

Judicial error doesn't block legal-mal claim

Summary judgment for Dechert reversed

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A judicial error by a foreign court that resulted in the reduction of a client's judgment did not absolve the client's law firm of liability for its own negligence in handling the matter, the Supreme Judicial Court has held.

The client, plaintiff Kiribati Seafood Co., had sued the Port of Papeete in Tahiti over a dry-dock collapse that destroyed one of its fishing boats. The plaintiff's insurer, Lloyd's of London, covered some but not all of the loss.

Meanwhile, Lloyd's assigned its subrogation claim to Kiribati — which was also pursuing a claim against the port for damages — in exchange for Kiribati's release of any claims against Lloyd's over legal costs it had incurred to that point.

When the port appealed a judgment in favor of Kiribati, a Tahitian appellate court suggested that the judgment would amount to a "double compensation" — barred by French law applied in Tahitian courts — absent proof that Kiribati provided consideration to Lloyd's in exchange for the right to bring the subrogation claim.

Kiribati's attorney, a Paris-based partner with the defendant law firm, Dechert, apparently disregarded the court's demand for such proof and failed to provide documentation that apparently would have satisfied the court. That resulted in a \$1.8 million reduction of the judgment.

In Kiribati's subsequent legal-malpractice action against Dechert, the law firm argued that the Tahitian court's evidentiary demand was erroneous under French law. According to Dechert, that constituted a "legal error" that superseded any negligence the firm may have committed, shielding the firm from any liability for the reduced judgment Kiribati suffered.

But the SJC disagreed, reversing a summary judgment for Dechert in Superior Court.

"Where an attorney makes a reasonable and correct argument of law and loses because of judicial error that was not foreseeable, the attorney cannot be found negligent for failing to prevent or mitigate that legal error," Chief Justice Ralph D. Gants wrote for the court. "But where the judicial error is foreseeable, such as where a judge or an appellate court has indicated an intention to rule in a manner that the attorney believes to be an error of law, then an attorney has an obligation

to take reasonable and prudent steps to prevent or mitigate that error."

The 15-page decision is *Kiribati Seafood Company, LLC, et al. v. Dechert LLP*, Lawyers Weekly No. 10-161-17. The full text of the ruling can be found at maslawyersweekly.com.

Old concept, new law

Megan C. Deluhery of Boston, who represented Kiribati before the SJC, said there previously was no appellate guidance in Massachusetts on the issue of attorney liability in a situation involving alleged judicial error combined with attorney error.

"The SJC has made new law in holding that, yes, in fact, attorneys can be liable [for their negligence] even when there's contributing judicial error," she said. "But in some ways, this isn't a novel negligence concept. You have two causes of a harm, and either party that's a contributing cause can be liable. That's essentially what the SJC held: that this longstanding principle of negligence is now clearly applicable in the area of legal malpractice."

Boston's Christopher R. Blazejewski, who represents lawyers in professional liability matters, said the decision represents a further whittling away in Massachusetts of legal defenses available to attorneys in malpractice actions.

First, he said, it undermines the defense of judicial error as a superseding cause of alleged harm in certain malpractice cases, regardless of what an attorney did or did not do.

Additionally, it clarifies the duty of attorneys to take reasonable steps, such as offering additional evidence, to convince a court that the client should win even under its erroneous but foreseeable ruling, he said.

"Overall, the lesson for lawyers from *Kiribati* is clear," he said. "Even if the umpire is calling the strike zone wrong, you still have to try to pitch to where the umpire is calling it."

Michael J. Stone, a Boston legal malpractice lawyer, said the decision does not alter the longstanding precedent that intervening judicial error is a defense in most legal-mal matters.

Rather, he said, the SJC carved out a small exception in an unusual situation in which "the judge virtually announced the error and the lawyer, after correctly analyzing the law, chose not to take advantage of an opportunity that was offered to circumvent the court's legal error."

Adding a baseball metaphor of his own, Stone likened the negligence in *Kiribati* to a manager choosing to forfeit a game following an umpire's mistake

rather than playing a winnable contest under protest.

Counsel for Dechert, Denis M. King and Richard M. Zielinski, could not be reached for comment prior to deadline.

Sitting on evidence

The plaintiff client, Kiribati, bought a vessel to fish for tuna in the Pacific.

After an incident damaged its rudder,

by requiring them. The judgment was subsequently reduced by \$1.8 million.

Kiribati sued Dechert in Superior Court for legal malpractice. Judge Kenneth W. Salinger granted summary judgment to the firm, ruling that the Tahitian court's judicial error was a superseding cause that barred Kiribati from recovering against Dechert.

Kiribati appealed.



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— Megan C. Deluhery, who prevailed on appeal

the vessel was placed in a dry dock in the Port of Papeete in Tahiti for repairs. The dock collapsed, causing the boat to be so badly damaged that Kiribati's insurer, Lloyd's, declared it a "total loss."

Kiribati sued the port for damages in Tahiti. When the plaintiff's attorneys left their firm to join Dechert, Kiribati stayed with them.

Lloyd's paid Kiribati \$1.8 million on its insurance claim, but the sum did not cover all of Kiribati's losses.

Meanwhile, Lloyd's had a right of subrogation to recover what it paid from the port. Lloyd's and Kiribati, which was still seeking to recover uncompensated losses, agreed to pursue their respective claims jointly, with Lloyd's agreeing to kick in half the attorneys' fees and costs.

Kiribati and Lloyd's soon began bickering over whether Lloyd's was really paying its fair share of the costs. Ultimately, the issue was resolved when Lloyd's agreed to assign its subrogation claim to Kiribati in exchange for the plaintiff releasing Lloyd's from claims for unpaid legal fees.

Four years later, in 2008, the court in Tahiti issued a judgment in Kiribati's favor. When the port appealed, the appellate court indicated that any part of the judgment due to the subrogation claim would amount to illegal "double compensation" unless Kiribati could show it provided consideration for the assignment.

Kiribati's general counsel provided documents to Dechert that would purportedly prove consideration, but Dechert attorney Xavier Nyssen never provided the documents to the court, apparently because he believed the court erred

Foreseeable error

The SJC found that judicial error is not, in fact, a superseding cause that insulates an attorney from liability for negligence if the error is made plain to the attorney.

"Stated simply, where an attorney will foreseeably lose on the law but can still win on the facts, an attorney is negligent if he or she foregoes the opportunity to win on the facts," Gants said. "To be clear, this does not suggest that an attorney has an obligation under the duty of reasonable care to argue an error of law. But where a court has indicated that it has a different view of the law from that of the attorney, and where the client can prevail on the facts even under that different view, an attorney is negligent if he or she forfeits that opportunity by failing to argue in the alternative."

In so finding, the SJC rejected Dechert's argument that for the purposes of a "trial within a trial" in the malpractice case, a new, reasonable trier of fact correctly applying French law would have to conclude that Kiribati should have prevailed without proof of the consideration it paid for the assignment of the subrogation claim. Thus, any negligence in failing to provide such proof could not be the proximate cause of the reduced judgment.

"The fundamental flaw in this argument is that a plaintiff's loss need not have only one proximate cause," Gants said. "[T]here can be multiple concurrent proximate causes."

Accordingly, the SJC concluded that the summary judgment should be reversed. **MLW**



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