



[Click to Print](#) or Select '**Print**' in your browser menu to print this document.

Page printed from: [New York Law Journal](#)

Professional Liability Insurance

Judiciary Law §487 Has Both Criminal and Civil Penalties

Sue C. Jacobs, New York Law Journal

March 15, 2016

Claims of legal malpractice stem from the attorney's alleged breach of duty of care to her client. A client may allege a violation of Judiciary Law §487 if the attorney allegedly willfully deceived, or committed fraud or collusion with the intent to deceive the court or the client. If the violation is established, the attorney will be guilty of both a misdemeanor and civilly liable for treble damages. The insurer is obligated to defend the attorney regardless of whether the §487 claim is the only cause of action alleged or one of several causes of action in a malpractice action.¹ The insurer, however, will not be obligated to pay the treble damages since they are punitive and insurance coverage for punitive damages is prohibited by the public policy of New York.

The Appellate Division, First Department, recently refused to dismiss a lawsuit in which a sole cause of action alleging a violation of Judiciary Law §487 was pleaded. Plaintiff alleged that the law firm and its partner were guilty of deceit in the representation concerning a disputed profit-sharing agreement during an underlying breach of contract action. The court held the cause of action based on a Judiciary Law §487 violation could not have been asserted in the underlying action because the attorneys' alleged offenses did not exist when that action was commenced.

Attorneys who are found to have been deceitful to their clients or to the court can be found guilty of a misdemeanor and subject to treble damages in an action alleging the §487 claim.

Judiciary Law §487

Judiciary Law §487, titled "Misconduct by attorneys," provides:

An attorney or counsel who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or
2. Willfully delays his client's suit with a view to his own gain; or willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for;

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.²

Sole Cause of Action

In [Melcher v. Greenberg Traurig](#),³ the First Department refused to dismiss the Judiciary Law §487 claim, the sole cause of action asserted against the law firm, Greenberg Traurig and its former partner, Leslie Corwin. The complaint alleges the attorneys engaged in deceit when representing their clients in a breach of contract action titled [Melcher v. Apollo Medical Fund Management, and Brandon Fradd](#).⁴

In its current decision, the First Department reviewed the history of events both in the current action including the Court of Appeals decision concerning the applicable statute of limitations for §487 claims, and in the underlying action, both of which had been contentiously litigated. The settlement in the underlying action specifically excluded any damages stemming from a violation of the Judiciary Law §487.

Underlying Facts

In 1995, Brandon Fradd formed Apollo Medical Partners, a hedge fund, and Apollo Medical Fund Management (management fund) to manage money on behalf of the hedge fund. In late 1997, after Apollo had experienced significant losses, James Melcher became a member and manager of the management fund.

Melcher and Fradd signed an operating agreement dated Jan. 8, 1998, providing for a 50/50 allocation of profits. Melcher alleged he complained to Fradd in January 2001 that he, Melcher, was not being given his full share of the profits. Melcher alleged, and Fradd denied, that they met several times in an unsuccessful attempt to resolve the profit allocation. Melcher commenced the underlying action in 2003 asserting Fradd breached the 1998 operating agreement.

In December 2003 during discovery Fradd produced a document he claimed was a May 1998 amendment to the January 1998 document that changed the profit formula. Melcher responded that: (1) the amendment never existed, (2) was forged and backdated after the dispute arose; and (3) Fradd's corporate counsel informed Fradd that an oral amendment would have no more than of 50 percent chance of success on a motion for summary judgment.

In a Jan. 27, 2004, meeting with Fradd and Melcher, Fradd's counsel, defendant Leslie Corwin, represented he had spoken with Apollo's former corporate counsel, who had confirmed the amendment's authenticity. Before Melcher could chemically test and authenticate the document, Fradd informed Corwin that on Feb. 1, 2004 the document, including its signatures, had been damaged in a small kitchen fire in his apartment. Corwin did not notify Melcher of the damaged document until March 18, 2004.

In 2007 during the pendency of the underlying action Melcher asserted in a motion that Fradd engaged in spoliation of evidence and sought discovery from Greenberg Traurig under the crime-fraud exception to the attorney-client privilege. Melcher also moved to disqualify Greenberg Traurig and to strike Fradd's answer based on his attorney's alleged deceit. The Appellate Division affirmed the lower court's ruling that denied the motion and held Melcher "had not conclusively demonstrated deceit" with respect to the disputed amendment.

Prior to trial, the defendants withdrew any reliance on the damaged alleged amendment, and claimed there had been only an oral agreement to change the profit-sharing formula. The case was tried before a jury in May 2009. Judgment was entered for Melcher in February 2010 finding Fradd breached the agreement, but also holding that Melcher was equitably estopped from asserting Fradd had breached the agreement because Melcher initially accepted the changed profit allocation without objections.

In January 2013 the Appellate Division set aside the estoppel verdict, reinstated the breach of contract claim and directed a hearing for remission on Melcher's claim on the "fabricated backdated and intentionally burned" document.

In January 2014, Melcher and Fradd negotiated a settlement in the action. The agreement provided that no amount paid was "in regard to any liability of the [Greenberg Traurig] firm or Corwin pursuant to Judiciary Law §487" and specifically reserved Melcher's rights concerning the appellate decision.

The Current Action

In July 2007 Melcher commenced this action while an appeal of the motion to strike the pleading was pending in the underlying action. The current action alleged only a violation of Judiciary Law §487. Melcher alleged Greenberg Traurig and Corwin engaged in deceitful and collusive conduct in its representations concerning Apollo's former corporate lawyer's role in drafting and confirming the authenticity of the alleged 1998 amendment. Apollo's former corporate attorney testified in a deposition he had no recollection of drafting the disputed amendment; nor a file with records concerning the amendment; nor time sheets referencing the amendment; nor did the document have a footer from his law firm.

The two lower courts denied defendants' motion to dismiss based on the unspecified statute of limitations. After the Court of Appeals held the statute of limitations was six years under CPLR §213(1), Melcher moved for partial summary judgment on liability. The defendants cross-moved arguing that §487 could not be interposed as a plenary action, and that a §487 claim should have been brought in the underlying action. The lower court denied both motions.

The First Department rejected defendants estoppel argument, holding the action did not involve "claim splitting" since the alleged deceit did not arise until after the document with the alleged amendment was damaged in a kitchen fire; the earlier action was already pending; the underlying complaint was not amended; the §487 claim is entirely distinct from the prior claim; and a motion is not the same as an amended complaint.

The court also held Melcher is not collaterally estopped from litigating the alleged deceit since the underlying action did not contain a cause of action based on Judiciary Law §487, and it is not required to be asserted in the same action in which the violation occurred. Here, plaintiff seeks to recover treble damages for the lost time, value of money and excess legal fees caused by Greenberg Traurig and its partner in the underlying action and subsequent legal proceedings.

Finally, the court held that even had a motion to amend the complaint been made in the earlier action, it would not have been granted if it would have "involved disqualification of counsel and prejudiced the defendant's right to be represented by attorneys of his choice."

Conclusion

Violations of Judiciary Law §487 are infrequently alleged and difficult to establish, but serve as a deterrent to willful deceit. The major deterrent is that the attorney is potentially liable in both criminal and civil actions. The attorney may be found guilty of a misdemeanor and will be required to pay civil damages for his own outrageous conduct since treble damages are not insurable.

Endnotes:

1. See "Applying Section 487 to Attorney Deceit Outside of New York Courts," NYLJ, Feb. 19, 2016 by George B. Smith and Thomas J. Hall for a full discussion of *Kallista, S.A. v. White & Williams* and the applicability of §487 to administrative proceedings and court proceedings outside of New York state.
2. N.Y. Jud. Law §487 (McKinney 2016).
3. 135 A.D.2d 547 (1st Dept. 2016).
4. 23 N.Y.3d 10 (2014), rearg. denied, 23 N.Y.3d 998 (2014).

Sue C. Jacobs is a member of Goodman & Jacobs. Howard M. Wagner, an associate at the firm, contributed to this article.

Copyright 2016. ALM Media Properties, LLC. All rights reserved.