

A Client's Own Criminal Conduct Can Bar a Claim Against His or Her Lawyer

Nearly every court in the nation that has addressed the issue of whether a client's own criminal conduct bars the assertion of a professional liability claim against his or her lawyer has held to some degree that such claims are barred. In some instances the rationale is that the criminal conduct is "the sole proximate or producing cause" of the client's eventual conviction and damages such that a legal malpractice claim against the attorney may not be brought absent a showing that the plaintiff has been exonerated from the criminal conviction. In other jurisdictions the principle is applied as a matter of public policy in that a criminal, who is not innocent, should not be allowed to "profit from or base a damage claim upon" his or her criminal conduct. Some courts have applied this doctrine to preclude claims for breach of contract and breach of fiduciary duty and disgorgement of fees, although a claim for disgorgement of fees can be sought under Pennsylvania law under a breach-of-contract theory. See, e.g., *Bailey v. Tucker*, 621 A.2d 108 (1993). A Texas appellate court recently considered this doctrine in the context of claims for breach of contract and breach of fiduciary duty.

In *Futch v. Baker Botts, LLP*, ___ S.W.3d ___, 2014 WL 2583769 (Tex.App.-Hous. (14 Dist.)), the client alleged a claim against his lawyer for having given the client's confidential information, which included notes of privileged communications between the client and his lawyer, to officials with the U.S. Department of Justice (DOJ). Allegedly using this information, the DOJ indicted the client, a natural-gas trader, on four counts of felony false reporting as part of a scheme to participate in his employer's attempt to manipulate natural gas prices. Faced with the incriminating evidence that his lawyer allegedly had given the government, the client eventually pled guilty to one felony count.

In the subsequent professional liability action, the client first attempted to assert a legal malpractice claim sounding in tort and a claim for breach of fiduciary duty and sought disgorgement of fees as his only damages. But the defendant lawyer and his law firm asserted what is referred to in Texas case law as the *Peeler* doctrine, which is based upon the plurality opinion by the Texas Supreme Court in *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995). In *Peeler*,

the client had pled guilty to a criminal offense pursuant to a plea agreement, only to find out later that, previous to her plea, "the United States Attorney had made an offer to (client's) attorney of absolute transactional immunity if (the client) would become a witness and testify against her colleagues." The attorney never communicated the offer to his client while it remained open. The client sued her attorney, alleging claims, among others, for negligence and breach of contract. The attorney defended and was granted summary judgment on all counts "on the grounds that (the client) had not been exonerated. ..." The plurality opinion did not articulate all of the claims and types of damages to which the doctrine applies, including whether it applies to claims for disgorgement of fees.



After getting shot down on the tort and breach-of-fiduciary-duty claims seeking disgorgement of fees, the client in *Futch* amended his claim to contend that the alleged disclosure of his privileged communications constituted a breach of contract. Unlike Pennsylvania case law, Texas law only recognizes legal malpractice sounding in breach of contract in instances where the lawyer has breached an express term of the contract and not for breach of the duty of care implied in the contract. As a result, the lawyer argued that the alleged disclosure was not in breach of any term of the contract and therefore there could be no claim for breach of contract. The trial court granted summary judgment on this basis. On appeal, the court embraced the lawyer's arguments and affirmed.

Because the contract contained no provision that obligated the lawyer not to turn over the client's privileged communications to the government, the court agreed that this claim sounded in tort instead, which claim the *Peeler* doctrine bars under these circumstances. Based upon previous Texas case law where the *Peeler* doctrine was applied in instances "involving allegedly actionable conduct that was not directly related to the criminal conviction," the court concluded that the *Peeler* doctrine was intended

Avoiding Liability



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to be given "an expansive interpretation." The appellate court agreed with the trial court that *Peeler* applies to claims for breach of fiduciary duty connected with a client's conviction, even if the damages sought are limited to fee forfeiture. The court rejected the client's argument that the *Peeler* doctrine should not apply to "a fee-forfeiture request because causation is not an essential element of a breach-of-fiduciary-duty for which the only remedy sought is fee forfeiture and because the main purpose of the fee-forfeiture remedy is to protect relationships of trust by discouraging disloyalty by the fiduciary." The lawyer agreed with the premise that causation is not an essential element when the damages sought are limited to disgorgement of fees but contended that the "expansive interpretation" to be given to the *Peeler* doctrine requires the finding that it also applies to claims for disgorgement of fees only. The court recognized that the policy considerations in support of *Peeler* are so strong that it applied "despite the possibility that the attorney may have engaged in serious misconduct."

There is one issue that the appellate court did not address because it had not been raised by the lawyer before the trial court — the client had not paid the attorneys' fees, his employer had. Therefore, the lawyer argued that he could not refund to the client what the client had not paid in the first instance.

It would appear that under Texas law a criminal defense lawyer representing a guilty client can "throw his or her client under the bus" — that is, deliberately tank the defense — and the client will have no civil remedy. Fortunately for clients (or unfortunately for lawyers), under Pennsylvania law clients can seek disgorgement on a breach-of-contract theory.