

PROFESSIONAL LIABILITY UPDATE

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Troy D. Okruhlik

Brent R. Doré

HARRIS, FINLEY & BOGLE, P.C.

This newsletter is intended to summarize significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every recent case involving professional liability issues nor of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the authors and do not necessarily reflect the views of Harris, Finley & Bogle P.C.

Quantlab Group, LP v. Dempster, No. H-18-2171, 2018 WL 6738014 (S.D. Tex. Dec. 21, 2018).

Case Summary: W.E. Bosarge, founder of the Quantlab companies and holder of controlling interests in several related entities (Bosarge and the entities are collectively referred to as “Bosarge”), sued his former attorney, Allen Dempster, and Dempster’s law firm, for breach of fiduciary duties and legal malpractice, stemming from Dempster’s actions as Quantlab’s counsel. Bosarge alleged Dempster aided Quantlab’s minority partners in disproportionately increasing their partnership voting rights, in having himself appointed voting trustee of the partnership, and in providing other assistance to the minority partners in their attempt to oust Bosarge from his controlling position at Quantlab. In response to Bosarge’s breach of fiduciary duty and legal malpractice claims, Dempster filed an Anti-SLAPP Motion to Dismiss.

The stated purpose of the Anti-SLAPP statute is to summarily dispose of lawsuits designed only to chill First Amendment rights. Specifically, the Anti-SLAPP statute protects a party’s exercise of the rights of free speech, petition, and association. However, the Court held that none of the claims Dempster asserted fell within the scope of the protected

activities. First, the Anti-SLAPP free speech protection is intended to protect communications made in connection with matter of public concern, not internal disagreements regarding corporate governance. The right to petition protection was not invoked because the claims against Dempster did not arise out of any judicial, administrative, or legislative proceeding. Finally, the free association protection was not invoked because the claims against Dempster were based on his alleged breach of loyalty in abandoning Quantlab, not his “association” with the minority partners.

In short, the Court held that the Anti-SLAPP statute did not apply to the claims made against Dempster. However, the Court was careful to say that its holding was limited to the specific claims made in this case, and noted that it “need not decide whether, as a general rule, [the Anti-SLAPP statute] is applicable to attorney malpractice” claims.

Practice Point: In most cases, the Anti-SLAPP statute cannot be used as a general liability shield in attorney malpractice and attorney breach of fiduciary duty cases.

In re Houston Specialty Insurance Company, No. 17-1060, 2019 WL 321152 (Tex. 2019).

Case Summary: Houston Specialty Insurance Co. (“HSIC”) insured South Central Coal Company (“South Central”) under a commercial general liability policy for its mining operations. Oklahoma plaintiffs sued South Central alleging it had illegally mined coal under their land. South Central subsequently requested a defense from HSIC. Acting on the advice of its counsel, Thompson, Coe, Cousins, & Irons, LLP (“Thompson Coe”), HSIC denied both South Central’s requests for coverage and defense.

South Central filed third party claims against HSIC in the Oklahoma case alleging breach of contract and breach of HSIC’s duties of good faith and fair dealing. The Oklahoma litigation was settled, including all claims between the landowners and South Central and between South Central and HSIC.

After settlement, HSIC accused Thompson Coe of legal malpractice based on its advice that HSIC did not have a duty to defend South Central. In response to the threat, Thompson Coe filed a preemptive suit in Harris County, seeking a declaratory judgment as to its non-liability.

HSIC filed a motion to dismiss Thompson Coe’s claims under Rule 91a and argued that potential defendants may not use the Uniform Declaratory Judgment Act (“UDJA”) to get declarations of non-liability in tort cases. The trial court denied the Rule 91a motion, and HSIC’s mandamus petition was denied by the Court of Appeals.

The Texas Supreme Court reversed and held that Thompson Coe’s attempted use of the UDJA was improper, explaining that the UDJA should not be used to deny potential plaintiffs “the traditional right to choose the

time and place of suit.” The Court affirmed its prior opinions that “potential tort defendant[s] may not seek declarations of non-liability in tort” cases. Put another way, suits for declaration of non-liability in tort cases are not valid claims in the state of Texas, and legally invalid claims cannot piggyback on potentially valid claims.

Here, Thompson Coe attempted to use the UDJA to deprive the potential plaintiff the right to sue in a venue and jurisdiction of their choice. The Court reiterated that there is no nuance or exception to the rule that a potential tort defendant’s may not seek declarations of non-liability in a future case. The Court granted HSIC’s mandamus relief, directing the trial court to grant HSIC’s motion to dismiss Thompson Coe’s claims.

Practice Point: The Texas Supreme Court reinforced its precedent that a party may not use declaratory relief to obtain a declaration of non-liability in a potential tort case, including potential legal malpractice claims.