



# Lawyers' Professional Liability UPDATE

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## Statutory Liability

### Law Firm Not Liable for 10(b) Violation Under *Stoneridge*

*In re Refco Inc. Securities Litigation*, 609 F. Supp. 2d 304 (S.D.N.Y. 2009)

In summary, plaintiffs alleged a violation of Section 10(b) of the Securities Exchange Act of 1934 by a law firm for allegedly helping draft an issuer's misleading statements. The allegations were held insufficient because the investors, based solely on knowledge that the firm was the issuer's primary outside counsel, could not have reasonably understood the law firm to have made the statements.

Shareholders of Refco, Inc. sued the company's former law firm, Mayer Brown, under Section 10(b). The U.S. District Court for the Southern District of New York granted Mayer Brown's motion to dismiss under Fed. R. Civ. P. 12(b)(6). Plaintiffs sought to hold Mayer Brown liable as a primary violator of Rule 10b-5(b), or alternatively for scheme liability. For these purposes, it was undisputed that Refco's IPO registration statement, among other documents, contained materially misleading statements. It was also undisputed that Mayer Brown played a part in drafting those statements.

The court held that Mayer Brown was not properly pled as a primary violator because despite the extent of the firm's actual involvement in drafting the statements, plaintiffs could not have reasonably understood the misleading statements to be attributable to Mayer Brown. Plaintiffs merely alleged that Mayer Brown was listed as primary outside counsel on the relevant documents, and therefore that the investors expected the firm had been involved in the preparation and review of such documents. This allegation was held to be insufficient to establish that plaintiffs reasonably understood Mayer Brown, rather than Refco, to be making the statements. It was therefore determined to be insufficient to establish primary violator liability.

Regarding plaintiffs' allegation of scheme liability under Rule 10b-5(a) and (c), the court held such liability foreclosed by *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008). Under *Stoneridge*, a participant in a scheme to violate Section 10(b) is not liable to a plaintiff unless the plaintiff in fact relied on the participant's deceptive conduct. The Court in *Stoneridge* noted that reliance cannot be established when a participant's conduct is too "remote" from a plaintiff's decision to invest.

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Here, it was undisputed that plaintiffs had no knowledge of Mayer Brown's conduct. Plaintiffs argued that the firm's conduct was not "remote" because Mayer Brown was more directly involved in the alleged scheme than were the participants in the *Stoneridge* scheme. Rebuffing this argument, the court held: "[t]he issue is not the distance between the issuer and the defendant, but rather the distance between the defendant's conduct and the investor."

This opinion interprets the *Stoneridge* holding in a way that insulates a category of potential defendants from Section 10(b) liability.

## Statutory Liability

### Lawyer's "Attorney Malpractice Report" Substantive in Nature and Unsolicited Faxing of It Does Not Constitute "Unsolicited Advertisement"

*Stern v. Bluestone*, 12 N.Y.3d 873, 911 N.E.2d 844 (2009)

In a 2008 New York decision, plaintiff, a lawyer, sued another lawyer, Bluestone, for faxing him unwanted one-page faxes titled "Attorney Malpractice Report," and subtitled, "Free Monthly Report on Attorney Malpractice From the Law Office of Andrew Lavooft Bluestone." *Stern v. Bluestone*, 47 A.D.3d 576, 850 N.Y.S.2d 90 (2008), *appeal dismissed*, 10 N.Y.3d 826, 858 N.Y.S.2d 652, 888 N.E.2d 394 (2008).

Plaintiff sued under the Telephone Consumer Protection Act of 1991 (TCPA) for the \$500 minimum for each of the 14 unsolicited faxes, in lieu of actual damages. He asked for the award to be trebled to \$21,000 because the violations were knowing and willful. The latter request was supported by a prior action brought by a different lawyer against Bluestone for the same conduct.

Bluestone argued that the faxes were solely informational and not advertisements for his services. The court disagreed, commenting that the faxes were indirect advertising, which invited contact for further information and also listed Bluestone's websites, which promoted his purported specialization in attorney malpractice lawsuits. Treble damages were warranted because he knew of the statute and its prohibitions based on the prior lawsuit.

In a 2009 decision, the New York Court of Appeals reversed based on an elaboration by the Federal Communication Commission (FCC) on what constitutes an "unsolicited advertisement." *Stern v. Bluestone*, \_\_\_ N.Y.3d \_\_\_, \_\_\_ N.E.2d \_\_\_, 2009 WL 1616529 (2009). The FCC stated concerning "informational messages" *via* facsimile:

[F]acsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules. *An incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement* . . . Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, *so long as the newsletter's primary purpose is informational, rather than to promote commercial products*. [emphasis in original].

The court concluded that Bluestone's "Attorney Malpractice Report" fit the FCC's framework for an "informational message" and thus that the 14 faxes were not unsolicited advertisements within the meaning of the TCPA. The court found that the reports were substantive in nature about attorney malpractice lawsuits. The court further noted that to the extent Bluestone might have devised the reports as a way "to impress other attorneys with his legal expertise and gain referrals, the faxes may be said to contain, at most, '[a]n incidental advertisement' of his services, which 'does not convert the entire communication into an advertisement.'"

## Statute of Limitations

### Statute of Limitations Commenced When Defense Was Raised in Underlying Case

*Frankston v. Denniston*, 74 Mass. App. Ct. 366, 907 N.E.2d 204 (2009)

In cases where a lawyer fails to timely commence an action or to advise a client of an impending time limitation, the client may pursue the perceived remedy with other counsel. A Massachusetts lawyer was sued for failing to advise the client of an impending lapse of the statute of limitations on his claims arising from a stock pooling agreement. In an action brought by other counsel, the defense was raised in a motion for summary judgment. The court held that the motion put the client on notice of the attorney's error, and his continued cost of litigation constituted "appreciable harm" sufficient for the statute to commence.

## “But for” Causation

### Failure to File in Other State Was Not a Superseding Cause

*Williams v. Joynes*, 278 Va. 57, 677 S.E.2d 261 (Va. 2009)

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The Virginia Supreme Court reversed summary judgment in favor of a lawyer who failed to timely file a personal injury action in Virginia but defended the legal malpractice action on the ground that the client's failure to file in Maryland was a superseding cause. The court disagreed with the attorney's contention because his failure to file a Virginia action was the cause of the client's need to file a Maryland lawsuit, and could thus not be a superseding cause. Further, the failure to file in Virginia barred an action against one of the two primary tortfeasors, even in Maryland. The court stated that it did not decide whether the client's failure to file in Maryland could be a failure to mitigate damages.

## Assignments

### Louisiana Court Holds Legal Malpractice Claim Is Not Assignable

*Taylor v. Babin*, 13 So. 3d 633 (La. 2009)

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In summary, plaintiffs appealed from a judgment granted in favor of defendants, although the appellate court affirmed holding that legal malpractice claims are not assignable. The alleged legal malpractice arose in connection with litigation stemming from a motorboat accident. Eva Taylor and Kevin Ledet were passengers in a motorboat operated by Jesse Foret. While traversing the waterway connecting Bayou Decade to Lake Jug in Terrebonne Parish, Foret drove the watercraft into a rock levee. Upon impact, all three occupants of the vessel were thrown overboard. Each sustained serious injuries.

Following the accident, Foret was arrested and charged with vehicular negligent injuring. He later pled guilty to charges of vehicular negligent injuring and first degree vehicular negligent injuring and was sentenced to a combination of home and weekend incarceration that allowed him to go to work during the week. He was also ordered, as part of his sentence, to pay Taylor and Ledet \$10,000 each in restitution. Foret had retained Jerri G. Smitko and the Law Offices of Jerri G. Smitko, APLC (Smitko) to represent him in connection with the criminal charges. Subsequently, Taylor and Ledet filed two separate civil suits, which were later consolidated, against Foret. Smitko also represented Foret in those two consolidated cases.

Foret had no liability insurance. He therefore retained additional counsel, Camille Saltz Babin (Babin), to file a voluntary petition in bankruptcy court. Babin was at the time employed by Joan Malbrough & Associates, APLC (Malbrough). Taylor and Ledet filed a separate adversary complaint in bankruptcy court to determine the dischargeability of their claims against Foret. Taylor and Ledet asserted that their claims against Foret were non-dischargeable. On October 7, 2004, the bankruptcy court signed and entered a consent order based upon “joint consent submitted by all parties represented herein,” declaring Foret's alleged debt to Taylor and Ledet non-dischargeable under 11 U.S.C. § 523(a)(9) and lifting the automatic stay of Taylor and Ledet's state court lawsuits against Foret.

Thereafter, a bench trial on liability alone was held. Foret was found to have negligently caused the boating accident that injured Taylor and Ledet and to have been intoxicated at the time of the accident. However, the trial court did not find that Foret's actions were wanton or reckless. Judgment was entered accordingly, and Foret, still represented by Smitko, appealed although the judgment was affirmed.

The argument that legal malpractice was committed was based on the assertion that at the time the consent order was signed in bankruptcy court, 11 U.S.C. § 523(a)(9) did not apply to the claims made by Taylor and Ledet. It was alleged that Babin, Smitko and Malbrough failed to adequately research whether 11 U.S.C. § 523(a)(9) applied to the claims made by Taylor and Ledet. In light of the trial court's ruling that Foret did not act in a wanton or reckless manner, it was alleged that the claims of Taylor and Ledet were dischargeable pursuant to Title 11 of the United States Code.

The trial court sustained the exceptions, and plaintiffs appealed. Defendants contended, and the trial court agreed, that plaintiffs had no right of action to bring this action because legal malpractice claims are not assignable. Initially, the appellate court noted that the issue of the assignability of legal malpractice claims had not yet been decided in Louisiana. Plaintiffs argued that legal malpractice claims are assignable under La. C.C. art. 2642 and/or 2044. Article 2642 provides:

All rights may be assigned, with the exception of those pertaining to obligations that are strictly personal. The assignee is subrogated to the rights of the assignor against the debtor.

Plaintiffs also argued that the Louisiana Supreme Court has held that actions for the recovery of tort damages are not strictly personal, citing *Nathan v. Touro Infirmary*, 512 So. 2d 352 (La. 1987), and *Guidry v. Theriot*, 377 So. 2d 319 (La. 1979). The court noted, however, that both of those cases involved the inheritability not the assignability of medical malpractice actions by a designated beneficiary, after the commencement of an action by the plaintiff tort victim through the filing of a suit or pre-suit complaint. In both cases, the Supreme Court emphasized the fact that the patients had asserted their rights to recover by filing a claim prior to death, thus creating property rights that were inheritable. *Nathan*, 512 So. 2d at 355.

Plaintiffs also argued that they could have initiated their action on their own behalf, without the disputed assignment of rights, based on La. C.C. art. 2044, which provides:

If an obligor causes or increases his insolvency by failing to exercise a right, the obligee may exercise it himself, unless the right is strictly personal to the obligor.

For that purpose, the obligee must join in the suit his obligor and the third person against whom that right is asserted.

Plaintiffs argued that because Foret discovered the legal malpractice on September 22, 2006, yet did not exercise his rights for more than eight months, they could have brought their action directly in their capacity as judgment creditors. The court rejected this argument for numerous reasons. The court stated that it was not convinced that Foret had increased his insolvency by failing to file a legal malpractice action against his former counsel. Indeed, had Foret filed suit, he might have increased his insolvency through the expenditure of legal fees and costs by pursuing a legal action that had no clear outcome.

Defendants argued that legal malpractice claims should not be assignable due to public policy considerations. The court noted that most of the many courts across the country that have been asked to address this issue have done so have determined that it is a simpler task, or a better approach, to simply resolve the issue from a public policy perspective. In taking that approach, the majority of courts have determined that legal malpractice claims are not assignable. Only a few states, including Maine and Pennsylvania, have held that such claims are assignable. The court found the common theme in cases holding that legal malpractice claims are not assignable to be that the relationship between an attorney and his or her client is a fiduciary one, of the very highest character, and that it binds the attorney to the most conscientious fidelity. Ultimately, the court held that legal malpractice claims may not be assigned. The mere threat of a malpractice claim being assigned would be detrimental to an attorney's duty of loyalty and confidentiality to his client, and would promote collusion and increase a lawyer's reluctance to represent an underinsured or insolvent client. The court thus concluded that as a matter of public policy, it is not prudent to permit enforcement of a legal malpractice claim that has been transferred by assignment but never pursued by the original client.

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