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Court of Appeals Holds Even Imperfect Conflict Waiver Provides Key Defense to Lawyer Breach of Fiduciary Duty Claim

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Conflict waivers are important for many reasons. For starters, they are required by the professional rules and they confirm the client's consent upon which lawyers then rely. The Court of Appeals recently added another. In *Bramel v. Brandt*, 190 Or App 432, 79 P3d 375 (2003), it found that even an imperfect conflict waiver can provide a key defense to a lawyer breach of fiduciary duty claim. *Bramel* was the subsequent civil chapter of a disciplinary case, *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000), that involved significant issues on Oregon's conflict waiver standards. Ironically, the Supreme Court found in the disciplinary case that the conflict waiver the lawyers used was deficient in several respects. But, the Court of Appeals held that the same waiver was sufficient to trigger the statute of limitation for a breach of fiduciary duty claim against the lawyers and on that basis ruled that the client's claim was time-barred.

The lawyers had represented a large group of automotive hand tool distributors—including plaintiff Bramel—in business tort litigation against Mac Tools and its corporate parent, Stanley Works, over Mac/Stanley's franchise agreements and practices. Literally at the last minute in "global" settlement negotiations, Mac/Stanley asked to hire the lawyers if all of the settlements were

completed to provide advice on its franchise practices. The lawyers reluctantly agreed after receiving advice from the Oregon State Bar. They disclosed the arrangement in both the settlement agreements with their clients and in a conflict waiver letter that contained the requisite Oregon recommendation that the clients seek independent counsel on whether to waive the conflict. Bramel sought the recommended independent counsel from an experienced ethics and business litigation practitioner who tried to use the situation to bargain down the lawyers' contingent fee. When the lawyers refused, Bramel completed the settlement with Mac/Stanley and filed a bar complaint against the lawyers as a predicate to the later breach of fiduciary duty claim seeking the return of the contingent fee.

In the disciplinary case, the Supreme Court found that the lawyers had a personal interest conflict under DR 5-101(A) between their financial interest in being retained by Mac/Stanley upon completion of the settlements and their continuing duties to advise their distributor clients independently on the pending settlements. See 331 Or at 132-37. The Supreme Court then concluded that the lawyers' conflict waiver letter was inadequate under DR 10-101(B)'s "full disclosure" standard because it should have gone into far greater detail in writing than it did in explaining the conflict. *Id.* The lawyers had argued, in part, that their waiver letter met the disclosure standard because Bramel understood the nature of the conflict and, in fact, had tried to use the lawyers' need for a waiver as a lever to get them to waive their contingent fee. See 331 Or at 125-26, 136-

37. The Supreme Court rejected this argument as “without merit” and focused instead on whether the lawyers’ waiver letter met an objective standard of disclosure under DR 10-101(B) rather than whether the client had subjectively understood the nature of the conflict regardless of any shortcomings in the waiver itself. 331 Or at 137.

In the civil case, Bramel brought claims for breach of fiduciary duty and fraud against the lawyers based on the asserted inadequacy of the disclosure and the resulting unwaived conflict. He sought fee forfeiture as his principal remedy. See generally *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 843 P2d 442 (1992) (casting violations of the professional rules as breaches of fiduciary duty and discussing fee forfeiture as a remedy). The trial court dismissed the case on the statute of limitation and held that the fraud allegation failed to state a claim. The Court of Appeals affirmed—although on slightly different grounds than the trial court as it related to the fraud claim.

In doing so, the Court of Appeals confirmed that a breach of fiduciary duty claim against a lawyer is subject to ORS 12.110(1)’s two-year limitation period. 190 Or App at 440. It also found that the limitation period included a discovery rule: “[A] claim accrues when the plaintiff knows or, in the exercise of reasonable care, should know facts that would make a reasonable person aware of a substantial possibility that each of the three elements of the claim—harm, causation, and tortious conduct—exists.” *Id.* at 441. The Court of Appeals then

refined this concept further for breach of fiduciary duty: “In the context of plaintiffs’ claim for breach of fiduciary duty, the issue is * * * when plaintiffs’ learned that defendants had been disloyal to them and that they had been harmed as a result of that disloyalty.” *Id.*

The Court of Appeals agreed with the trial court that the collective impact of the lawyers’ disclosure and the independent advice Bramel received at the time triggered the statute of limitation and, accordingly, Bramel’s breach of fiduciary duty claim was time-barred because he filed it more than two years later. *Id.* at 441-42. In short and with no little irony, the same conflict waiver letter that the Supreme Court found inadequate for disciplinary purposes triggered the statute of limitation for civil liability purposes on the breach of fiduciary duty claim.

The Court of Appeals found that there were fact issues on the limitation period for fraud. But, it affirmed the dismissal of that claim on the alternative ground that the fee agreement at issue in the former client’s fraud claim had come into existence over a year before the alleged fraudulent conduct in form of the inadequate conflict disclosure—in other words, there was no fraud in the inducement as a matter of law.

The odd irony presented by the disparate treatment of the same waiver letter in the *Brandt/Griffin* disciplinary case and the *Bramel* breach of fiduciary

duty case highlights the potential importance of any kind of waiver letter in defending a lawyer breach of fiduciary duty claim built around an alleged conflict.

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