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IN THIS ISSUE

The in pari delicto defense can be a useful tool for defense practitioners in legal malpractice claims where a former client is attempting to shift blame for his own malfeasance. This article provides an overview and analysis of the defense and then discusses a recent North Carolina case in which the North Carolina Court of Appeals applied the doctrine to bar the claim of a client who lied under oath in a criminal proceeding.

Clients Barred from Blaming Lawyer for Consequences of Clients' Illegal, Immoral or Wrongful Conduct: North Carolina Court of Appeals Reaffirms *In Pari Delicto* Defense in Legal Malpractice Actions

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Clients often attempt to shift blame to their lawyers for their own acts of malfeasance. A criminal client may allege that his lawyer advised him to lie under oath. A business client may contend that her lawyer told her that it was okay to misrepresent the company's financial condition. A bankruptcy client may claim that his lawyer advised him that it was okay to make fraudulent disclosures in bankruptcy filings. When the client faces the consequences of his or her own wrongdoing, the client often sues the lawyer for damages that flowed from their misconduct. Depending on the jurisdiction and subject to certain limitations, lawyers may avoid liability for such claims by asserting the defense of *in pari delicto*, which translates literally to mean "in equal fault."

This article will discuss the application of the *in pari delicto* doctrine to legal malpractice claims and the rationales relied upon by various courts to bar the otherwise potentially meritorious claims brought by clients. The article will then review the 2016 opinion in *Freedman v. Payne* in which the North Carolina Court of Appeals relied on the defense of *in pari delicto* to dismiss the plaintiff's claim for legal malpractice.[1]

Evolution of the *In Pari Delicto* Defense

In pari delicto's common law origins can be traced as far back as the late 1700's.[2] Courts since that time have upheld the doctrine as a defense in a variety of cases. However, courts were slow to recognize the doctrine as a defense in legal malpractice actions. The first reported decision allowing a lawyer to avoid liability in a legal malpractice case based on *in pari delicto* was the 1980 Illinois opinion of *Mettes v. Quinn*.[3] In *Mettes*, the client sought damages against her attorney for negligently advising her to make fraudulent misrepresentations in connection with the procurement of a settlement agreement. When the client's misrepresentations came to light, the court in that proceeding set the settlement agreement aside. A subsequent and less favorable agreement was subsequently reached in that separate proceeding. The client sought damages against her attorney for the damages she claimed to have incurred as a result of the less favorable settlement agreement. The court affirmed the dismissal of the client's action on the grounds that the law would not allow a client to profit from her own fraud.[4] In the last 40 years, there has been a shift toward a recognition of the defense in legal malpractice actions.

At least 19 states have recognized the principle that a client's illegal, fraudulent, immoral or unscrupulous conduct may serve as a bar to the client's claim against the lawyer who gave advice regarding the conduct. Most courts recognizing this

[1] 784 S.E.2d 644 (N.C. Ct. App. 2016).
[2] *See Stout v. Rassel,* 2 Yeates 334 (Pa. 1798).
[3] 411 N.E.2d 549 (Ill.App.1980).
[4] *Id.* at 551-552. In the last 40 years, there has been a shift toward a recognition of the defense in legal malpractice actions.

principle have applied the doctrine of *in pari delicto*, but others have relied on the doctrine of unclean hands.[5] The reasons proffered by these courts and theories relied upon are wide-ranging. Courts like *Mettes* have reasoned simply that clients should not be allowed to benefit from their own wrongdoing.[6] Stated another way, "no court will lend its aid to a man who grounds his action upon an immoral or illegal act."[7]

There is very little consistency among the states that have recognized the *in pari delicto* defense in legal malpractice claims.[8] A number of courts require that the client's fault must be equal to or greater than the fault of the attorney.[9] One of the factors that these courts take into consideration in making this determination is the complexity of the legal issues involved. In cases where a client lies under oath, this analysis is easy.[10] In other cases, the illegality or egregiousness of the client's conduct might not be as readily comprehended by the client as it would be by the attorney, who is a legal expert. This was the case in an Oregon malpractice action in which the client alleged that he relied on his attorney's advice in tendering and subsequently dishonoring a check in a scheme to recover personal property from a third party. The third party was able to present evidence of the fraudulent scheme and recover damages. The client sought to shift the blame and the loss to his attorney. The attorney raised *in pari delicto* as a defense to the client's claim. The court refused to bar the plaintiff's action under the *in pari delicto* doctrine on the grounds that the lawyer defendant was in a superior position to appreciate the wrongfulness of the plaintiff's conduct.[11]

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[5] Ronald E. Mallen, Legal Malpractice § 22:11 (2017 ed.) (providing an extensive summary of reported decisions in all states).

[6] *Mettes*, 411 N.E.2d at 552-53; *see also Heyman v. Gable, Gotwals, Mock, Schwabe, Kihle, Gaberino,* 994 P.2d 92, 94 (Okla. Civ. App. 1999) ("It would be contrary to public policy to allow the clients here to benefit from their own confirmed fraud and recover a monetary judgment from the firm to indemnify them for their fraud."); *Evans v. Cameron*, 360 N.W.2d 25, 29 (Wis. 1984) (court refused to allow client to avoid consequences of his misconduct by recovering damages from attorney as result of following attorney's advice to lie under oath at the first meeting of creditors in a bankruptcy proceeding); *Pantely v. Garris, Garris & Garris, P.C.*, 447 N. W.2d 864, 867 (Mich.Ct.App. 1989) ("[C]ourts should not lend their aid to one who founds a cause of action on an immoral or illegal act.").

[7] *Fowler v. Scully*, 72 Pa. 456, 467 (1872) (quoting sources originating with Holman v. Johnson, 98 Eng. Rep. 1120 (1775)).

[8] *See Official Comm. Of Unsecured Creditors of Allegheny Health Educ. & Res. Found. v. PriceWaterhouseCoopers*, 607 F.3d 346, 350 n.2 (3d Cir. 2010) (describing the *in pari delicto doctrine* as a "murky area of law" and "an ill-defined group of doctrines that prevents courts from becoming involved in disputes in which adverse parties are equally at fault");

[9] *See Turner v. Anderson*, 704 So.2d 748, 751 (Fla. Dist. Ct. App. 1998) ("client may not be barred where the client's fault is far less than counsel's. . . ."); *Jones v. Hyatt Legal Services*, 132 B.R. 853, 860-61 (Bankr.S.D. Ohio 1991) (applying rule that client must be at least equally at fault with attorney).

[10] *See Pantely*, 447 N.W.2d at 868 ("A law degree does not add to one's awareness that perjury is immoral and illegal, any more than an accounting degree adds to one's awareness that tax fraud is immoral and illegal.").

[11] *McKinley v. Weidner*, 698 P.2d 983, 986 (Or. Ct. App. 1985).

Some courts have relied upon the doctrine of unclean hands to dismiss legal malpractice claims that involved clients' criminal acts or misconduct.[12] Because unclean hands is more expansive in its application than *in pari delicto*,[13] there might be an advantage to relying on this defense over *in pari delicto*. *In pari delicto* generally precludes a plaintiff from recovering damages only if their fault is equal to or greater than the defendant.[14] In contrast, if a court finds that a plaintiff has unclean hands, it may dismiss the claim regardless of the mutuality of fault or wrongdoing.[15] In the context of a legal malpractice claim in which the plaintiff is seeking monetary damages, the unclean hands defense might not be available. Traditionally, courts have restricted the unclean hands doctrine to cases seeking equitable relief.[16] However, a number of courts no longer limit the unclean hands defense to equitable remedies.[17] This includes courts that have applied the defense in legal malpractice actions.[18] An Illinois court relied on the unclean hands doctrine to dismiss a client's legal malpractice action where the client alleged that he suffered damages as a result of the lawyer's negligent advice in connection with evading service in expected tax litigation.[19] The court noted that the client admitted to his illegal conduct in his verified complaint.[20] Without any discussion of the equitable nature of the unclean hands doctrine, the court affirmed dismissal of the client's case on the grounds that "[b]oth parties came to this court with 'unclean hands,' seeking relief from their wrongful conduct."[21]

Often times, courts appear to apply the doctrines of unclean hands and *in pari delicto* interchangeably. This was the case in a South Dakota decision where the Supreme Court of South Dakota considered a malpractice action in which an attorney and

[12] *See Blain v. Doctor's Co.*, 272 Cal. Rptr. 250, 258-59 (Cal. Ct. App. 1990) (holding that unclean hands doctrine barred legal malpractice claim by client seeking emotional distress damages where lawyer advised client to lie in deposition); *Kirkland v. Mannis*, 639 P.2d 671, 673 (Or. Ct. App. 1982) (holding that where the client and his attorney cooperated in perjury, client's unclean hands barred recovery).

[13] T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, 45 Am. Bus. L.J. 455, 489 (2008) (arguing that unclean hands doctrine is broader in its application than *in pari delicto*).

[14] *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985).

[15] *See Precision Instrument Mfg.Co. v. Auto Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) ("It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.").

[16] *See* T. Leigh Anenson, *Beyond Chafee: A Process-Based Theory of Unclean Hands*, 47 Am. Bus. L.J. 509, 516 (2010) (citing *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992)).

[17] *Id.* at 516, n.40 (noting that there are hundreds of cases that have applied the unclean hands defense against legal remedies).

[18] *See Makela v. Roach*, 492 N.E.2d 191, 195 (Ill. App. Ct. 1986) (holding that wife's unclean hands barred her malpractice action against attorney who advised her on plan to transfer marital assets from husband for purpose of defrauding husband's creditors).

[19] *Robins v. Lasky*, 462 N.E.2d 774 (Ill. App. Ct. 1984).

[20] *Id.* at 778.

[21] *Id.* at 779.

client conspired in backdating and forging a document.[22] After an extensive discussion of the history and application of the *in pari delicto* doctrine, the court affirmed the dismissal of the client's claim. The court held: "Because [the client] came to the court with unclean hands, and because his conduct was obviously wrongful and fraudulent, he was *in pari delicto* with [his attorney]."[23]

Other courts that have dismissed clients' claims on grounds of *in pari delicto* or unclean hands have relied on the rationale that an action for damages is not the appropriate remedy. These courts reason that such matters are more appropriately addressed in disciplinary actions against the attorney. A Massachusetts appellate court relied on the doctrine of *in pari delicto* to affirm dismissal of a bankruptcy client's legal malpractice action in which the client alleged that he relied on his attorney's advice in making misrepresentations in his bankruptcy filings and in committing perjury at his bankruptcy hearing.[24] The court held that "[a]n attorney's misconduct of advising clients to perform illegal acts should be discouraged by the threat of attorney disciplinary action, as opposed to clients filing suit against the attorney to recover damages incurred due to being caught."[25] In a Wisconsin case, the Supreme Court of Wisconsin similarly explained that the threat of disciplinary proceedings should be sufficient to deter attorneys from advising clients to perform illegal acts.[26]

A number of courts have suggested that the purpose of applying the *in pari delicto* doctrine to legal malpractice claims is to deter future misconduct. The Supreme Court of Iowa relied on the *in pari delicto* doctrine to dismiss a malpractice claim against a trademark firm where the client had made misrepresentations in affidavits submitted with a trademark renewal registration prepared by the firm.[27] The court acknowledged that the effect of its decision was to relieve the firm from civil liability for its participation in the deception but found that "[t]he interest in deterring misconduct by lawyers can be better addressed through grievance procedures designed to deal with the unethical actions of attorneys, rather than by rewarding one of the participants in the misconduct."[28] One commentator has suggested that deterrence could be better served by the application of comparative fault so that the client's recovery would be diminished accordingly.

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[22] *Quick and ZR Consulting, Inc. v. Samp*, 697 N.W.2d 741 (S.D. 2005).
[23] *Id.* at 747.
[24] *Choquette v. Isacoff*, 836 N.E.2d 329 (Mass. App. 2005).
[25] *Id.*at 335.
[26] *Evans v. Cameron*, 360 N.W.2d 25, 29 (Wis. 1985) (relying on *in pari delicto* defense to dismiss client's malpractice claim where bankruptcy client alleged that she relied on lawyer's advice in lying under oath at first meeting of creditors).
[27] *General Car and Truck Leasing System, Inc. v. Lane & Waterman*, 557 N.W.2d 274 (Iowa 1996) ("The purpose of the *in pari delicto* doctrine is to deter future misconduct by denying relief to one whose losses were substantially caused by his own fraud or illegal conduct.").
[28] *Id.* at 283.

Most of the cases that have applied the *in pari delicto* defense or unclean hands doctrine in legal malpractice actions have done so in cases involving illegal conduct by the plaintiff. The most common situations involve clients who lie under oath or commit financial crimes. However, other courts have shown a willingness to apply these doctrines more broadly to include misconduct that does not rise to the level of illegal conduct. The Court of Appeals of North Carolina barred a client's malpractice action against his attorney where the client's misconduct was described as "unethical" and "significant misconduct."[29] In an Oklahoma decision that relied on *in pari delicto* to dismiss the malpractice claim of a client who had pled guilty to defrauding the United States Internal Revenue Service, the court held that "where parties to an immoral or illegal transaction are *in pari delicto* with each other, each is estopped, as to the other, to take advantage of his own moral turpitude, illegal act, or criminal conduct for purposes of recovering damages for injuries sustained as a consequence of their joint wrong."[30] At least one commentator has criticized the broader application of *in pari delicto* to cases involving mere immorality.[31]

Exceptions to the *In Pari Delicto* Doctrine

Courts have created a number of exceptions to the *in pari delicto* defense. Even where a defendant can show that the plaintiff is equally culpable, a court may override the *in pari delicto* defense where one of these exceptions applies. For example, under the public interest exception, where a court finds that application of the doctrine would be contrary to public policy, the court may refuse to dismiss the case even where there is equal fault.[32] In the context of legal malpractice actions, courts appear hesitant to apply the public policy exception. A Michigan appellate court acknowledged the public policy exception in a legal malpractice action but refused to apply the exception to defeat the defendants' *in pari delicto* defense.[33] The plaintiff in that case admitted to committing perjury in a divorce proceeding but said that she did so in reliance on the advice of the defendants.[34] She argued that public policy dictated she be allowed to recover from her attorneys.[35] The court acknowledged that "fair-minded and conscientious observers could well conclude that the public interest in the integrity of the

[29] *Whiteheart v. Waller*, 681 S.E.2d 419, 423 (N.C. Ct. App. 2009) (no reference to plaintiff's conduct as being illegal).
[30] *Tillman v. Shofner*, 90 P.3d 582, 584 (Okla. Civ. App. 2004) (quoting *Bowlan v. Lunsford*, 54 P.2d 666, 668 (Okla. 1936)).
[31] See Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. Rev. 43, 71 ("By referring to 'immorality,' these courts greatly and imprecisely expand the range of offending conduct that might trigger the defense and, by requiring 'moral turpitude,' they raise all of the issues and disagreements that have surrounded that phrase.").
[32] *See* 1 Story, Commentaries on Equity Jurisprudence § 423, at 399-400 (14th ed. 1918) (footnotes omitted) ("[T]here may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may.").
[33] *Pantely*, 447 N.W.2d at 869.
[34] *Id.* at 868.
[35] *Id.*

Bar requires that errant members be called to task even if a perjuring client is the immediate beneficiary."[36] However, the court rejected the plaintiff's argument and dismissed her claim, noting that while "the public interest is served by discouraging attorney misconduct, it would be inappropriate to promote that interest by removing the damage to those who deliberately and willfully lie under oath. . . ."[37]

Another exception to the *in pari delicto* doctrine has been recognized in cases where the lawyer defendant seeks to impute the bad acts of managers or officers to the corporate entity. Ordinarily, bad acts of the officers or managers would be imputed to the corporate entity so that the corporate entity would be deemed equally at fault and, therefore, subject to the *in pari delicto* defense. However, under the adverse interest exception, if the manager or officer was acting adversely to the corporate entity, those acts may not be imputed and the corporate entity may not be subject to the *in pari delicto* defense.[38] The exception has been construed very narrowly so that it applies only where the manager was acting solely for his own benefit.[39] The adverse interest exception has been further limited by the sole actor rule. Under this rule, even if the plaintiff can satisfy the adverse interest exception, the defendant may still be able successfully to assert *in pari delicto* if it can show that the bad actor had sole control of the corporate entity.[40] Note that this is not limited to situations where the corporate entity has only one shareholder or officer. It has been applied in cases where there are multiple officers or managers, but the bad actors had complete control of the corporation.

The Freedman Decision

North Carolina first recognized the *in pari delicto* defense to a legal malpractice claim in *Whiteheart*.[41] In *Freedman*, the North Carolina Court of Appeals followed the reasoning from the *Whiteheart* decision to dismiss the case of a plaintiff who had lied under oath in a criminal case. The defendant in *Freedman* represented the plaintiff in the criminal case in which the plaintiff was charged with violations of the Clean Water Act. The plaintiff owned and operated a hog farm operation and was accused of discharging hog waste into a federal waterway in violation of the Act. During the criminal trial, the defendant negotiated a plea deal for the plaintiff. The plaintiff alleged that the defendant told the plaintiff that there was a "side deal" pursuant to which the prosecutor would "stand silent" during sentencing and not recommend incarceration and the plaintiff would not be debarred from federal farm subsidy

[36] *Id.*
[37] *Id.* at 869 (quoting *Evans v. Cameron*, 360 N.W.2d 25, 29 (Wis. 1985).
[38] *See Kirschner v. KPMG LLP*, 938 N.E.2d 941, 952 (N.Y. 2010).
[39] *See Baena v. KPMG LLP*, 453 F.3d 1, 8 (1st Cir. 2006).
[40] *See Reider v. Arthur Andersen, LLP*, 784 A.2d 464, 472 (Conn. 2001).
[41] 681 S.E.2d 419 (N.C. Ct. App. 2009).

programs. The plaintiff further alleged that the defendant told the plaintiff that he must not disclose the side deal to the court. The court sentenced the plaintiff to six months imprisonment and six months of house arrest. When the plaintiff discovered that there was no side deal, he sued the defendant for legal malpractice.[42]

The defendant filed a motion to dismiss in which he asserted *in pari delicto* as a defense to plaintiff's legal malpractice claim. Relying on *Whiteheart* , the trial court dismissed plaintiff's negligence claims.[43] On appeal, it appears that the sole argument of the plaintiff was that the trial court erred "because the *in pari delicto* doctrine does not apply to defendants' representation of [plaintiff] in a complex federal criminal prosecution and [plaintiff's] complaint does not establish as a matter of law his intentional wrongdoing."[44]

The court began its analysis by stating the general rule that "in a case of equal or mutual fault … the condition of the party in possession [or defending] is the better one."[45] The court next observed that the doctrine "prevents the courts from redistributing losses among wrongdoers."[46] The court discussed other cases in which courts "distinguished between wrongdoing that would be obvious to the plaintiff and 'legal matters so complex … that a client could follow an attorney's advice, do wrong and still maintain suit on the basis of not being equally at fault.'"[47] The plaintiff argued that the court should apply this distinction because the complaint did establish his intentional wrongdoing.[48]

The court rejected plaintiff's arguments, pointing out that plaintiff lied under oath in order to get the benefit of a side deal. The court held that the plaintiff "attempted to redistribute the loss, which the courts of [North Carolina] will not do."[49] In affirming the trial court's dismissal, the court acknowledged that the underlying criminal case may have been complex, but found that the illegality of his actions was not.[50]

Conclusion

Since the *Mettes* decision in 1980, courts seem to be receptive to the recognition of the *in pari delicto* defense in legal malpractice cases. This is true in North Carolina where, in just a seven-year period, courts have upheld the dismissal of two cases on the basis of *in pari delicto*. However, there is very little consistency among the states in the application of the defense. Defense lawyers asserting this defense on behalf of their lawyer clients must be familiar with the law of the jurisdiction in which they find themselves. In jurisdictions where there is not yet any

[42] *Id.* at 646-47.
[43] *Id.* at 647.
[44] *Id.*
[45] *Id.* at 648 (quoting *Skinner v. E.F. Hutton & Co.*, 333 S.E.2d 236, 239 (N.C. 1985)).
[46] *Id.* (citing *Whiteheart, 681 S.E.2d at 422.*
[47] *Id.* (citing *Whiteheart*, 681 S.E.2d at 422 (quoting *Pantely*, 447 N.W.2d at868)).
[48] *Id.* at 649.
[49] *Id.*
[50] *Id.*

precedent, defense attorneys must be prepared to rely on opinions from other states. Where there is no *in pari delicto* precedent for legal malpractice actions, they might want to assert unclean hands as a defense as well because of its more expansive application. In jurisdictions that allow the assertion of the equitable doctrine of unclean hands to actions seeking damages, this could be advantageous. Additionally, defense practitioners should argue that disciplinary proceedings provide a more appropriate redress for attorneys' misconduct. Finally, lawyers defending professionals should not limit assertion of the defense to matters involving illegal or criminal conduct by a client. Some courts may be receptive to application of the defense to a broader class of misconduct, including unscrupulous, immoral or unethical conduct.[51]

[51] *See Whiteheart*, 681 S.E.2d at 423 (applying *in pari delicto* based on the court's finding that the plaintiff had engaged in unethical and significant misconduct).

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