

## Absolute litigation privilege may protect against contract-breach claims

The following post was taken from “The Litigators’ Blog,” which is hosted on the website of the Boston law firm Krokidas & Bluestein, [www.kb-law.com](http://www.kb-law.com).

An open question of Massachusetts law may be making its way to the Supreme Judicial Court: whether the absolute litigation privilege, as a matter of law, protects an attorney who breaches the confidentiality provision of a contract entered into in connection with the settlement of a different case.

Under California law the answer is clearly “no.” The issue has not yet been decided in Massachusetts.

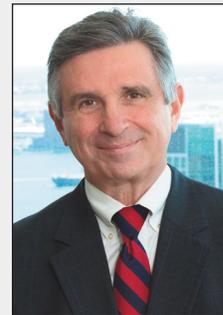
The factual scenario on which the issue is often raised is very common in everyday litigation. A case is settled on terms that include a confidentiality agreement prohibiting the parties, and their counsel, from disclosing confidential information revealed during discovery. One of the attorneys has cause to commence a second action against a third party, or even the same party, and, in the course of the second litigation, discloses the confidential information.

In a leading California case, *Wentland v. Wass*, 126 Cal. App. 4th 1484, 25 Cal. Rptr.

*Vincent Pisegna and Anthony Cichello are partners at Krokidas & Bluestein in Boston, where they focus their practices on litigation.*

### BLOG OF THE WEEK

By Vincent Pisegna  
and Anthony Cichello



Vincent Pisegna



Anthony Cichello

3rd 109 (2005), the defendant attorney entered into a confidentiality agreement in connection with the settlement of litigation. In subsequent litigation, the attorney made assertions in an opposition to a motion for summary judgment that were assumed to be in violation of the confidentiality agreement entered into in the previous case.

The California Court of Appeal held that although the attorney’s allegedly offending statements were made in the course of litigation, the absolute litigation privilege did not insulate the attorney from liability for a claimed breach of contract where the contract was entered into in a matter separate and distinct from the instant litigation.

The court determined that application of the absolute litigation privilege in such a case would not further the policies underlying the privilege.

If and when the SJC is presented with this issue, the reasoning of the California

courts may prove to be compelling. First, like in California, Massachusetts law recognizes exceptions to the absolute litigation privilege for actions such as over-publication and exploitation of the privilege as an opportunity to defame with impunity. See, *Taylor v. Swartwout*, 445 F. Sup. 2nd 98 (D. Mass. 2006), citing *Milford Power Ltd. Partnership v. New England Power Co.*, 918 F. Supp. 471 (D. Mass. 1996).

Further, both sides of the issue invoke powerful policy considerations. If confidentiality clauses can be breached “with impunity” in subsequent litigation, there may be a chilling effect on the ability of litigants to settle cases where confidentiality is an issue.

Also, one might wonder whether the privilege might insulate a lawyer from liability for disclosing, in litigation, confidential statements and agreements made in connection with mediation.

For now, caution is advised.



**KROKIDAS & BLUESTEIN**

ATTORNEYS

[www.kb-law.com](http://www.kb-law.com)