Lawyer's Failure To Complete UCC Renewal May Be Malpractice

By Jason M. Scally

A lawyer who failed to inform a client that a security interest was not released in a sale of a company needed to be renewed or renew it himself may be held liable for legal malpractice, the Georgia Supreme Court has ruled.

The trial court had dismissed the plaintiff's claim, noting that the statute of limitations for malpractice had expired. The Georgia Court of Appeals affirmed, finding that the date the original security interest was perfected was the date any malpractice occurred, since it was then that the attorney failed to tell the plaintiff that the UCC statement had to be renewed in five years.

But the Georgia Supreme Court's decision reversing that ruling -- in cases involving the failure to renew a security interest -- has some attorneys questioning whether transactional attorneys now have additional duties when closing business deals.

"If you are an attorney closing a transaction for a seller that includes financing, there is a new form you need to have signed at the closing, and that form [must] tell the seller when they need to renew the UCC financing statement," said Atlanta attorney John S. Kingma, who, along with John C. Rogers represented the defendant.

In Kingma's view, "the court's ruling places additional burdens on lawyers that weren't imposed before." Worried that the decision could cause malpractice insurance premiums to rise, he has filed a motion for reconsideration.

But the plaintiff's attorney Richard E. Harris, also of Atlanta, disagreed that the court created new duties for lawyers.

Instead, he said, the decision was the only logical conclusion because the statute of limitations could not start to run until the cause of action accrued -- in this case, when the financial statements were supposed to be re-filed, five years after the original statements expired.

Nationally, legal experts told Lawyers Weekly USA that while the decision may not create a bright line duty, it does offer guidance to attorneys who handle business or transactional work -- especially banking attorneys.

Eric J. Cozen, who teaches a course on secured transactions and corporations at Western New England College School of Law, said that the decision "tells you the value of having a good 'tickler' system, if nothing else," which provides a reminder whenever something is a

The recent decision from the Georgia Supreme Court highlights the value of a good "tickler" system.

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The bill was paid $60,000 on closing, but is subject to 90 days promissory note in favor of the plaintiff for the balance of the closing price.

On Oct. 30, 1996, Barnes' attorney the defendant, David Turner Jr., perfected his client's security interest by filing UCC financing statements.

However, the defendant didn't inform the plaintiff that the UCC statements were only good for five years, unless renewed. Under Georgia laws, the statements cannot be renewed, however, any earlier than six months prior to their expiration.

Since no new statements were filed, on Oct. 30, 2001, the original statements lapsed. Meanwhile, unbeknownst to the plaintiff, the Lippes had pledged the same collateral to other parties who also filed UCC statements. As a result, the other parties were placed in a superior position. In late 2002, the plaintiff filed a lawsuit under the promissory note, suing the defendant for malpractice in October 2002.

The trial court granted the defendant attorney's motion to dismiss the claim as barred by the four-year statute of limitations and the Court of Appeals affirmed.

But in a 4-3 decision, the Georgia Supreme Court reversed.

It held that not only do attorneys handling business deals in which their clients receive security interests have a duty to file the original UCC financing statements, if the financing statement require renewal before full payment is made to the seller, then the attorney has some duty regarding this renewal. Otherwise, it said, the seller may lose his right to protection.

"Safeguarding a security interest is not some unexpected duty imposed upon the unwitting lawyer," the majority opinion said. "It goes to the very heart of why the lawyer was retained to fulfill the business in exchange for payment."

In this case, the defendant's "duty was to safeguard [the plaintiff's] interest. There were two means of doing so: by informing [him] of the renewal requirement, or by renewing the financial statements himself. Either one would have been sufficient to comply with the defendant's duty, and any breach of that duty occurred only upon [his] failure to do both.

Further, the court said, if the statute of limitations began to run when the original financing statements were filed, "then [the plaintiff] had to bring suit before the financing statements could even be renewed.

"This view deprives [him] and his clients in his position of any remedy for malpractice.

"There deserving judges complained that the holding "creates new duties that could outweigh not only the period of the attorney-client relationship, but even the attorney's life."

Here's the System

Kingma said that the court's decision showed the importance of having a notification or "trigger" system, explaining that "every lawyer has to have something like that to remind themselves of deadlines and when filing should occur."

"It illustrated that 'back in the dark ages,' attorneys had to use slips of paper or sticky notes attached to a file. But nowadays, he said, computer programs can be done much more efficiently with computer programs.

As an alternative, Kingma said that lawyers looking to limit their malpractice exposure could try to make clear what the scope of the representations is from the beginning.

"What we have in Michigan," he explained, "are contracts that say 'I will look at your auto accident claim only so I don't have to advise you on other matters.'"

By narrowing the scope of the representation at the start, Kingma said, "You don't use these loose ends that come back to bite you."

Expanded Impact?

Kingma said that the issues raised in this case might have far-reaching implications especially with regard to malpractice insurance premiums.

"The potential for expanding or diluting the statute of limitations," he warned, "is very important. The inability to buy malpractice insurance at reasonable rates, and the pricing for claims is impacted from state to state by what the statute of limitations is."

The dissenting opinion addressed this issue, stating that "[i]t not only does this new duty ... add to every attorney's potential liability to clients, it adds more uncertainty and lack of finality to every transaction that malpractice insurance policies will be unable to make accurate assessments of their exposure."

Kingma said that the majority opinion's reasoning could have an even greater impact if followed in other circumstances outside of the malpractice arena.

For example, he explained that in Georgia, there is a requirement that judgments that aren't satisfied within five years have to be renewed. Under the analysis in this case, Kingma said, "if you have an unsolicited judgment, make sure you have a letter in the file [telling the client] that the judgment must be renewed."

However, Grovinn said that some of these fears may be unwarranted.

"This is, as dissenter do, creates this parade of horribles, but I don't think it's as dire as that," he remarked.

"Maybe it results in a change in practice in Georgia -- such as a letter to the client ... or making the 'trigger' in place for renewing the financing statement in the years," he said. "But I don't think the world is going to end."

Questions or comments can be directed to the writer at: Jacklyf@gazetteweekly.com