MORTGAGE COMPLIANCE FORUM is a unique website, devoted to providing articles written by professionals and featured contributors who specialize in the area of residential mortgage compliance. Comments are encouraged!

Wednesday, July 15, 2015

Attorney Immunity – Unshielded for Fraud

Jonathan Foxx
President & Managing Director
Lenders Compliance Group

A contestant in the Longest Prison Term Sweepstakes is Robert Allen Stanford. If you recall, Stanford was a *bon vivant*, self-made billionaire – "self-made," that is, through making his money by having his foreign bank sell investors sham certificates of deposit. His $7 billion ponzi scheme put him in jail for 110 years. He's a mere piker compared with Bernard Madoff, who bilked his clients for $20 billion in principal funds and was sentenced to 150 years in the clink.

Stanford's scheme needed somebody to "aid and abet" him in his illicit endeavors. In Madoff's case, the insiders allegedly consisted of a close circle of associates. But Stanford's contemptible circumstance has produced a new piñata in alleging civil conspiracy and aiding and abetting fraud; I refer, of course, to the lawyers!

The illustrious, *crème de la crème* law firms of Proskauer Rose, LLP and Chadbourne & Parke, LLP are alleged to have aided Stanford's Ponzi scheme. In a class action suit, it is alleged that Proskauer, Chadbourne, Thomas Sjoblom, a former attorney for both Proskauer and Chadbourne, and former Stanford general counsel Mauricio Alvarado aided in the scam. The two law firms were retained by Stanford to perform legal services.

The burned investors, led by Mexican citizen Samuel Troice, brought the suit against Proskauer and Chadbourne in 2009, following a U.S. Securities and Exchange Commission action against Stanford's empire and its executives. The SEC accused Stanford of selling billions in fraudulent certificates of deposit issued by Stanford International Bank Ltd., while going to great lengths to avoid scrutiny. The investors allege that Sjoblom worked with Stanford and others to thwart the SEC investigation and that Proskauer and Chadbourne should have known that Sjoblom was craftily conniving various ways to avoid scrutiny.[i]

Faced with an SEC inquiry, the Stanford entities hired Chadbourne to represent them in connection with the investigation. Troice alleges that Sjoblom, then a partner at Chadbourne, entered into a conspiracy with principles at Stanford, including Alvarado and none other than Robert Allen Stanford himself, to obstruct the SEC investigation

Website Powered By

TEAM TRID™

from 2005 to 2009. As part of the conspiracy, it is further alleged that Sjoblom made a number of false statements to the SEC designed to slow down the investigation and that he played a role in the destruction of evidence prior to an impending SEC inspection. Moreover, Troice alleges that in 2009 Sjoblom, then a partner at Proskauer, assisted various principles at Stanford's entities in giving false testimony to the SEC in a last ditch effort to stall the SEC investigation.

But Proskauer and Charbourne took the position that they were completely immune!

A word about immunity. Under Texas law, an attorney may not generally be held liable for conduct undertaken in the representation of a client.[ii] The general rule is designed to encourage zealous legal representation that might be compromised if an attorney were subject to suit by a third-party.[iii] The scope of the rule turns "on the type of conduct in which the attorney engages, rather than on whether the conduct was meritorious in the context of the underlying lawsuit."[iv] Thus, an attorney is generally immune from suit for conduct that "require[s] the office, professional training, skill, and authority of an attorney."[v] Despite the breadth with which the rule is often described, courts have carved out various exceptions.[vi]

Troice maintains that a viable claim for conspiracy to commit fraud should be based on allegations that Sjoblom and Alvarado, aware of Stanford's underlying wrongdoing and illegality, agreed to help obscure its wrongdoing from the SEC in order to perpetuate Stanford's operation. Based on attorney immunity, the law firms contended that they were shielded from such claims. And, in any event, they should not be held liable if employee Sjoblom does not act within the general authority given him, does not act in furtherance of the employer's business, and does not act for the accomplishment of the object for which the employee was employed.[vii] Chadbourne argued that employers may not be held liable for unforeseeable actions involving serious criminal activities or intentional or malicious actions.[viii]

While U.S. District Judge David C. Godbey dismissed several claims in his March 2015 ruling, he also allowed an array of other claims including conspiracy to violate the Texas Securities Act, civil conspiracy and aiding and abetting fraud. He said, "Defendants assert at the threshold that they are wholly immune from suit under Texas's attorney immunity doctrine. Because plaintiffs plead defendants engaged in fraud and conspiracy to commit fraud, attorney immunity is no bar at this stage."[ix]

Motions and appeals followed, but in the meantime the Proskauer and Chadbourne folks advanced a finding from unrelated litigation. On July 8th, they urged the Fifth Circuit not to dismiss their interlocutory appeal of an order denying the firms immunity. Their view was that a June 26th ruling by the Texas Supreme Court, in a case called Cantey Hanger, which is another law firm, erased the immunity loophole that kept them under duress in March, to wit, the fraud exception. To quote: "Fraud is not an exception to attorney immunity."[x] Let me translate that for you: according to the Cantey Hanger case, attorney immunity provides full immunity to the suit, even where fraud is at issue. That means Judge Godbey's ruling, allowing fraud to be an occasion to penetrate immunity, effectively stripped the firms of their immunity.

It will be interesting to watch what happens next. Proskauer and Chadbourne are urging the Fifth Circuit not to dismiss their appeal of an order denying the firms immunity. So goes the suit against Stanford's lawyers, brought by investors who lost money in Robert Allen Stanford's $7 billion Ponzi scheme.

---

[i] Troice v. Proskauer Rose LLP, 2015 U.S. Dist. (N.D. Tex. Mar. 4, 2015)

[ii] See, e.g., Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 406 (Tex. App. — Houston [1st Dist.] 2005, pet. denied)
[iii] Idem at 405
[iv] Renfroe v. Jones & Associates, 947 S.W.2d 285, 288 (Tex. App. — Fort Worth 1997, writ denied).
[v] Taco Bell Corp. v. Cracken, 939 F. Supp. 528, 532 (N.D. Tex. 1996)
[vi] Op. cit. 1, II, A
[vii] Williams v. United States, 71 F.3d 502, 506 (5th Cir. 1995)
[viii] Chadbourne's Mot. Dismiss 33 (citing Williams, 71 F.3d at 506 n.10; Millan v. Dean Witter Reynolds, Inc., 90 S.W.3d 760, 768 (Tex. App. — San Antonio 2002, pet. denied))
[ix] Op. cit. II
[x] Cantey Hanger, LLP v. Byrd, 2015 Tex., 58 Tex. Sup. J. 1400 (Tex. 2015)

Labels: Attorney Immunity

Home Older Post

Subscribe to: Post Comments (Atom)