Ga. High Court Revives Proskauer Tax Malpractice Case

Despite widespread media coverage years ago of shady tax shelters and BigLaw firms, Proskauer Rose LLP didn't show that investors who relied on the firm's tax opinion long before filing suit were "specifically aware" of those issues, the Georgia Supreme Court ruled Wednesday, breathing life into the closely watched malpractice case.

A unanimous court said it was unconvinced by Proskauer's argument that their former clients should have known, based on the public attention at that time, they had possible legal claims before 2011.

The Georgia Supreme Court's decision reverses a state appeals court ruling last year that two investors weren't reasonably diligent in discovering the law firm's allegedly fraudulent acts. (Cara Salvatore/Law360)

The court also noted that Proskauer was "actively" representing the investors, Douglas and Jacqueline Coe, when it issued the tax opinion, and thus had a "higher duty" to fully disclose its relationship with BDO Seidman LLP, the couple's longtime accounting firm that promoted a tax strategy Proskauer endorsed.

"We fail to see why a person exercising reasonable diligence would not be entitled to rely on the disclosure or lack thereof made by his or her attorney even after the legal engagement was completed, at least until other facts come to light that would cause a reasonably diligent person to revisit the issue," **the opinion** stated.

"Thus, a genuine issue of material fact exists as to whether the Coes had actual knowledge about Proskauer's lack of independence, and we cannot say that, as a matter of law, the Coes had knowledge that Proskauer was not an independent law firm based solely on the language in the engagement letter."

The decision reverses **a state appeals court** conclusion last year that the Coes weren't reasonably diligent in discovering Proskauer's allegedly fraudulent acts.

The case goes back to a lucrative 2001 sale of a company, and a BDO Seidman "distressed debt strategy" designed in part to offset capital gains taxes it would trigger for the Coes. As part of the deal, BDO asked the Coes to get advice from an "independent" law firm. The Coes paid Proskauer $30,000 for an opinion that stated that the strategy would most likely survive an IRS challenge and not trigger penalties.

But in 2005, the IRS began an audit of the Coes' 2001 tax returns; that matter did not end until a settlement in 2012, when the Coes paid what they later called "significant" back taxes, penalties and interest.

In those ensuing years, the "distressed asset" shelter, also known as a DAD, and its ilk had come under **sharp criticism**, including at the IRS and in Congress. BDO, along with a number of prominent accounting and law firms, were subjects of various lawsuits and investigations in the 2000s for their roles in designing and marketing complex tax shelters, many of which used overseas assets and paper losses to offset capital

gains. The IRS formally categorized DAD transactions as an impermissible tax dodge in 2008.

The Coes initially sued Proskauer in 2015, accusing the firm of conspiring with BDO and an investment advisory company to issue a sham opinion while failing to come clean about its full relationship with BDO, which included a fee-split deal that wasn't spelled out in the engagement letter. The case was under a "standstill" deal until 2017, when it was restarted.

Proskauer has maintained the Coes should have realized at least by 2005, when they hired a well-known tax firm for the IRS audit, that they had potential claims, and therefore filed suit long after the relevant statutes of limitations ran out.

Central to that defense position was a plethora of public sources — including a CBS "60 Minutes" segment, congressional reports, and dozens of news clippings — about risky tax shelters, BDO and other entities, all of which the firm argued should have put the Coes on notice.

But in the Wednesday decision, the court noted that only two of those articles mentioned Proskauer specifically, and that one of them said evidence of a "coordinated partnership" between Proskauer and BDO was lacking.

"We are not persuaded by Proskauer's characterization of this information, involving highly complex investment and tax transactions, as so 'widely known' as to establish, as a matter of law, that the Coes, in exercising reasonable diligence, should have discovered their claims before 2011," the court said. "And there is no evidence in the record that the Coes were specifically aware of the reports identified by Proskauer."

The state Supreme Court decision, which sends the case back to the trial court, also represents a blow to a long list of BigLaw firms and state bar leaders. That group had argued as amici that, in the context of a malpractice case, an alleged breach of duty to the client gives rise "immediately" to at least nominal damages, and thus starts the accrual of a cause of action.

The Wednesday order effectively restarts the case and forecloses Proskauer's arguments about the suit's timing, putting the case back on track for a potential trial.

"Among other things, we were certainly pleased with the court's recognition that a few articles in specialized or other states' newspapers was not required reading for Georgia taxpayers," said **Josh Belinfante of Robbins Alloy Belinfante Littlefield LLC,** who argued the case for the Coes.

Counsel for the firm and a Proskauer spokesperson did not respond to requests for comment Wednesday.

The Coes are represented by Josh Belinfante of Robbins Alloy Belinfante Littlefield LLC, Jeven R. Sloan of Loewinsohn Deary Simon Ray LLP and Harry W. MacDougald of Caldwell Carlson Elliott & DeLoach LLP.

Proskauer is represented by Harold D. Melton of Troutman Pepper, Mark G. Trigg and Shari L. Klevens of Dentons and Lisa S. Blatt, John S. Williams, Matthew Rice, Tyler Infinger and Denis R. Hurley of Williams & Connolly LLP.