

The Professional Liability Law Blog

BRINGING PROFESSIONAL LIABILITY INFORMATION TO CALIFORNIA ATTORNEYS,
INSURANCE PROFESSIONALS, ACCOUNTANTS AND STOCK BROKERS



[An Attorney's Failure to Disclose His Inadequate Investigation of a Complaint Does Not Amount to Constructive Fraud](#)

Tuesday, October 12th, 2010

It is not uncommon for legal malpractice plaintiffs to attempt to convert garden-variety legal malpractice claims into claims for constructive fraud. A fraud claim gives rise to the possibility of punitive damages, and might be seen as having more appeal to a jury. In an unpublished decision issued on August 24, 2010, the United States District Court for the Eastern District of California rejected a creative effort to plead a claim against an attorney as one for constructive fraud. The case is *Tillman v. Tillman*, 2010 U.S. Dist. LEXIS 92655.

The client had retained attorneys to bring a wrongful death action against a trucking company, after the client's husband died in a single vehicle accident. Following a jury trial, the client obtained a judgment against the trucking company for \$4.95 million. Later, the decedent's son by a former marriage sued the client, the trucking company and the attorneys for having failed to join him in the underlying wrongful death action. The client then filed a third party complaint for constructive fraud (aka fiduciary fraud) against the individual attorney who had signed her wrongful death complaint. The client's position was that the attorney should have recognized and disclosed to her that she could be held liable to an omitted heir for omitting that heir from a wrongful death action.

In response to the attorney's motion to dismiss the constructive fraud claim, the client argued that the attorney had committed constructive fraud by: (1) signing the complaint in the underlying action, thereby representing to the client that he had conducted an adequate investigation into the facts and law of her case when he had not; and (2) failing to disclose to the client his inadequate investigation of the facts. The District Court rejected both of these theories, explaining that by signing a complaint, an attorney makes a representation to the court, not to his client. Further, and more importantly, the court explained, the gravamen of the claim against the attorney was one for legal malpractice, and such a claim "is not transmuted into a claim for fraud through the act of signing a complaint." Similarly, the court found no authority for the proposition that "a claim for legal malpractice may be converted into one for constructive fraud because the attorney failed to disclose his own malpractice."