New York Estate and Trusts Attorney Risk Management Update

Estate of Saul Schneider v. Victor M. Finmann, et al., --- N.E.2d ----, 2010 WL 2399564 (2010)

By: A. Michael Furman, Esq. and Joshua B. Sandberg, Esq. of Furman Kornfeld & Brennan LLP, located in New York City. www.fkbllp.com

Background and Overview

On June 17, 2010, in Estate of Saul Schneider v. Victor M. Finmann, et al., the New York Court of Appeals ruled that a personal representative of an estate may maintain a legal malpractice claim against a decedent's attorney for damages resulting from negligent representation in estate tax planning that causes enhanced estate tax liability.

In Estate of Saul Schneider, the defendant attorney represented the decedent for a period of six years, up to the decedent's death in October 2006. The decedent had a $1 million life insurance policy that he had transferred between various entities and, in the year prior to his death, back to himself. Accordingly, upon the decedent's death, the life insurance policy proceeds were included as part of his gross taxable estate, resulting in increased estate tax liabilities. The decedent's estate commenced this legal malpractice action in 2007, alleging that the defendant attorney either negligently advised the decedent to transfer the life insurance policy to himself, or negligently failed to advise the decedent not to do so.

Relying upon New York's strict privity rule as applied in the context of estate planning malpractice actions, which provides that an estate's personal representative and beneficiaries can not sue the decedent's attorney in the absence of fraud, collusion, malicious acts or other special circumstances, the lower court dismissed the complaint for failure to state a cause of action.

Case Summary and Holding

The Court of Appeals overruled this previous New York precedent, finding that it would "leave the estate with no recourse against an attorney who planned the estate negligently." Agreeing with the Texas Supreme Court that "the estate essentially stands in the shoes of a decedent, the Court of Appeals held that "privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." The Court noted that an attorney involved in estate planning should be well aware that minimizing an estate's tax burden is one of his/her central obligations to his/her client, and that the ruling comports with EPTL §11-3.2(b), which permits an estate's personal representative to prosecute an action for "injury to person or property" (of the decedent) after the decedent's death.

The Court explicitly narrowed its ruling to hold that New York's strict privity rule still applies to bar beneficiaries and other third-parties from commencing estate planning malpractice claims absent a claim of fraud or other intentional conduct, acknowledging that relaxing privity to permit such claims "would produce undesirable results -- uncertainty and limitless liability."

Prior to this decision, the Appellate Divisions of the Second and Third Departments specifically precluded an executor from suing an attorney for legal malpractice on behalf of the estate. See Deeb v. Johnson, 170 A.D.2d 865, 566 N.Y.S.2d 688 (3d Dept. 1991); Spivey v. Pulley, 138 A.D.2d 563, 564, 526 N.Y.S.2d 145, 147 (2d Dept. 1988); Viscardi v. Lerner, 125 AD2d 662, 663-664 (2d Dept 1986). However, in the First Department, the case of Newbach v. Giaimo & Vreeburg, 209 A.D.2d 222, 618 N.Y.S.2d 307 (1st Dept. 1994), held that an executor may sue an attorney for legal malpractice on behalf of the estate so long as the decedent sustained actual injury during his/her lifetime. In Estate of Saul Schneider, the Court of Appeals has extended the ruling in Newbach by permitting an executor to maintain a legal malpractice claims against the decedent's attorney regardless of whether the decedent sustained injury from the alleged malpractice during his/her lifetime.

Practice Impact and Risk Management Suggestions

This ruling potentially opens the door for increased legal malpractice claims against attorneys who are engaged in estate planning in New York, as such attorneys are no longer insulated by their clients' deaths. Prior to this ruling, it was arguable that any LPL exposure for an attorney that made an error in drafting a will and/or formulating an estate plan expired upon his/her client's death. Without the strict privity defense, there could be an increase in activity in will drafting/estate planning legal malpractice claims. In addition, this ruling raises the question of whether the continuous representation doctrine may be applied to toll the beginning of executor's statute of limitation period to bring a legal malpractice claim up to the time of the decedent's death.

Attorneys engaged in estate planning in New York should be aware that they may now be held responsible for estate planning services by future executors or personal representatives of their current estate planning clients upon their deaths. To avoid or to minimize liability in light of this ruling, attorneys need to ensure that they consider the tax implications of the estate plans that they draft for their clients and document that they advised their clients accordingly.

Back to Newsletter

**Travelers Casualty and Surety Company of America and its property casualty affiliates.
One Tower Square, Hartford, CT 06183.**

Creditor and Collection Attorney Risk Management Update

Karen L. Jerman v. Carlise, McNellie, Rini, Kramer & Ulrich LPA, et al., 130 S.Ct. 1605 (2010)

By: A. Michael Furman, Esq. and Joshua B. Abrams, Esq. of Furman Kornfeld & Brennan LLP, located in New York City. www.fkbllp.com

Background and Overview

On April 21, 2010, in Karen L. Jerman v. Carlise McNellie, Rini, Kramer & Ulrich LPA, et al., the United States Supreme Court held that a mistaken interpretation of the Fair Debt Collection Practices Act ("FDCPA") does not constitute a proper bona fide error defense for a debt collector under the FDCPA.

In Jerman, the defendant law firm sent a notice letter to the plaintiff debtor regarding an alleged unpaid mortgage debt. The letter included a statement that the debt would be assumed to be valid unless the plaintiff disputed it within thirty days in writing. However, the FDCPA allows debtors to dispute debts orally, and does not restrict debtors to disputing debts in writing. The plaintiff accordingly filed a lawsuit seeking damages under the FDCPA, alleging that the defendant law firm violated the FDCPA by restricting a dispute of the debt to writing.

The District Court found that such language was in fact a violation of the FDCPA, but held that the defendant was shielded from liability since the violation was not intentional and instead resulted from a bona fide error in interpreting the FDCPA. The Sixth Circuit Court of Appeals affirmed the District Court's ruling.

Case Summary and Holding

Relying on the common legal maxim that "the ignorance of the law will not excuse any person", the United States Supreme Court overturned the lower courts, holding that misinterpreting a provision of the FDCPA would not be considered a valid bona fide error defense (the elements of which are 1) that the violation was unintentional, 2) that the violation resulted from a bona fide error, and 3) that the error occurred despite the collector's maintenance of procedures reasonably adapted to avoid the error). The Court specifically limited its ruling to misinterpretations of the legal requirements of the FDCPA and held that it would not rule as to whether a misinterpretation of other federal or state laws would be considered a valid bona fide error defense under the FDCPA.

The Court's decision in Jerman opens the door to an influx of FDCPA based actions against attorneys with debt collection practices, as the Supreme Court has made it clear that even a mistaken interpretation of the FDCPA will result in liability (the FDCPA allows for $1,000 in statutory damages as well as an automatic award of attorneys fees for in cases where violations are proven).

Practice Impact and Risk Management Suggestions

To avoid liability under the FDCPA, attorneys with debt collection practices should be vigilant in ensuring that their practices and procedures fully comply with the FDCPA, while also keeping abreast of any new developments and interpretations of the FDCPA. When drafting a notice letter (which was at issue in Jerman), attorneys practicing in this area of law would do well to simply employ the language of the FDCPA, which provides guidance as to what should and should not be included in such a letter. After reviewing applicable caselaw and other relevant guidance, if an attorney is still unsure of whether a particular act, statement or collection activity is in compliance with the FDCPA, he or she should seek an advisory opinion from the Federal Trade Commission (FTC). Notwithstanding the ruling in Jerman, the bona fide error defense remains available for errors of law for debt collectors who can establish that they acted in good faith in conformity with an advisory opinion from the FTC.

Back to Newsletter

Travelers Casualty and Surety Company of America and its property casualty affiliates.
One Tower Square, Hartford, CT 06183.

Debtor Attorney Risk Management Update

By: A. Michael Furman, Esq., Bain R. Loucks, Esq. and Furman Kornfeld & Brennan LLP. Furman Kornfeld & Brennan LLP is located in New York City. www.fkbllp.com

Milavetz, Gallop & Milavetz, P.A., et al v. United States, --- S. Ct. ---, 2010 WL757616 (2010)

Background and Overview

In, Gallop & Milavetz, P.A., et al v. United States, the U.S. Supreme Court was asked to consider whether attorneys and law firms providing bankruptcy counseling services are exempt from being considered part of the class of bankruptcy professionals termed "debt relief agencies" under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The Court held that attorneys who provide bankruptcy assistance to persons under the Bankruptcy Code are considered "debt relief agencies," and therefore subject to the provision of the BAPCPA.

The Milavetz Court's decision requires attorneys who provide debt relief services to comply with the BAPCPA or face penalties, including claims for actual damages from the debtor and/or civil penalties under state and federal law. The statute permits the debtor to obtain actual damages, attorneys' fees, and costs for failing to comply with its measures. Moreover, the attorney general is vested with authority to commence an action to obtain actual damages as well as attorneys' fees and costs for the prosecution of the action. The bankruptcy courts, either *sua sponte*, or on motion of the debtor and/or the bankruptcy trustee, are also vested with authority to impose sanctions for intentional violations and/or a pattern or practice of violating the statute.

Case Summary and Holding

The BAPCPA prohibits "debt relief agencies" from advising debtors to incur additional debt solely because the debtor is filing for bankruptcy, rather than for a valid purpose. Milavetz, Gallop & Milavetz, P.A., a law firm, challenged various sections of the BAPCPA, including whether the BAPCPA's definition of a "debt relief agency" includes attorneys that provide debt relief services. In addition, the Milavetz firm challenged rules of professional conduct mandated by the BAPCPA, as well as the BAPCPA's requirement that debt relief agencies include certain disclosures in their advertisements.

The Court first considered plaintiff's challenge to the definition of "debt relief agency." The BAPCPA defines "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for…payment…, or who is a bankruptcy petition preparer." See §§ 101(12A). The Court held that "debt relief agency" includes attorneys who provide bankruptcy assistance.

Next, the Court considered the scope and validity of § 526(a)(4), which prohibits a debt relief agency from "advis[ing] an assisted person… to incur more debt in contemplation of filing for bankruptcy…" The Court noted that the statute is designed to prohibit debt relief agencies from advising a debtor to "load up" on debt in the expectation that it will be discharged in bankruptcy, a practice that has the potential to harm both the debtor and creditors.

Finally, the Milavetz Court addressed plaintiff's challenge to the validity of § 528's advertising disclosure requirements. The Court held that § 528 requires the advertiser to identify itself as a debt relief agency and identify the advertiser's legal status and the character of the assistance provided.

Practice Impact and Risk Management Suggestions

From a risk management standpoint, the holding of the Milavetz case has potential impact in two major areas for law firms representing debtor clients. The first is the nature of legal advice that can be provided regarding the pre-filing incurrence of debt. Law firms who counsel debtors in this area need to understand where to draw the line between acceptable debt relief advice, and advice that may run afoul of BAPCPA rules. Law firms with debt relief practices should seek to minimize their exposure under BAPCPA with written disclaimers, advising clients not to incur additional debt with the expectation of its discharge in bankruptcy.

Beyond the holding of Milavetz, additional guidance on how to ethically and legally advise debtors about pre-filing incurrence of debt may also be found in local state bar ethics rules and opinions, especially the local equivalent rule to the ABA Model Rule of Professional Conduct 1.2(d), which states: "A lawyer shall not counsel a client to engage…in conduct that the lawyer knows is criminal or fraudulent…" Finally, the Milavetz Court specifically notes that the professional is free to candidly discuss the incurrence of debt with the debtor, but is prohibited from *instructing or encouraging* the debtor to incur additional debt.

The second major impact of Milavetz is in the area of attorney advertizing. Milavetz makes clear that law firms with debt relief practices are subject to BAPCPA's advertizing rules, including identification of the advertiser as a Debt Relief Agency, identification of the advertiser's legal status, and also of type of debt relief services offered. Law firms with debt relief practices will want to carefully review BAPCPA's advertising rules found in § 528.

Back to Newsletter

Travelers Casualty and Surety Company of America and its property casualty affiliates.
One Tower Square, Hartford, CT 06183.