

Ballard Spahr a Victor in Suit Filed Against it by Potential Client

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A Montgomery County jury vindicated Ballard Spahr Andrews & Ingersoll Monday in a breach of fiduciary duty suit brought against the firm by a man seeking between \$17 million to \$30 million in lost profits plus interest and punitive damages.

Plaintiff Saul R. Epstein originally claimed the firm and Alan S. Kaplinsky, the firm's consumer financial services group chairman, committed legal malpractice, breached their fiduciary duty and interfered with a prospective contractual relationship, according to court documents. In *Epstein v. Kaplinsky*, Epstein claimed the firm shared his prospective business interests with another firm client involved in similar work, according to court documents.

An 11-to-1 jury found that Ballard Spahr owed a duty to Epstein, but found by the same margin that neither Kaplinsky nor the firm breached that duty, according to Ballard Spahr partner Darryl May who acted as in-house counsel for the firm during the case.

Epstein dropped the legal malpractice claim because it became "superfluous" under Pennsylvania law, which allows for a breach of fiduciary duty claim to include both a negligent or intentional breach, according to H. Robert Fiebach of Cozen O'Connor, who represented Ballard Spahr and Kaplinsky.

Epstein had met with Kaplinsky and Ballard partner Jeremy Rosenblum in October 1998 about potential representation of a payday lending company he was looking to create. At the meeting, Epstein disclosed the details of his business plan and sought advice on a legal opinion he received from another firm that approved the plan, according to court documents.

He also asked if Kaplinsky knew of any banks interested in partnering with him in this plan. Ballard Spahr said in court documents that Kaplinsky had suggested a firm client, Crusader Savings Bank, as a potential partner because he knew the client was interested in expanding its services.

Famed Florida litigator Roy Black of Black Srebnick Kornspan & Stumpf represented Epstein along with Boca Raton-based Lance W. Shinder and local counsel Marc R. Steinberg, managing partner of Rubin Glickman Steinberg & Gifford in Lansdale, Pa. His attorneys said in court documents that Crusader was never mentioned at the meeting with Epstein and Kaplinsky and that Epstein met with Crusader, and its then executive -- now gubernatorial candidate -- Tom Knox, on his own in February 1999.

In the meantime, Ballard Spahr had taken on representation of McKenzie Cash Advance, a company that was being investigated for not having a bank as a partner in its payday loan program, according to court documents.

Epstein said he created a proposed business plan with Crusader and called Kaplinsky on Feb. 8, 1999, to

discuss his representation of the venture. He said Kaplinsky did not inform him that the firm was now representing McKenzie, according to court documents.

Both parties agree that Kaplinsky had suggested to McKenzie, as the firm alleges he had to Epstein, that Crusader might be a viable banking partner. Kaplinsky said in court documents that he did not share Epstein's business plan with McKenzie and had made this suggestion to the company in January, a month before Epstein got back to Kaplinsky about a deal he had potentially set up with Crusader.

Fiebach said the firm agreed that it owed a fiduciary duty to Epstein, as the jury found in the first question of the verdict sheet. Regardless of whether Epstein was a client, potential client or former potential client, Fiebach said the firm agreed it had a duty not to disclose anything from Epstein's business plan or the firm's discussion with Epstein in October 1998. Fiebach said both sides stipulated at trial that no duty was breached from information obtained in October. He said the plaintiff contended instead that Kaplinsky breached a fiduciary duty after the Feb. 8 phone call by then telling McKenzie about Crusader's interest in payday lending after Kaplinsky knew about Epstein's possible deal with Crusader.

Ballard Spahr maintains that it told McKenzie about Crusader's interest a month before in January, Fiebach said. The firm had previously prepared a 10-K filing for Crusader that was submitted to the U.S. Securities and Exchange Commission that outlined that part of the company's business plan was to enter into "niche businesses that promised high rates of return without the need for opening or acquiring additional branches," according to court documents.

Fiebach said Kaplinsky testified that he understood that plan to include the possibility of payday lending.

In combating Epstein's claim that the firm interfered with a contractual relationship between Epstein and Crusader, the firm put Knox and former Crusader executive Bruce Levy on the stand to show that the bank was never interested in doing a deal with Epstein, Fiebach said. The jury found in an 11-to-1 vote that Epstein had no prospective contractual relationship with Crusader.

McKenzie and Crusader ultimately ended up going into business and Epstein's proposed company never did, according to court documents.

Epstein argued in court documents that Ballard Spahr improperly disclosed confidential information to another client to Epstein's detriment and created a conflict of interest when it "pitted Epstein and McKenzie as competitors for a partnership in the payday loan business with Crusader Bank."

He also alleged the firm "sabotaged" his deal and helped push the McKenzie-Crusader deal through while representing all three clients.

Ballard Spahr said in court documents that Epstein made it a habit of meeting with attorneys only to get the names of potential bank partners, and had no intention of signing engagement letters with these firms. The firm said Barry Abelson of Pepper Hamilton was the only attorney that ever officially represented Epstein since 1997.

At trial, Epstein originally brought on his brother-in-law, Shinder, who had connections with Black, according to May. Black handled the opening statements and closing arguments and handled questioning of most of the witnesses, May said.

Black gained fame as a litigator in 1991 when he won an acquittal for William Kennedy Smith on rape charges. He currently represents Rush Limbaugh on charges related to the commentator's alleged misuse of prescription drugs. Black participated in a short-lived television show titled "The Law Firm," that was modeled off of "The Apprentice."

"It was a great challenge to show that I could go toe-to-toe and better with this legendary lawyer,"

Fiebach said of going up against Black.

Ballard Spahr Chairman Arthur Makadon said he is "tremendously gratified by the verdict and the jury's patience and the fairness with which ... [Montgomery County President Judge S. Gerald] Corso conducted the trial." He said it's regrettable that suits like these are brought, but it's gratifying to see this result.

Makadon said law firms fear these kinds of suits because a firm is an easy target and one can never know how a jury will interpret these types of cases.

When asked whether Makadon thought the increasing nature of attorneys offering business advice on top of legal advice would result in an increase in this type of case, Makadon said it has more to do with the competitiveness of law firms.

Firms don't always screen clients as carefully as they should given the focus on bringing in new work, he said.

"Sometimes you get what you wish for and clients bring baggage you don't expect and you end up with a very expensive lawsuit," Makadon said.

There was an attempt to settle this case before trial, but Fiebach said no formal offers ended up on the table. The parties participated in mediation before former judge Diane M. Welsh of JAMS on Nov. 15, 2006, but were unable to reach a conclusion.

Epstein was seeking between \$17 million and \$30 million in lost profits, plus interest from 1999 on and punitive damages. Montgomery County Common Pleas Judge Arthur R. Tilson granted during pre-trial motions Epstein's motion to seek punitive damages. Corso presided over the trial.

Fiebach said the punitive damages portion of the case was bifurcated. The same jury would have heard testimony on punitive damages issues had the liability portion gone in Epstein's favor and the judge determined punitive damages applied, he said.

The original demand in the case was for \$50 million in damages, not including punitives, Fiebach said. That was brought down to \$30 million before trial and then to \$16 million during trial, he said.

The jury was selected May 27 and closings concluded Monday. The case was given to the jury around 3:45 p.m. and a verdict was returned at 5:45 p.m.

While declining to comment about the case, Steinberg did say that an appeal of the verdict is being considered. Black and Shinder didn't immediately respond to calls for comment by press time.

Lawrence Fox of Drinker Biddle & Reath served as expert witness on legal ethics for the defense. Both May and Fiebach said he made a "tremendous" impression on the jury. Charles D. Gullickson of South Dakota testified as a defense expert as to the regulatory environment of payday lending. May said they didn't feel the need to put their damages expert on the stand after Fiebach cross-examined Epstein's damages expert.

Epstein's expert witnesses were damages expert Jeffrey Sklar and legal ethics expert and law professor Nancy Moore of Boston University.