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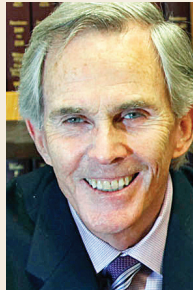
MOST EFFECTIVE LAWYERS - COMPLEX BUSINESS / CIVIL LITIGATION

TEW CARDENAS PAIR HELPED FIRM DEFEAT \$200M MALPRACTICE CLAIM

Joseph DeMaria and Thomas Tew
Tew Cardenas



Joseph DeMaria



Thomas Tew

Joseph DeMaria and Thomas Tew helped Rachlin Cohen & Holtz defeat a claim for \$200 million in professional malpractice damages that might have crippled the Miami accounting firm.

DeMaria and Tew, partners at Tew Cardenas in Miami, successfully defended Rachlin Cohen & Holtz and name partner Laurie S. Holtz by getting the \$200 million malpractice claim dismissed. In August, U.S. District Judge Gregory A. Presnell in Orlando ordered the case dismissed with prejudice.

Rachlin Cohen & Holtz, a subsidiary of New York-based professional services firm Marcum, had malpractice insurance but not enough to cover the nine-figure claim. "There is no reasonable amount of insurance that could protect a regional accounting firm from a \$200 million claim," DeMaria said.

The plaintiff, a bankrupt Orlando company, sought \$200 million from Rachlin Cohen because the company was facing a similar amount of financial liability for its participation in a scheme to steal payroll taxes.

"Trustees of failed businesses are suing anyone who's got [malpractice] insurance," Tew said, "and most of the time, that's bankers, accountants and lawyers."

Not every professional is fighting back, of course. Many quietly settle rather than risk

the results at trial. But Rachlin Cohen fought while other professionals retreated.

DeMaria and Tew said the favorable outcome for Rachlin Cohen could encourage other professional firms to fight malpractice claims from former business clients that go out of business.

"In this case, the trustee sued two law firms and two accounting firms," DeMaria said. "The two law firms paid to settle. One paid a little bit and the other one paid a lot. And the other accounting firm paid money to settle. We were the only one that got out" without paying the plaintiff.

The plaintiff, Mirabilis Ventures, was one of several companies that convicted swindler Frank Amodeo manipulated to steal payroll taxes. Rachlin Cohen was doing accounting work for Mirabilis, a staffing agency, when Amodeo used Mirabilis and similar companies to steal the tax money. Amodeo shifted payroll tax liability from one company to another to hide it. Mirabilis and other companies that Amodeo controlled were professional employer organizations that placed workers in

jobs with other companies but treated them as their own, paying their salaries and withholding federal taxes from their paychecks.

Mirabilis ceased operation in 2006 when a grand jury investigated the company. In 2008, Amodeo pleaded guilty to payroll tax evasion, received a 22½-year prison sentence and agreed that \$181 million of restitution was owed to the Internal Revenue Service. Mirabilis was convicted of corporate complicity in the payroll tax theft and was ordered to pay \$200 million to the IRS.

DeMaria said he was "flabbergasted" to learn that Mirabilis decided to sue Rachlin Cohen and base its claim against the accounting firm on the \$181 million theft of payroll tax, then "rounded up" the amount by \$19 million to \$200 million. He called the plaintiff's legal argument — that the accounting firm was liable for the payroll tax theft that Amodeo conducted — a "fanciful pass-through theory." Tew said the \$200 million claim by Mirabilis "was all Amodeo's plan to raise some money to pay the IRS so he could get out of jail a little earlier."

Mirabilis was unable to justify the \$181 million restitution amount, which the IRS proposed and Amodeo accepted, according to DeMaria. "The IRS in that case never had to put proof on. They just picked a number," he said. "So

to this day, they still have no idea where the \$181 million came from."

Venue played an important role in the Mirabilis case. The Orlando company filed for Chapter 11 bankruptcy protection in the Middle District of Florida. Following the practice among federal courts in districts nationwide, the federal court in Orlando automatically referred the Chapter 11 case to the federal bankruptcy court.

"The key to this case was when we moved to reverse the automatic referral," Tew said. DeMaria and Tew got the Mirabilis case moved back to the district court despite objections from the court-appointed bankruptcy receiver of Mirabilis, R.W. Cuthill, the driving force behind the \$200 million claim against Rachlin Cohen.

"On a close call, on a tough case, we'd much rather have the broad experience of a district court rather than a bankruptcy court, whose sole focus is the trustee, the trustee, the trustee," DeMaria said.

Presnell allowed a daylong evidentiary hearing on motions by DeMaria and Tew to argue for two pretrial motions: to exclude testimony on alleged damages by an expert witness for Mirabilis and to exclude the \$200 million damages claim. The judge entered orders approving both motions, and Cuthill, the bankruptcy receiver for Mirabilis, subsequently dismissed the Mirabilis suit before trial could begin.