

## **Maritime Update: Court Affirms Dismissal of Cal Dive's Challenge to Settlement with a Commercial Diver**

**ATTORNEYS**

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On January 21, 2016, the Fifth Circuit Court of Appeals in the case *Cal Dive International, Inc., et al. v. Schmidt et al.*, affirmed the dismissal of a suit to set aside a settlement Cal Dive had with a former employee. This opinion illustrates that it is difficult to have a settlement agreement undone based on fraud without evidence that plaintiff was never injured or his/her injuries were *de minimis*.

### **A. Background**

Andrew Schmidt, a commercial diver employed by Cal Dive International, Inc. ("Cal Dive"), suffered a brain injury due to decompression sickness contracted while surfacing from a work-related dive on April 7, 2010. Schmidt sued Cal Dive, alleging he suffered from decompression sickness and was required to remain in a supine position, which rendered him totally disabled.

Schmidt was examined by numerous medical professionals, and there were conflicting expert reports regarding the nature of plaintiff's injuries and whether he was permanently disabled. Cal Dive and Schmidt reached a settlement on the eve of trial, plaintiff signed a Release of All Claims (the "Release"), and the district court entered judgment dismissing all claims.

Cal Dive continued to surveil Schmidt to collect evidence of the extent of his alleged injury. Cal Dive learned that after settlement was reached, but before plaintiff signed the Release, plaintiff obtained a driver's license and purchased a new car. In the months following the settlement, Schmidt was seen "cutting his grass, shopping, driving, and jogging at least two miles" so Cal Dive filed a suit against Schmidt, his attorneys, and others to have the settlement undone.

Defendants moved to dismiss Cal Dive's suit and the district court did so. Cal Dive appealed.

### **B. Discussion**

To show fraudulent inducement to enter into a settlement, a plaintiff must prove that: (1) a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the representation was made with the intention that it be acted upon by the other party; (5) the party acted in reliance on the representation; and (6) the party suffered injury.

### **C. Conclusion**

The Fifth Circuit affirmed the district court ruling because Cal Dive did not sufficiently plead reliance on plaintiff's alleged fraud. Specifically, Cal Dive did not plead that it acted in reliance on plaintiff's representations regarding the extent of his injuries and couldn't have done so since it never believed plaintiff's representations in this regard. In fact, plaintiff's injuries were corroborated by his treating physicians and multiple physicians and experts chosen by Cal Dive.

#### D. Why Is This Important?

1. Recognizing and establishing that a personal injury claimant engaged in fraud could result in your company and/or its insurer(s) recovering the amount paid in settlement and more.
2. In the Fifth Circuit, compelling arguments can be made that a settlement agreement and judgment should be set aside if previously unavailable evidence establishes that the plaintiff was in fact not injured at all, or sustained only *de minimis* injuries.
3. Occasionally, previously unavailable evidence establishes that a plaintiff is fully recovered the day after receiving the settlement funds despite claiming permanent and disabling injuries. Additional investigation to establish plaintiff was never injured or sustained only *de minimis* injuries should be considered.
4. Using a new investigator and/or attorney with the post-settlement investigations should be considered, since neither the original attorney nor his/her investigator will want to find evidence that could and/or should have been uncovered prior to the settlement.