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The Perils of a Legal House Divided

VW Legal Perspective
By Christopher Caruana

Times of economic upheaval unfortunately tend to lend themselves more frequently to (a) reorganization of firms where those accountants who are seen as being less productive are replaced and (b) individuals looking for scapegoats for their investment or other losses to seek compensation from their accountants and financial advisors. One of the occasions in which these two aspects intersect is when an accounting firm and its former partner are sued for negligence.

The former partner and the firm will usually have a desire to present a "unified front" in terms of the defence of the lawsuit. This can easily be accomplished if the firm's errors and omissions insurer agrees to provide a defence for both the firm and the former partner. However, this is not always the case – especially if there is a divergence of interests in the litigation (such as where the former partner acted without the knowledge or approval of the firm in a manner that goes beyond mere negligence).

In the recent decision in *Green* v. *Affinity Financial*, an accounting firm and its former partner were sued to recover the client's investment losses. The former partner was sued in both his capacity as an accountant as well as in his capacity as a financial advisor for the client. While there was a unified front with respect to the defence of the negligence claim *qua* accountant, the firm was, at best, ambivalent with respect to the claim *qua* investment advisor (since any finding of liability on this basis would have no effect against the firm) and was, at worst, supportive of such a finding (since it might minimize, if not negate entirely, any finding of liability on the firm's part). Because of this divergence of interests, the firm's insurer declined to represent the former partner in the litigation. The former partner represented himself in the lawsuit.

At the former partner's examination for discovery, "voluminous and complicated undertakings" were given. Subsequently, a list of 452 follow-up questions were submitted to the former partner by the plaintiff. In light of the obvious difficulty faced by the former partner, counsel for the accounting firm offered to assist the former partner to answer the undertakings and follow-up questions. On learning of this offer, the plaintiff's counsel sought an Order prohibiting the firm's counsel from providing such assistance. The Order was granted.

The primary concern for the Court was the fact that there was an apparent conflict of interest between the firm and its former partner. While the Court took great pains to

ensure that no suggestion of impropriety was to be accorded to the firm or its counsel, the mere possibility of a conflict of interest and that the answers to the undertakings or follow-up questions would be worded so that they conformed to the evidence given by the firm were too great to ignore. The conflict could have been waived by the former partner, and it appeared that he did give such a waiver, but the Court ruled that any such waiver must be an informed consent and an informed waiver – and one for which, at a minimum, the former partner should have received independent legal advice ("ILA") before signing.

The argument was made by the firm's counsel that he was required to seek information and answers from all partners of the firm in order to prepare a full and fair defence for the firm. While the Court was willing to accept that this was the case, this would only lead to the conclusion that the lawyer was permitted to obtain information from the former partner. It did not follow that this permission could be transformed into an ability to assist the former partner with his defence on the merits – especially in light of the possibility of a conflict of interest.

At a minimum, this case provides guidance for accountants and their former partners or employees as to the limits to which the firm's lawyer can assist the other party to help present a unified position. It also helps to show insurers the advantages of providing defences to both the firm and its former partner or, alternatively, the advantage of paying for the former partner to obtain ILA for the purpose of signing a waiver.

This case also provides an example of when co-defendants might wish to consider the use of "joint defence agreements" rather than taking a knee-jerk response and issuing cross-claims. It is not uncommon for plaintiffs to sue several parties in a "divide and conquer" strategy. The issuance of cross-claims helps to further such a strategy. To the contrary, a joint defence agreement can assist the defendants to put forward a unified position in that the parties can agree to share strategies and communicate among themselves. In *Green* the defendants issued cross-claims against each other and the chance to use a joint defence agreement was immediately precluded. If a joint defence agreement had existed, the former partner may well have obtained the assistance he required and, if nothing else, the firm would have saved the costs of contesting the motion. Although normally entered into among parties who are represented by counsel, there is nothing to preclude a self-represented party, such as the former partner in *Green*, from joining such an agreement (although each party having had ILA is usually a term for such an agreement).