

# Business & Securities Law Forum

The newsletter of the Illinois State Bar Association's Section on Business & Securities Law

## Attorneys are subject to malpractice actions for mishandling shareholder derivative claims, but not by investors asserting claims in their individual capacities and not by former shareholders

BY MICHAEL R. KARNUTH

In *Stevens et al. v. McGuire Woods LLP*, 2015 IL 118652 (Sept. 24, 2015), the Illinois Supreme Court held that shareholders cannot sue (in their individual capacities) a corporation's attorneys because the

attorneys' duties runs to the corporation only, individual shareholder recoveries are not available under derivative claims, and shareholders cannot pursue

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## Guidance for attorneys in dealing with cybersecurity risks

BY LISA JUNGMAN AND KAREN TOBIN, SMITH AMUNDSEN, LLC

The recent cyberattacks and data breaches in 2014 on Target, Home Depot, Sony Pictures Entertainment, just to name a few, illustrate that we can't ignore the

potential risks afforded by complacency in protecting the electronic information obtained from our clients. Such a data

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## Attorneys are subject to malpractice actions

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derivative claims for the corporation if they have already divested themselves of the company's shares.

In *Stevens*, plaintiffs were former minority shareholders in Beeland Management LLC ("Beeland"), who hired the law firm of McGuireWoods LLP ("McGuireWoods") to bring individual and derivative claims against Beeland's managers, owners and majority shareholder for misappropriating Beeland's trademarks and other intellectual property. *Id.* at ¶3. After the trial court dismissed several counts without prejudice, plaintiffs retained new counsel to file an amended complaint, which added Beeland's corporate counsel, Sidley Austin LLP ("Sidley"). *Id.* at ¶4. The trial court dismissed plaintiffs' individual claims against Sidley on the ground that plaintiffs lacked standing to sue Sidley in their individual capacities because Sidley's duty ran solely to the corporation and not to its individual shareholders. *Id.* The trial court also dismissed plaintiffs' derivative claims as untimely. *Id.*

Thereafter, plaintiffs settled their claims against the remaining defendant (the owner and majority shareholder), the entire case was dismissed with prejudice and plaintiffs relinquished all their ownership interest in Beeland. *Id.* at ¶5. Shortly thereafter, plaintiffs filed a one-count complaint against McGuireWoods for malpractice, for failing to timely assert claims against Sidley. *Id.* at ¶6.

Applying long-standing legal malpractice law, the Illinois Supreme Court recognized that for plaintiffs to succeed they "must establish what the result in the underlying action would have been, absent the alleged negligence." *Id.* at ¶12 (citing *Eastman v. Messner*, 188 Ill. 2d 404, 411 (1999)). In framing its analysis, the Court importantly found that "plaintiffs are suing McGuireWoods solely in their *individual capacities*." *Id.* at ¶13 (emphasis added). As such, the Court concluded that "plaintiffs ... cannot possibly show that ... they would have recovered monetary damages from the timely assertion of their claims against

Sidley" in either their individual capacities or derivatively. *Id.* at ¶14.

With respect to plaintiffs' individual claims, the Court agreed with the lower courts that "plaintiffs lacked any and all standing to sue Sidley" because Sidley's duties were confined to the Company, Beeland, not its shareholders, and "[g]iven this, McGuireWood's failure to assert plaintiffs' individual claims against Sidley in a timely manner cost plaintiffs precisely nothing." *Id.* Having no claim against Sidley under this theory, plaintiffs had no basis to pursue a similar claim against McGuireWoods.

As for plaintiffs' derivative claims against Sidley, the Court focused primarily on whether plaintiffs would have recovered damages in their individual capacities in the underlying action. The Court found the answer to that question to be an "insurmountable problem," in that plaintiffs were unable to recover anything "in their *individual capacities* ... because derivative claims always and only belong to the corporation on whose behalf they are brought, and any damages awarded in a derivative suit flow exclusively and directly to the corporation, *not* to the nominal plaintiffs. *Id.* at ¶15 (emphasis supplied) (citing *Brown v. Tenney*, 125 Ill.2d 348, 355-57 (1988)). The Court noted that this principle was well recognized under common law and codified in the Limited Liability Company Act. *Id.*

Consequently, the Court rejected plaintiffs' argument that their malpractice claim can be supported by indirect damages available to shareholders in derivative actions. Although indirect damages are available in derivative actions, in the form of an increase in the company's stock price, they are not available as damages in malpractice actions brought by shareholders in their individual capacities. *Id.* at ¶16. The Court also noted that plaintiffs were not just seeking an indirect benefit, but also direct "damages in excess of \$10 million" in their *individual capacities* based upon McGuireWoods's

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Published at least four times per year. Annual subscription rates for ISBA members: \$25.

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alleged failure to assert *derivative* claims.” *Id.* at ¶17 (emphasis supplied). In refusing plaintiffs’ arguments, the Court reasoned that to rule in plaintiffs favor would put plaintiffs in a “vastly superior position to that which they would have been in had they prevailed in the underlying case” because had McGuireWoods prevailed, the resulting judgment or settlement would have remitted entirely and directly to Beeland, with plaintiffs only benefiting indirectly. *Id.* at ¶17. The Court emphasized that “[t]his is entirely inappropriate and absolutely proscribed by our case law. *Id.* (citing *Eastman v. Messner*, 188 Ill. 2d 391, 399-400 (2010) (holding that the plaintiff in a legal malpractice suit can be in no better position by bringing suit against the attorney than if the underlying action had been prosecuted successfully)).

The Court also rejected plaintiffs’ claim that finding McGuireWoods not liable would render attorneys handling derivative actions for minority shareholders immune to legal malpractice claims. The Court pointed out that a number of parties could have sued McGuireWoods, including the Company, Beeland, who owns the claims that plaintiffs sought to bring derivatively

against Sidley, and the remaining Beeland shareholders. *Id.* at ¶21 (citing *Lower v. Lanmark Mutual Fire Ins. Co.*, 151 Ill. App. 3d 471, 473 (1986) (“plaintiff in a shareholder’s derivative suit must have been a shareholder at the time of the transaction of which he complains and must maintain his status as a shareholder throughout the entire pendency of the action.”); 805 ILCS 180/40-5 (2008)).<sup>1</sup>

On the last point, the Court found it important “to state explicitly,” even “though the parties do not raise it,” that shareholders, including the plaintiffs here, do not have standing to sue on a malpractice claim involving a “failure to assert derivative claims” where the shareholders no longer own their shares. *Id.* at ¶¶22-23. Without having a financial interest in the corporation the shareholder no longer has a derivative interest on the corporation’s behalf and, therefore, no standing to sue derivatively. *Id.* (“having now relinquished their ownership interest in Beeland, plaintiffs likewise relinquished their ability to ‘champion’ Beeland’s claims against Sidley, including by extension whether McGuireWoods was negligent for failing to assert those claims in a timely

manner.”).

## Conclusion

The Court’s holding reaffirms the ownership and distribution rules of derivative claims. Only shareholders who continue to own shares of a company may assert derivative claims and recoveries obtained in derivative lawsuits inure solely to the benefit of the company. Shareholders looking to sue corporate attorneys under facts similar in *Beeland* may do so only derivatively and malpractice actions against attorneys who botch derivative claims cannot be brought by shareholders in their individual capacity. ■

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1. The Court also refused to apply equitable principles to provide plaintiffs a remedy because it “is ... settled ... both at common law and by statute” that “shareholders cannot recover personally on ... derivative claims.” *Id.* at ¶¶19-20.

## Guidance for attorneys in dealing with cybersecurity risks

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breach or cyberattack could be devastating to any lawyer or law firm’s business. But while most lawyers are well intentioned about keeping client confidences, few lawyers have reframed how they think about protecting their clients’ private information in the wake of an explosion of technological advances.

Many law firms mistakenly assume that their Technology Services Division has implemented adequate safeguards to prevent a data breach, or the loss of private, sensitive, or confidential information. This reliance disregards the biggest risk for lawyers and law firms that comes with technology: Human error.

The advances in technology create numerous circumstances in which

lawyers, through their own blunders, unwittingly reveal client confidences or violate attorney-client privilege. The examples are numerous: A thumb drive or other portable device with confidential information may be misplaced or stolen, a lawyer or secretary may misaddress an email containing confidential information, a lawyer may send an email to a client to which a third party has access, thereby putting the attorney-client privilege at risk, or a lawyer may innocently click on a link in a “phishing email” that will download malware onto a network targeted by the hacker to obtain confidential information.

Just how big of a risk is the human error factor for lawyers and firms? It is difficult to obtain reliable statistics documenting the

vulnerability of law firms to data breaches, but the few statistics available demonstrate that human error prevention should be at the top of the list when addressing law-firm cybersecurity. A 2014 report by BakerHostetler noted the causes of the data breach breakdowns were as follows: employee negligence 37%, phishing and malware 25%, outside theft 22%, and internal theft 16%. Employee negligence includes the human error factor of an inadvertent disclosure. Further, Mandiant, a security consulting firm, reported in 2012 an estimate that 80% of the 100 largest American law firms had some malicious computer breaches in 2011.

State ethics committees and bar associations have generally been slow

to respond to help lawyers navigate the implications of the exploding technological landscape. In the last few years, however, the American Bar Association has recognized the growing risk that technology imposes on lawyers. In 2012, it amended its model rules and imposed a duty upon lawyers to understand the risks of technology. More specifically, a comment was added to Rule 1.1, Competence, stating that, “a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. (Comment 8 to Model Rule 1.1).

The ABA also warned lawyers about the dangers of using email communications to communicate with their clients in Formal Opinion 11-459. This opinion specifically cautions lawyers against emailing clients where there is a significant risk that a third party, such as an employer, may have access to the client’s email account. Communicating on such an account jeopardizes the attorney-client privilege and potentially violates Model Rule 1.6. Rule 1.6 requires a lawyer to refrain from revealing “information relating to the representation of a client unless the client gives informed consent.” In addition, Comment [16] observes that a lawyer must “act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”

### What can lawyers do to be more diligent?

Lawyers need to have conversations with clients about the means of communication and cautioning the risks that come with it. Formal Opinion Rule 11-459 advises lawyers to warn clients about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access.

Learning and using the benefits of encryption technology can also reduce the risk of human error. Encryption is the

process of encoding information in such a way that only authorized parties can read it via a decryption key. In other words, if you do not have the key, you cannot view the content. Devices including laptops, thumb drives, portable hard drives, CD’s and DVD’s, along with emails can be encrypted. Encryption technology provides an additional thick layer of protection and demonstrates an intent to keep a communication confidential.

Presently, neither the Illinois State Bar Association nor the American Bar Association has issued a mandate for encryption for all substantive communications. So how does a lawyer know when to encrypt a device or email? On October 15, 2015 the Illinois Supreme Court provided additional guidance for attorney’s by enacting the following amendments to the Illinois Rules of Professional Conduct. These Rules became effective on January 1, 2016. Under Rule 1.1 Section 8. Maintaining Competence, it states “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engage in continuing study and education and comply with all continuing legal education requirements to which a lawyer is subject.” In addition Rule 1.6 Confidentiality of Information, was amended to add “...***(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.***” In the comment section for this new rule it states that factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of the disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the additional safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent the clients (e.g. by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement

special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

In summary, maintaining a security program is imperative. As the ABA stressed in its Report to the Delegates by the Cybersecurity Legal Task Force Section of Science and Technology Law, the maintenance of a security program has moved beyond the realm of technical personnel; the maintenance of a security program is a responsibility that all senior executives, attorneys, general counsels, compliance officers and government officials should embrace. ■

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**Thursday, 07/07/16- Webinar—**  
Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

**Friday, 07/08/16- Teleseminar—**What Business Lawyers Need to Know About Licenses, Part 2. Presented by the ISBA. 12-1 pm.

**Tuesday, 07/12/16- Teleseminar—**  
Income Tax Issues for Estate Planners, Part 1. Presented by the ISBA. 12-1 pm.

**Wednesday, 07/13/16- Teleseminar—**  
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**Friday, 07/15/16—**The Ethics of Creating Attorney-Client Relationships in the Electronic Age. Presented by the ISBA. 12-1 pm.

**Tuesday, 07/19/16- Teleseminar—**  
Tricks and Traps in the Assumption of Liabilities in Transactions. Presented by the ISBA. 12-1 pm.

**Thursday, 07/21/16- Teleseminar—**  
Drafting Sales Agents' Agreements. Presented by the ISBA. 12-1 pm.

**Thursday, 07/21/16- Webinar—**  
Introduction to Boolean (Keyword) Searches for Lawyers. Presented by

the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

**Friday, 07/22/16- Teleseminar LIVE REPLAY—**Ethics of Going Into Business With Clients. Presented by the ISBA. 12-1 pm.

**Tuesday, 07/26/16- Teleseminar—**  
Buying and Selling Distressed Real Estate, Part 1. Presented by the ISBA. 12-1 pm.

**Wednesday, 07/27/16- Teleseminar—**  
Buying and Selling Distressed Real Estate, Part 2. Presented by the ISBA. 12-1 pm.

## August

**Tuesday, 08/02/16- Teleseminar—**Due Diligence in Real Estate Acquisitions. Presented by the ISBA. 12-1 pm.

**Wednesday, 08/03/16- Teleseminar LIVE REPLAY—**2016 UCC Update – Secured Transactions, Notes, Leases, Sales & More. Presented by the ISBA. 12-1 pm.

**Thursday, 08/04/16- Webinar—**  
Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

**Monday, 08/08/16- Teleseminar LIVE REPLAY—** Post-Closing Adjustments & Issues in Business Transactions. Presented by the ISBA. 12-1 pm.

**Tuesday, 08/09/16- Teleseminar—**  
Charging Orders in Business Transactions. Presented by the ISBA. 12-1 pm.

**Wednesday, 08/10/16- Teleseminar—**  
Role of Public Benefits in Estate Planning. Presented by the ISBA. 12-1 pm.

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Real Estate Finance, Part 2. Presented by the ISBA. 12-1 pm.

**Tuesday, 08/23/16- Teleseminar—**  
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**Wednesday, 08/24/16- Teleseminar—**  
Sales of Family Businesses: An Interdisciplinary Approach, Part 1. Presented by the ISBA. 12-1 pm.

**Thursday, 08/25/16- Teleseminar—**  
Sales of Family Businesses: An Interdisciplinary Approach, Part 2. Presented by the ISBA. 12-1 pm.

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**Wednesday, 08/31/16- Teleseminar—**  
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## September

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Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

**Thursday, 09/08/16- Webinar—**  
Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association –

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12:00- 1:00 pm.

**Thursday, 09/08/16- Webcast—**  
Monetizing Intellectual Property. Presented  
by IP. 12:30 p.m. – 2:15 p.m.

**Wednesday, 09/14/16- Webcast—Hot**  
Topic: Union Dues/Fair Share—Friedrichs  
v. California Teachers Association.  
Presented by Labor and Employment.  
10:00 a.m. – 12:00 p.m.

**Thursday, 09/15/16- CRO—Family**  
Law Table Clinic Series (Series 1).  
Presented by Family Law. 8:30 am – 3:10  
pm.

**Friday, 09-16-06- CRO and Live**  
**Webcast—**The Fear Factor: How Good  
Lawyers Get Into (and avoid) Bad Ethical  
Trouble. Master Series Presented by the  
ISBA—WILL NOT BE RECORDED OR  
ARCHIVED. 9:00 a.m. – 12:15 p.m.

**Thursday, 09-22-16- Webcast—Family**  
Law Changes and Mediation Practice.  
Presented by Women and the Law. 11:00  
a.m. – 12:00 p.m.

**Thursday, 09/22/16- CRO and**  
**Webcast—**Recent Developments in  
E-Discovery in Litigation. Presented by  
Antitrust. 1:00- 5:15 pm.

**Thursday, 09/22/16- Webinar—**  
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Searches for Lawyers. Presented by  
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12:00- 1:00 pm.

**Monday, 09/26/16- Friday, 09/30/16—**  
**CRO—**40 Hour Mediation/Arbitration  
Training Master Series. Presented by the  
ISBA. 8:30 am – 5:45 pm each day.

**Friday, 09-30-16—DoubleTree**  
**Springfield—**Solo and Small Firm Practice  
Institute Series. Title TBD. Presented by  
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## October

**Thursday, 10/06/16- Webinar—**  
Introduction to Legal Research on

Fastcase. Presented by the Illinois State  
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**Thursday, 10-06-16—Webcast—**Nuts  
and Bolts of EEOC Practice. Presented by  
Labor and Employment. 11:00 a.m. – 12:30  
p.m.

**Monday, 10-10-16—CRO and Fairview**  
Heights, Four Points Sheraton—What  
You Need to Know to Practice before  
the IWCC. Presented by Workers  
Compensation. 9:00 a.m. – 4:00 p.m.

**Thursday, 10/13/16- Webinar—**  
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Research on Fastcase. Presented by  
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**Webcast—**From Legal Practice to What's  
Next: The Boomer-Lawyer's Guide to  
Smooth Career Transition. Presented by  
Senior Lawyers. 12:00 p.m. to 5:00 p.m.

**Wednesday, 10-19-16—DoubleTree**  
**Bloomington—**Real Estate Law Update  
2016. Presented by Real Estate. 8:15 a.m. –  
4:45 p.m.

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**Friday, 10/21/16- Galena, Eagle**  
**Ridge Resort—**Obtaining a Judgement  
and Collections Issues. Presented by:  
Commercial Banking, Collections, and  
Bankruptcy. 8:50 am - 4:30 pm.

**Friday, 10-28-16—CRO—Solo and**  
Small Firm Practice Institute Series. Title  
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## November

**Wednesday, 11-02-16—Linder**  
**Conference Center, Lombard—**Real  
Estate Law Update 2016. Presented by Real

Estate. 8:15 a.m. – 4:45 p.m.

**Thursday, 11/03/16- Webinar—**  
Introduction to Legal Research on  
Fastcase. Presented by the Illinois State  
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Members Only. 12:00- 1:00 pm

**Thursday, 11/10/16- Webinar—**  
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Research on Fastcase. Presented by  
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12:00- 1:00 pm.

**Friday, 11-11-16—CRO and live**  
**Webcast—**Motion Practice from Pretrial  
through Post Trial. Presented by Civil  
Practice and Procedure. 8:50 a.m. - 4:00  
p.m.

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Law Table Clinic Series (Series 2).  
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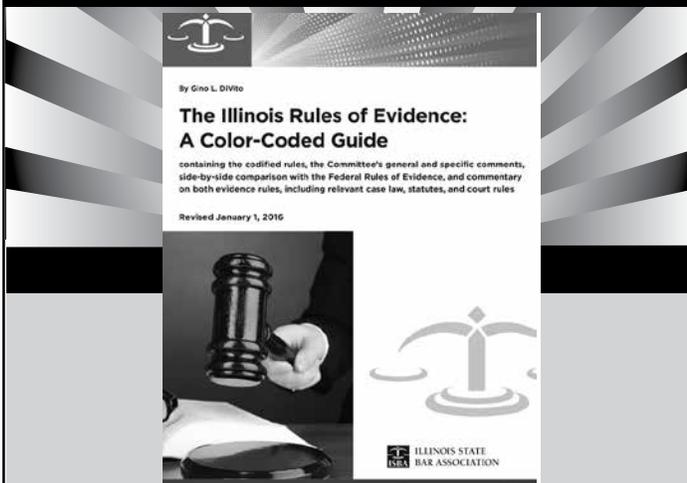
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