



Advice-of-counsel defense recognized and also limited

By: Barbara L. Jones March 5, 2015 0

Most of the time when a person has a misstep with the law, it is not helpful to claim that “my attorney said I could.” But in a case released March 4, the Minnesota Supreme Court clarified a limited exception to that rule in a claim of tortious interference with contract.

A justification defense to a claim of tortious interference may be satisfied by a defendant’s good-faith reliance on advice of outside counsel, provided that the legal advice is obtained through a reasonable inquiry, a unanimous court held in *Sysdyne Corp. v. Rousslang et al.* Justice Alan Page wrote for the majority and Justice David Lillehaug did not participate.

The court also found that the respondent met its burden of proving interference with the contract was justified because it honestly relied on counsel’s advice that the contract was unenforceable.

“We are pleased that the Minnesota Supreme Court recognized, as we believe it should have, that a client’s good faith reliance on the advice of legal counsel can support the justification defense to a tortious interference with contract claim,” said Minneapolis attorney Joseph Sokolowski, who represented the defendants.

Justification is a case-by-case question

Sysdyne Corp. and *Xigent Solutions LLC* provide staff augmentation services to companies in the engineering and information technology industries. *Sysdyne* hired *Brian Rousslang*, who agreed to a noncompete agreement.

Rousslang became interested in working for *Xigent* and provided the company with a copy of the noncompete. *Xigent* gave the agreement to its outside counsel, *Joseph Sokolowski*, for review. *Xigent’s* president said *Sokolowski* said the agreement was overbroad and unenforceable. *Xigent* then offered *Rousslang* a job. *Sysdyne* then sued *Rousslang* for breach of contract and *Xigent* for tortious interference.

The elements of a cause of action for tortious interference are a contract, the wrongdoer’s knowledge of the contract, intentional procurement of its breach, without justification and damages. The only element at issue in this case is justification.

The trial court said that *Xigent* was justified in interfering with the contract based on reasonable inquiry and advice of counsel. The Court of Appeals affirmed

Sysdyne argued that the justification defense cannot be satisfied by the defendant’s reliance on legal advice. It also argued that justification is limited to situations in which the defendants have asserted, in good faith, a legally

protected interest of their own.

The court disagreed. While it has held that an assertion of a legal interest may be justification, it has not said that such an assertion is the only time a justification defense may be raised. Instead, it has said that justification depends on what is reasonable under the circumstances and is a case-by-case fact question, Page wrote.

The court also agreed with the defendants that its 1998 opinion, *Kallok v. Medtronic*, impliedly recognized that an interference may be justified by reliance on legal advice. In that case, the legal inquiry was not reasonable and could not be a basis for the defense, the court said.

"Given the fact-based nature of the justification-defense inquiry and our reasoning in *Kallok*, we conclude that the lower courts did not err when they determined that the justification defense may be satisfied by a defendant's reliance on advice of counsel when that reliance is reasonable," the court stated.

Documentation not required

The trial court specifically found that Xigent conducted a reasonable inquiry and that was not clear error, the Supreme Court said. The testimony was that Xigent gave Sokolowski the employment agreement, informed him that Rousslang would be doing essentially the same work and through its president talked with Xigent. The company also had worked with Sokolowski on noncompetes for the previous 10 to 12 years. These facts, along with the trial court's ability to evaluate the witness's credibility supported the District Court judge's finding that Xigent made a reasonable inquiry, the court said.

The court turned back the plaintiff's argument that the record did not include the content and legal basis for Sokolowski's advice. "[T]he fact that legal advice was verbal and undocumented may be relevant to the reasonableness of the defendant's reliance on the advice, but does not necessarily preclude the possibility that the facts of a particular case may establish justification," the court said.

'Infirm' consultation insufficient

TechServe Alliance, a national trade association of information technology and engineering staffing solutions firms, appeared in the case as amicus curiae. Its attorney, William Davidson, said that the holding is limited.

"The Supreme Court expressly recognized what it earlier had already impliedly recognized in 1998 in *Kallok v. Medtronic*," Davidson wrote in an email to Minnesota Lawyer. "In *Sysdyne* the Supreme Court simply made clear that advice of counsel 'may' be one basis for a defending party to establish a justification defense. It is not the only way to establish the justification defense. Whether the justification defense has been established is a fact issue, and the burden of proof to establish justification remains on the defendant. The justification defense continues to evade precise definition and will remain a fact-intensive inquiry, whether based on advice of counsel or otherwise.

"An assertion that one 'relied on counsel' will not automatically absolve an interfering party; the Supreme Court made clear in footnote 3 that reliance on counsel does not 'per se justifi[y] tortious interference with contract.' And the court reiterated that an 'infirm' consultation with counsel will defeat an attempted justification defense based on the advice of counsel. For advice of counsel to potentially justify interference with a contract, there must be a reasonable inquiry." Davidson wrote.

But the association itself is disappointed with the decision because it believes it has the potential to weaken the ability of employers to enforce reasonable noncompete agreements through tortious interference claims, it said in an email provided by Davidson.

Sokolowski said the opinion had two takeaways for lawyers: "Encourage your clients to get a legal opinion on the enforceability of restrictive covenants before making a hiring decision," and "Get all the facts from your client surrounding the prospective hiring to the lawyer providing the advice," he said.