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Suit against K&S is a tall order

Ex-client's hurdles in malpractice case against firm include explaining why it kept K&S on after problems arose with contract

By Greg Land, Staff Reporter

Among the nearly $195 million in damages sought by former clients of King & Spalding in a malpractice suit are $14.5 million the plaintiffs said they spent on litigation caused by the firm's alleged mistakes in a sales contract.

Given timesheets and billing records, the costs incurred by the Atlanta Spirit in its legal fight with one of its members over how to value his share in the group's sports teams and other assets would be one of the easiest parts of the group's suit against King & Spalding. Proving the other $181 million in damages—not to mention the malpractice and breach of fiduciary duty claimed in the suit—would be a lot harder, said Atlanta lawyers knowledgeable of professional liability issues.

The lawyers, none of whom is involved with the King & Spalding suit but who reviewed the 20-page complaint filed in Fulton County Superior Court last week, cited proving the extent of damages as one of the challenges facing the plaintiffs.

Other stumbling blocks the lawyers identified include:

• whether the plaintiffs' claims are hurt by their continuing to keep the firm as its representative after problems from the contract surfaced;

• whether King & Spalding's clients had a duty to notice the alleged mistakes in the contract—which meant the Atlanta Spirit's position in negotiations was not reflected accurately—before they signed them;

• and whether the alleged mistakes made any difference, because the Atlanta Spirit member the group was trying to buy out may not have accepted the terms the Atlanta Spirit says are missing from the contract.

The plaintiffs' lawyers in the malpractice suit, Robert E. Shields, Everette L. Doffermyre, Kenneth S. Canfield and Samuel W. Wethern of Doffermyre Shields Canfield & Knowles, did not comment for this story. Steven M. Collins of Alston & Bird, who represents King & Spalding, repeated the statement he made after the suit was filed, that the suit lacked merit.

The saga began in 2003, when a group of investors formed HTPA Holding Co. (named for the Atlanta Hawks, Atlanta Thrashers and Philips Arena) to negotiate with Turner Broadcasting System Inc., which was interested in selling the teams and rights to the arena where both played.

Texas businessman David McDavid was also angling for the teams, but he lost out to the HTPA group, which paid about $216 million for the package and formed the Atlanta Spirit to run the teams.

(McDavid sued Turner for breach of contract suit, and last year the sides entered a confidential settlement after a jury awarded McDavid a $281 million judgment.)

The HTPA/Spirit consortium originally numbered nine individual investors but was reduced to eight when one sold out. Then the group encountered problems with member Steve Belkin, who owned a 30 percent interest in the group.

"By the summer of 2005," says the complaint, "the disagreement came to a head over a proposed trade for Joe Johnson, a promising NBA player and eventual all-star. A majority of the ownership agreed to the trade, but Belkin disapproved and, as the Hawks' NBA governor, refused its authorization."

The rest of the group called a board meeting to exercise their contractual right to remove Belkin as their NBA governor, says the suit, and he responded by getting an injunction barring his removal.

"In light of the ongoing dispute, it became clear that Belkin's continued involvement in the management of HTPA was untenable," the suit says, and the rest of the group entered into negotiations to buy out Belkin's share. Representing HTPA during the negotiations was King & Spalding partner Raymond E. Baltz Jr.

Because the parties could not agree on a sales price, they agreed to build an appraisal process into the contract to determine the value of Belkin's interest.

The suit says that Baltz "understood that it was of paramount importance to plaintiffs that they have the right to select either the first appraiser or the second appraiser, and that they have the right to object to either appraisal, even if it was conducted by a firm selected by plaintiffs."

The eventual purchase and sales agreement signed by both sides instead gave Belkin the right to choose the first appraiser, but if either party objected to that selection, the second appraiser was to be selected by "the objecting party," the suit says.

The agreement, says the suit, did not specifically give HTPA the right to select any of the appraisers and was moot upon what would happen if both sides objected..

But Baltz assured his clients that they could pick the second appraiser, the suit says, writing in an e-mail that he "was 'confident' he was correct because 'he was the one who negotiated the agreement.'"

In November 2005, the appraiser chosen by Belkin, Citigroup, submitted its appraisal.

"Within one minute of receiving the appraisal and four minutes before the appraisal had even reached plaintiffs, Belkin objected and claimed the right to name the second appraiser," says the suit.

HTPA, too, objected and notified Belkin that it had selected Morgan Stanley to be the second appraiser.

Within five hours, Belkin filed a breach-of-contract suit in Maryland.

"As a result of missing terms, ambiguities regarding who would select the second appraiser, and the definition of fair market value, the [sales agreement] was fatally ambiguous and, consequently, legally void and unenforceable," says the complaint.

Five years of litigation

For a time, King & Spalding continued to represent HTPA in the Maryland action, assigning senior partner and one-time managing partner Ralph B. Levy as lead litigator. The suit claims that Levy was, at the time, chairman of the board of Attorneys' Liability Assurance Society, the legal malpractice insurer for King & Spalding. (He is still on the board, according to the ALAS website.)

Levy's involvement constituted a conflict of interest, says the suit, because as board chairman he "owed ALAS a fiduciary duty to reduce if not eliminate the insurer's exposure to a malpractice claim. As attorney for plaintiffs, he owed them a duty to zealously represent their interests, even if those interests compelled the assertion of arguments that might expose ALAS to financial loss."

According to the suit, King & Spalding assumed a "subordinate role" in the Maryland litigation in December 2005.

The Maryland litigation dragged on until last year, with a trial court ruling in Belkin's favor on a summary judgment motion in 2006, only to be reversed when the Maryland Court of Special Appeals found that the contract was "ambiguous on its face" and remanded the case for trial.

A three-week trial in 2009 ended with the court finding the contract void and unenforceable. Belkin appealed, and in December 2010 the parties settled for a confidential sum.

The suit claims that during the time that Belkin and the seven other owners were locked in litigation, the Thrashers franchise lost more than $50 million in value even as potential buyers were turned away because no "free and clear title" to the team could be secured. The suit also seeks damages of more than $130 million in "out-of-pocket losses operating the franchise over this time period" and $14.5 million in legal expenses stemming from the Maryland litigation.

The Daily Report asked several attorneys familiar with both sides of legal malpractice issues to review the complaint and provide their observations of the case.

One of the first questions raised was whether the suit was barred by the four-year statute of limitations, since the allegedly mishandled contract was finalized in 2005 and King & Spalding withdrew from the case in June 2006. But Steven J. Estep of Cohen, Cooper, Estep & Allen, who served as additional counsel to HTPA for the Maryland litigation and agreed to provide some background information about the case, said a tolling agreement had been entered into in 2007, so that would not be a consideration.

Conflicts or concealment

McKenna Long & Aldridge partner David L. Balser, who practices business and commercial litigation along with law firm defense, took particular issue with the suit's assertion that Levy's role as board chairman for ALAS implied a conflict of interest.

"The plaintiff's allegations that Ralph Levy had a conflict are wrong," said Balser. "Those allegations

are based on a fundamental misunderstanding of what ALAS is. It is a mutual insurance company, owned by its member firms. It does not have a profit motive."

"ALAS is very clear that membership on its board in no way restricts a lawyer's duty to his client," said Balser, who has served as his firm's general counsel and liaison to ALAS.

As to Levy's alleged conflict, he said, "I just don't see it. I mean, clearly Ralph's interests were in prevailing in the lawsuit; but in this case, even if there had been some duty to ALAS, those duties were aligned with those of his client."

Linley Jones, who handles legal malpractice and personal injury claims as a solo practitioner, said the suit's claims of a poorly drafted contract may not be King & Spalding's main concern.

"The most serious allegation is not that King & Spalding botched a contract, but that King & Spalding concealed its malpractice," said Jones via e-mail. "Concealment of malpractice that negatively affects the client's interest is a violation of a lawyer's duty of communication under Georgia Rules of Professional Conduct 1.4, which provides, 'A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'"

"Concealment of malpractice is also a basis for bad faith and punitive damages against a lawyer in a negligence case in which punitive damages might not otherwise be warranted," she continued. "If the plaintiffs' allegations of a cover-up are proven through discovery, there could be a very significant risk of a punitive damages award. On the other hand, proving concealment will involve the daunting task of determining who knew what, and when."

And if the allegations of negligence in drafting the contract are true, she said, "it will be obvious even to the average juror that King & Spalding should have protected its client's right to have its own appraisal play into the process. A contract provision that allows the seller to conduct both appraisals is unheard of, and it is downright silly to imagine that King & Spalding intentionally drafted a provision that risked its client's right to an appraisal on a race to the fax machine (or email)."

But, Jones noted, HTPA may have weakened its case by keeping the firm on after Belkin's suit.

"After being sued by Belkin in Maryland over the faulty language," said Jones, "it is difficult to understand plaintiffs' claim that they were still unaware of the alleged malpractice by King & Spalding and that they were damaged by their continuing representation. And King & Spalding will have available the defense that they continued their representation of plaintiffs in an effort to mitigate the plaintiffs' damages. King & Spalding will also have the causation defense that the faulty contract provisions were eventually thrown out by the Maryland trial court. Plaintiffs will have the burden of proving that the deal would have been finalized years earlier if the contract language had not been faulty."

Shared blame?

Atlanta solo practitioner David N. Lefkowitz, who specializes in legal malpractice and cases involving fiduciary misconduct, said that, even assuming the allegations are true, there may still be blame on both sides.

"It seems to me that, in any case, a client has an obligation to read and understand a document before signing it. If there were provisions that were too complex to understand, then King & Spalding has an obligation to make sure they understand. But if it was clear, a client also has an obligation to catch them."

According to the suit and to Estep, the provision regarding the appraiser selection was changed shortly before the contract was signed.

"That may be true," said Lefkowitz, "but at some point the contract would have been presented for signature. I'm a strong advocate for the position that a lawyer should always read through a document again to ensure that a client is protected."

"It's going to be a question whether King & Spalding demanded at least one crack at getting an appraiser," he said. "Whether they continued to advise the client that they had the unilateral right to pick the second appraiser when they did not will be closely examined during trial."

Lefkowitz was less certain whether the allegations that King & Spalding's continued representation after the Maryland action was filed constitute malpractice.

"There is a spectrum of expert opinion on when you have to notify," he said. "Ethical rules say you have a duty to promptly communicate with your client; some experts say you can go ahead and try to repair your work. I happen to believe you have a duty to inform your client immediately and let him decide."

"Repairing an error may well benefit the client as well as the lawyer," he noted. "But once the lawyer is trying to protect his interests as well—and I'm not saying there is a conflict in this case—the fact that there may have been an alignment of interests doesn't necessarily eliminate the conflict."

Carlock, Copeland & Stair partner Peter Werdesheim, whose practice focuses on professional liability and real estate litigation, said a key issue is whether Belkin would have signed a contract with the terms the plaintiffs say they wanted.

"It all seems to hinge on this appraisal," said Werdesheim. "I wonder if they can determine that Belkin would have agreed to that language. If I were defending this case, I would argue that King & Spalding can't be held liable for language Belkin never would have agreed to."

"Also," said Werdesheim, "it would be very important in defending this case to know what the terms of the [2010] settlement with Belkin were. As I understand it, the fact that the judge in Maryland essentially voided the contract ended up benefitting the Atlanta Spirit folks; one wonders how favorable their settlement with Belkin was, and whether it offset some of the damages they're claiming."

Damages

Jones, Lefkowitz and Werdesheim all took note of the eye-popping damages being sought and agreed that justifying many of them would be problematic.

"Damages may prove tricky in this case because even the complaint concedes that the plaintiffs later 'pursued a different legal strategy which ultimately succeeded and led to a settlement in December,

2010,'" said Jones. "It is always a greater challenge to prove damages in a case which is voluntarily settled by a plaintiff. It basically puts the plaintiffs in the position of convincing the jury of the reasonableness of the subsequent settlement, and then proving the loss of value occasioned by the negligent lawyer's actions."

"If [the plaintiffs] can prove all the legal elements of the legal malpractice claim and all the elements of the damages, there may be a possibility of recovery," said Lefkowitz. "That's only if they can prove there would have been no litigation without the contract [issue]. But these losses may have been incurred anyway. They'll have to prove that, but for these errors, there would have been no litigation at all.

"[King & Spalding] will assert that Belkin was a litigious type, that it would have gone into litigation anyway," he said. "I don't know how [the plaintiffs] will prove that litigation would not have ensued. That will be the plaintiff's burden."

"At the end of the day, it's hard to give a concrete opinion about damages without knowing the details of the settlement," said Werdesheim.

The damages related to the Spirit's retention of the team while the litigation dragged on, he said, "don't seem likely or recoverable to me, because it's premised on the notion that they would have sold the team but for the Belkin mess. It's telling, to me, that there's no reference to any particular purchaser or offer. I don't see how they can ever recover the full freight of all these damages, especially when those operating losses are the lion's share of their damages."

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