Professional Liability Defense QUARTERLY

Development of At Issue Exception to Attorney-Client Privilege

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The scope of the attorney-client privilege and when, and if, it is waived by being put at issue will be an increasing source of litigation as claims for aiding and abetting become more prevalent. In *Kroll v. Cozen O'Connor*, 2020 U.S. Dist. LEXIS 101341, 19 C 1939 (N.D.Ill. June 10, 2020), the defendant law firm issued subpoenas to the plaintiff's prior and current counsel to collect information to challenge the plaintiff's claim that he did not discover the alleged wrongdoing within the two-year statute of limitations. The court, applying Illinois law to this diversity matter, quashed the subpoenas finding that the plaintiff did not sufficiently place the documents "at issue." As there was no Illinois Supreme Court decision directly on point, the court analyzed the nearest analog, *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.,* 189 Ill. 2d 579 (2000), and decisions that had been cited in that decision from New York and California.

Facts of the Case and Procedural History

Rabbi Stanley Kroll ("Kroll"), entered into an agreement with the Chicago Loop Synagogue ("Synagogue") to fund his retirement through deferred compensation at 7.5% interest. The Synagogue sought to cut expenses and asked that Kroll retire at the end of 2016. Kroll agreed and he was to receive his retirement in 15 payments. However, on December 31, 2016, his last day, Kroll was told that there was a tax issue that needed to be resolved.

Kroll eventually sued the Synagogue for fraud and breach of fiduciary duty, among other things, after learning that it had retained counsel to find ways to reduce his compensation. Kroll also learned that the retirement plan had not been in compliance with tax regulations since 2005, and if he was paid in installments as planned he would be subject to 20% tax. Kroll alleged that in July 2017 a lawyer from Cozen O'Conner provided his counsel with an amendment to the retirement plan that eliminated the interest payments and was backdated to the effective date of Kroll's retirement on December 31, 2016. It is Kroll's contention that July 2017 was the first time he learned of Cozen O'Connor's involvement in his dispute with the Synagogue. Ultimately, Kroll and the Synagogue settled their dispute.

On May 10, 2019, Kroll filed suit against Cozen O'Connor alleging, among other things, aiding and abetting the Synagogue's fraud and breach of fiduciary duty. The law firm asserted that the suit was barred by the two-year statute of limitations, which it claimed began to run in December 2016 when the allegedly actionable conduct occurred. Kroll contended that he did not know of Cozen O'Conner's actions until July 5, 2017 and thus the statute of limitations was equitably tolled and his lawsuit was timely filed.

The district court found that Kroll had plead sufficient facts to make it plausible that he did not learn of the alleged improper conduct of Cozen O'Connor until July 2017, and denied the law firm's motion to dismiss based on the statute of limitations.

Shortly thereafter, Cozen O'Connor issued subpoenas to three of Kroll's current and former lawyers seeking "documents without regard to privilege or work-product claims" for the purpose of discovering communications before May 13, 2017 which would defeat Kroll's claim under the statute of limitations. Kroll moved to quash the subpoenas or at least to have them modified.

The Court's Analysis

In analyzing Kroll's motion to quash, the court focused on the "at issue" exception to the attorney-client privilege. The parties only cited to *Lama v. Preskill*, 353 Ill. App. 3d 300, 307 (2nd Dist. 2004), and dicta from *Daily v. Greensfelder, Hemker & Gale, P.C.*, 2018 Ill. App. (5th) 150384 ¶ 32 n.8. Those cases both hold that "privilege as to communications about claim accrual is waived by a party who places the discovery rule in issue." As those decisions are appellate court decisions, the court sitting in diversity jurisdiction with the task of predicting what the Illinois Supreme Court would do turned its attention to *Fischel & Kahn, Ltd.*

In *Fischel & Kahn, Ltd.*, Court held that the defendant law firm was not entitled to communications between the former client and subsequent counsel regarding the settlement of the underlying claim for the purpose of ascertaining the damages incurred by the plaintiff which were allegedly attributable to the conduct of the defendant law firm. In reaching its conclusion, the Illinois Supreme Court relied on *Jakobleff v. Cerrato, Sweeney & Cohn*, 468 N.Y.S. 2d 895 (1983) and *Miller v. Superior Court,* 111 Cal. App. 3d 390 (1980).

Jakobleff v. Cerrato

In *Jakobleff*, the plaintiff sued her former lawyers in a divorce proceeding for failing to include a provision in the divorce decree that her ex-husband would pay her health insurance premiums. The defendant law firm filed a third-party complaint against the plaintiff current attorney for failing to seek a resettlement of the judgment of divorce and sought his deposition. *Jakobleff*, 468 N.Y.S. at 897. The defendant law firm sought "whether [current counsel] had advised plaintiff of possible remedial actions which could have been taken, whether he advised her not to proceed with any such actions, or whether plaintiff, having been advised to proceed with such actions, had refused to do so." *Id.* The court held that "[t]hese communications were made between the attorney and client in the course of professional employment for the purpose of obtaining legal advice, and therefore fell within the privilege "and there was no waiver because they had not been placed at issue. *Id*. at 897-898.

Miller v. Superior Court

The *Miller* court directly addressed the issue of whether a defendant lawyer is entitled to obtain information and documents from prior counsel related to the application of the statute of limitations, and held that the defendant law firm was not entitled to such discovery. *Miller v. Superior Court,* 111 Cal. App. 3d 390, 392 (1980) citing to *Lohman v. Superior Court*, 81 Cal. App. 90 (1978). Also arising out of a divorce proceeding, the plaintiff in *Miller* sued her former lawyer for malpractice that allegedly occurred in 1971 when the defendant lawyer allegedly undervalued property owned by her husband. *Miller*, 111 Cal. App. 3d at 392. The plaintiff disclosed that she consulted with seven lawyers since the representation had concluded and did not discover the undervaluation until 1977. *Id*. The court concluded that to allow

the discovery "would create an intolerable burden upon the attorney-client privilege, making it very difficult for the parties to the relationship to openly discuss matters which might eventually lead to litigation." *Id*. at 395.

Application to *Kroll* Case

Applying the reasoning of *Fischel & Kahn, Ltd.* and *Miller*, the *Kroll* court likewise found that discovery of the communications with prior counsel was an improper invasion of the attorney-client privilege. Citing to the purpose of the privilege "to encourage and promote full and frank consultation between client and legal advisor by removing the fear of compelled disclosure of information," the Court held that simply because the communications "may touch on the issues" of when the plaintiff discovered her cause of action did not make them discoverable. *Fischel & Kahn, Ltd.,* 189 Ill. 2d at 584-585 citing *Waste Mgt., Inc. v. Int'l Surplus Lines Ins. Co.,* 144 Ill. 2d 178, 190 (1991).

The Court then turned to *Lama v. Preskill*, 353 Ill. App. 3d 300, 307 (2nd Dist. 2004), and dicta from *Daily v. Greensfelder, Hemker & Gale, P.C.*, 2018 Ill. App. (5th) 150384 to distinguish them from *Fischel & Kahn, Ltd.* As to *Daily*, the court dismissed the defendant law firm's reliance on a footnote from that decision which stated:

> We note that the record reveals a potential issue regarding whether the plaintiffs brought their breach of fiduciary duty claim against Greensfelder within the applicable statute of limitations. If the plaintiffs were to confront this issue with a claim that the discovery rule applies to toll the statute of limitations, then documents listed on the plaintiffs' privilege log evidencing communications between the plaintiffs and [the Missouri litigation lawyers] that are relevant to the time frame in which the plaintiffs became aware of a cause of action against Greensfelder for breach of fiduciary duty would also fall within the "at issue" exception to the attorney-client privilege. See *Lama v. Preskill*, 353 Ill. App. 3d 300, 306-07 (2004) (citing *Pyramid Controls, Inc. v. Siemens Industrial Automations, Inc.*, 176 F.R.D. 269, 271 (N.D. Ill. 1997).

The *Kroll* court concluded that this dicta did not overrule the conclusion the court had reached on the prediction of what the Illinois Supreme Court would do based upon *Fischel & Kahn, Ltd.*

Likewise, the *Kroll* court discarded *Lama* because it had no discussion of *Fischel & Kahn, Ltd.* that would be of aid in predicting what the Illinois Supreme Court would do if faced with this issue. The *Kroll* court criticized the *Lama* court for relying on *Pyramid Controls. Inc. v. Siemens Indus. Automations, Inc.* 176 F.R.D. 269, 271 (N.D. Ill. 1997), a case which was also cited in *Dailey*, as that court did not analyze Illinois common law on the issue of attorney-client privilege. The *Kroll* court concluded that the defendant law firm was not entitled to the documents and information sought and quashed the subpoenas.

Conclusion

It is clear that there are two different lines of case law that have developed in Illinois and across the country. See *Outpost Solar, LLC v. Henry, Henry & Underwood, P.C.*, 2017 Tenn. App. LEXIS 841 (Tn. Ct. App. 2017) (holding that where plaintiff asserted discovery rule defense to statute of limitations, at issue waiver of attorney-client privilege applies), see also *Memorylink Corp. v. Motorola, Inc.*, 2010 U.S. Dist. LEXIS 80027 (N.D. Ill. August 6, 2010) and *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP*, 2009 U.S. Dist. LEXIS 102579 (N.D. Cal. October 21,

2009) compare *Rademacher v. Greschler*, 455 P.3d 769 (2020) (holding that no at issue waiver where the plaintiff did not raise discovery rule defense to statute of limitations argument).

A consideration that the *Kroll* court did not take in account is that the *Lama* court looked to the fundamental principal that the privilege is an exception to the rule requiring discovery and, citing to the Illinois Supreme Court, "should be 'strictly confined within its narrowest possible limits.'" *Waste Mgt., Inc.,* 144 Ill. 2d at 190. Under Illinois law, it is well established that the assertion of a privilege is the exception, not the rule. See *Golminas v. Fred Teitelbaum Const. Co.*, 112 Ill. App. 2d 445, 448-449 (2d Dist. 1969). "[I]n Illinois, we adhere to a strong policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit." *Waste Mgmt., Inc.*, 144 Ill. 2d at 190. Privileges are strongly disfavored under Illinois law. *In re Marriage of Daniels*, 240 Ill. App. 3d 314, 324-25 (1st Dist. 1992). Emblematic of this position, Illinois retains the more narrow control group test for the application of the attorney-client privilege in the corporate context (*Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103 (1982)) and Illinois has only recently adopted the common interest exception to the waiver of privilege rule (*Selby v. O'Dea*, 2017 IL App (1st) 151572).

That the *Fischel & Kahn, Ltd.* court found that the privilege prevailed to preclude discovery of materials related to damages from prior counsel should not lead to the conclusion that it will always prevail in Illinois, or anywhere else. This is especially so when a party has put the issue sought to be discovered "at issue." Yogi Berra, among others, is credited with saying that "prediction is difficult, especially about the future" and the future here likely holds that an at issue waiver case is going to reach the Illinois Supreme Court for it to address this issue. In the meantime, lawyers defending lawyers across the country have some support for the proposition that when the plaintiff raises the statute of limitations, communications with prior counsel can be obtained, even if the *Kroll* decision is one case against that position.

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