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Tortious interference claim can proceed over lawyer's advice to breach non-compete

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Can an attorney who advises an employee to breach a non-compete be sued by the employer for tortious interference with contract? The answer may be yes, at least according to the U.S. District Court for the Western District of Kentucky, which recently refused to dismiss such claim against the attorney defendants in *Pinnacle Surety Services, Inc. v. Mannion Stigger, LLP*.

In May 2013, the plaintiff Pinnacle hired two employees from Wells Fargo to open a surety bond business in Louisville, Ky. The attorney defendants, who would later be sued for tortious interference, represented the employees in the contract negotiations with Pinnacle.

The agreement reached between Pinnacle and the employees provided for a three-year employment term and imposed non-competition, non-solicitation and non-disclosure restrictions.

Wells Fargo promptly filed suit against the employees and Pinnacle. In a twist that may have fueled the subsequent lawsuit, the attorney defendants undertook to represent Pinnacle in addition to representing the employees. The Wells Fargo suit was settled a month after it was filed.

The relationship between the employees and Pinnacle quickly soured, and they began planning an early exit. In early May 2014, the attorney defendants sent a letter on behalf of the employees to Pinnacle proposing to end the relationship.

When Pinnacle refused, the employees went ahead with their plans and resigned on May 30, 2014. Pinnacle sued the employees, and the employees countersued. Those cases were eventually resolved.

Not content with its suit against the employees, Pinnacle filed a separate action against the attorney defendants. Pinnacle alleged upon information and belief that the attorney defendants "planted the seed" with the employees and "directed and encouraged" them to terminate their agreement with Pinnacle prematurely and breach their non-competes.

Pinnacle also alleged the attorney defendants told the employees they could do better financially if they resigned early and then helped them execute their departure, including by forming a new company for them. Finally, Pinnacle alleged its attorney-client relationship with the

attorney defendants continued through June 2014, when the final payment was made under the Wells Fargo settlement agreement.

Based on these allegations, Pinnacle asserted claims for, among other things, legal malpractice, tortious interference with contract and aiding and abetting breach of fiduciary duty. Pinnacle sought compensatory and punitive damages, as well as an accounting.

The district court granted the attorney defendants' motion to dismiss, but only in part. It dismissed the malpractice claim. Even accepting as true that the attorney defendants continued to have an attorney-client relationship with Pinnacle through June 2014, the allegation that their conduct violated the Rules of Professional Conduct, standing alone, does not state a cause of action under Kentucky law.

In contrast, the court found the complaint adequately stated claims for tortious interference with contract and aiding and abetting breach of fiduciary duty. The complaint alleged that the attorney defendants "directed" the employees to terminate their contract with Pinnacle prematurely and to breach their non-competes.

According to the complaint, "The Court concludes that these alleged facts are sufficient at this stage to show that Defendants intended to cause the breach and that their conduct in fact did cause the breach."

Further, the complaint alleged the attorney defendants told the employees they would benefit financially from terminating early and helped them form a competing entity. Accepting those allegations as true, as the court must, the complaint sufficiently alleged that the attorney defendants provided their clients with "substantial assistance or encouragement" in breaching their fiduciary duties.

Do attorneys giving advice on non-competes need to be worried?

While potentially an alarming precedent, the case hopefully does not herald a wave of tort claims against attorneys who advise employees on non-competes. This case is somewhat unique in that the attorney defendants represented both Pinnacle and the employees in the Wells Fargo suit.

Pinnacle alleged the attorney defendants continued to have an attorney-client relationship with the company at the time they were helping the employees plan their exit. This unusual fact may have been a driver of the litigation.

Although the attorney defendants denied they continued to represent Pinnacle, they did not have anything in writing confirming the termination of the attorney-client relationship.

Hell hath no fury like a client spurned — even if it is a client you think you only represented for a month. Count it as another reason to use disengagement letters.

Pinnacle made very liberal — arguably too liberal — use of upon-information-and-belief pleading in its complaint. Pinnacle baldly alleged the defendant attorneys "planted the seed" and "directed" the employees to terminate their contacts. An allegation that the attorney controlled the client is the reverse of how the relationship typically works and seemingly should require more than a conclusory allegation to plausibly allege such a fact. But the court did not push Pinnacle on the issue.

The decision also ignores arguably the key question: privilege. One element of an action for tortious interference under Kentucky law is that "defendant had not privilege or justification to

excuse its conduct.” It is widely acknowledged that an attorney is privileged to give legal advice that may cause a client to breach a contract, provided he or she does so honestly and within the scope of the request for advice.

At the end of the day, there is reason to hope this decision will remain an outlier. An attorney who stays within the typical bounds of the attorney-client relationship and merely advises a client about its options regarding a non-compete should be on safe ground.

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