

Effective 12(b)(6) Motions

By: Karen A. Smyth, Esq., Lipson, Neilson, Cole, Seltzer & Garin, P.C.

Understanding and effectively utilizing the standards of review governing a 12(b)(6) motion can make the difference when defending a claim of legal malpractice. Such was the case in the matter of *PPW Royalty Trust Dated September 27, 1989, et al v George Barton, et al.*, 14-00513-CV-W-BP (W.D. Mo. 2015).

An important practice pointer for practitioners challenging a malpractice complaint in federal district court is that the court is not constrained in a 12(b)(6) challenge to restrict its review only to the complaint in determining whether the plaintiff has stated a claim. Here, the district court found it may look to the state court record from the underlying proceedings because they are public records. (*Id.*, *2). As such, it can take judicial notice of other proceedings in courts which “directly relate to matters at issue.” (*Id.*, *2). The court, tackling choice of law rules to determine applicable state law to analyze the preclusive effect of the prior court decisions, embraced the notion that “nationwide uniformity in the substance of the matter is better served by having the same-preclusive rule (the state rule) apply whether the dismissal ordered by a state or a federal court. . . . [Thus, the court adopts] the law that would be applied by state courts in the State in which the federal diversity court sits.”(internal citations omitted) (*Id.*, *18)

Under this framework, the district court, focusing on the “but for” or “case within a case” element in proving a claim of legal malpractice, examined the underlying state court records to assess whether the outcome of the plaintiffs’ case would have been different but for the alleged misconduct.

In *Barton, et al.*, plaintiffs, composed of trusts and estates claiming rights as beneficiaries, successors, or assignees of owners of coal-mining royalty interests, sued their former attorneys, who had represented plaintiffs in a series of lawsuits and appeals in 1999 (*Willis I*), 2008 (*Willis II*) and 2011 (*Willis III*), asserting claims of legal malpractice and breach of fiduciary duty. Plaintiffs theorized that the attorneys’ failure to raise, among other things, various preclusion doctrines and constitutional claims caused the unfavorable judgment against Plaintiffs. Defendants attacked the sufficiency of the pleading by filing a motion to dismiss it in its entirety under Rule 12(b)(6).

The district court, taking judicial notice of the findings of the state courts, concluded that none of the complained of actions by the defendants' attorneys would have changed the outcome of the prior litigation. (*Id.*,**17-26). In this regard, a review of the underlying proceedings underscored that any failure by the defendants to raise the doctrine of res judicata, collateral estoppel, and full faith and credit, did not make a difference. The underlying cases did not involve the same issues or claims. Moreover, because two of the successive lawsuits at issue were filed 9 years apart (1999 and 2008), the claims involved in the latter proceeding could not have been litigated in the prior proceeding. Thus, the court found it "not plausible to assume" that had defendants raised these arguments the outcome would have been different. The court also found based on its review of the public record that the defendants had raised other arguments -- such as the full faith and credit doctrine; however, as the 1999 decision did not have a preclusive effect on the claims and issues in the 2008 action, any alleged failure by the defendants would not have resulted in a different outcome. Similarly, any claim that the failure to raise the constitutional argument of judicial taking in the 2008 action precluded such as argument in yet a third matter filed in 2011 also failed to state a claim. Here, the court in the 2011 action found that private entities cannot engage in a judicial taking or violate due process, and that any state action was based on an exercise of judicial function, barred by judicial immunity.

Finally, distinguishing the attorney's duty to exercise due care i.e., the malpractice claim, with an attorney's duty of loyalty and confidentiality i.e., the fiduciary duty claim, the court found that because the breach of fiduciary duty claim is wholly dependent on the legal malpractice claim it fails as a matter of law. (*Id.*, *27). Moreover, facing a request to allow amendment of the breach of fiduciary duty claim, the court took notice of the plaintiffs' admission that they did not currently have facts to support the claim to deny the request to amend. The court cited with approval the principle that "[t]he very purpose of the Fed. R. Civ. P. 12(b)(6) is to enable to challenge the legal sufficiency of complaints without subjecting themselves to discovery." (*Id.*, * 28)

Contact Karen Smyth

Phone: 248-593-5000

Email: ksmyth@lipsonneilson.com