the lawyer and the law firm and retained her husband as her attorney. On February 7, 2008, the U.S. Court of Appeals for the Second Circuit denied the client's petition for review and upheld the reinstatement of the May 5, 1999 deportation order.

The client commenced her action against the lawyer and law firm on December 14, 2010, asserting claims for legal malpractice, breach of contract and breach of fiduciary duty. She alleged that the lawyer was dishonest and deceitful with her to her detriment in an effort to create legal fees. The client also alleged that the lawyer and law firm had encouraged her to apply for adjustment of status “as soon as possible,” “without informing her of numerous material issues,” including the fact that she was deemed inadmissible and the likelihood of reinstatement of the prior removal order. The lawyer and law firm allegedly informed the client that if she applied for adjustment of status in 2006, “there was no risk of her being deported much less detained.”

The trial court granted the motion to dismiss the legal malpractice claim, noting that the retainer agreements “clearly identif[ied] the difficulty of [the client's] position and warn[ed] of a ‘harsh’ legal environment.” The trial court further reasoned that given the passage of “time and intervening events” from the time she retained the lawyer and law firm in February 2006 to her ultimate deportation in May 2010, the actions of the lawyer and law firm in soliciting her business could not be deemed the “but for” cause of her deportation.

The appellate court reversed and remanded. The court disagreed with the trial court's conclusion that due to intervening events, the malpractice of the lawyer and law firm was not a “but for” cause of the client's removal from the United States. The court found that the client was unambiguously ineligible for relief under prevailing case law when the lawyer and law firm submitted her application to immigration authorities. Once her application was submitted and denied and the removal order reinstated, any efforts by the client's husband, whom the client had retained to represent her after terminating the services of the lawyer and law firm, were too late to remedy the situation.

The court concluded that given the client's allegations that she had no chance of obtaining immigration relief and that the lawyer and law firm failed to thoroughly discuss the possibility, if not certainty, of reinstatement of the order of deportation and removal upon submission of the application, she sufficiently alleged that the lawyer and law firm were negligent in pursuing the application. The court further found that the client had sufficiently alleged proximate cause because the submission of the application alerted authorities to her status, which led to the issuance of the reinstatement order and ultimately to her removal. The client's unlawful status alone did not trigger her removal since she had resided in the United States, albeit unlawfully, for more than six years; she was removed only after the lawyer and law firm affirmatively alerted immigration authorities to her presence. The record showed that had the client waited four more years she would have been eligible to apply for reinstatement.

### **Significance of Opinion**

This case is significant because the court impliedly endorsed, as a matter of “but for” causation, the client continuing her unlawful status in the U.S. for four more years and then seeking to reapply.

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



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