



Lawyers' Professional Liability UPDATE

December 2009 Issue 11

Assignments

Florida Federal District Court Upholds Insurer's Legal Malpractice Claim Against Defense Counsel

Hartford Insurance Co. of the Midwest v. Koepfel, 629 F. Supp. 2d 1293 (M.D. Fla.2009)

Plaintiff Hartford Insurance Company of the Midwest (Hartford) filed a diversity action against defendants seeking damages for legal malpractice, equitable subrogation, legal malpractice as third-party beneficiary, and breach of contract as third-party beneficiary. Hartford's lawsuit arose from its retention of defendants to handle a demand letter from an attorney representing an individual who had been injured in an accident with one of Hartford's insureds. Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which was denied by the district court.

On March 2, 2005, while operating his automobile, Ronald Davis (Davis) collided with a motorcycle driven by Gaspare Oliveri, III (Oliveri). Oliveri suffered significant injuries in the accident. At the time of the incident, Davis and his wife (collectively, the Insureds) were insured under an automobile liability policy issued by Hartford. The policy had a liability limit of \$100,000 applicable to the accident. Oliveri subsequently filed a claim against the Insureds. After being contacted about the accident, Hartford assessed that Oliveri's claim would greatly exceed the policy limit. On March 9, 2005, Hartford tendered the policy's limit by delivering a check to Oliveri along with a proposed release of his claim against the Insureds. Oliveri did not negotiate the \$100,000 check or execute Hartford's proposed release.

Hartford thereafter informed the Insureds that Oliveri's damages exceeded the policy limit and that they were thus exposed to potential liability for a judgment in excess of the policy limit. Hartford therefore advised the Insureds to retain personal legal counsel. On or about April 1, 2005, the Insureds retained attorney Pablo Lense to represent them in defense of Oliveri's claim. Hartford thereafter continued to pursue a settlement of Oliveri's claim within the policy limit with Oliveri's attorney. Hartford shared information it received regarding Oliveri with the attorney retained by the Insureds. On August 4, 2005, Oliveri's attorney issued a time sensitive policy limit demand letter to Hartford, offering to settle Oliveri's claim for, *inter alia*, a check for the \$100,000 policy limit and a "mutual notarized general release." Hartford thereafter sent a copy of the demand letter to the Insureds' personal attorney. On August 25, 2005, Hartford retained Koepfel "to properly accept the . . . [demand letter], including drafting and delivering the 'mutual notarized general release.'" Hartford thereafter informed the Insureds' personal attorney of its retention of Koepfel to effectuate a settlement of Oliveri's claim in accordance with the demand letter.

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In its complaint, Hartford maintained that Koepfel negligently responded to the demand letter, resulting in Oliveri pursuing a lawsuit against the Insureds in Florida state court. Sometime before February 12, 2007, when the state court matter was scheduled for trial, Hartford settled the case for an amount substantially in excess of the policy limit, thereby protecting the Insureds from a potential excess judgment. Hartford then filed its legal malpractice action against defendants.

Defendants argued that Hartford lacked standing to assert its legal malpractice claim against them because there was no attorney-client relationship between Hartford and Koepfel. They contended that Koepfel's attorney-client relationship was with the Insureds, alone. Defendants further argued that, pursuant to Florida law, an attorney's liability for negligence arising out of his or her professional duties is limited to clients with whom the attorney shares privity of contract. Defendants made the same argument in support of a motion for dismissal, i.e., that absent an attorney-client relationship between Hartford and Koepfel or evidence that Hartford was a third-party beneficiary of the contract for Koepfel's services, Hartford could not establish that Koepfel owed it a professional duty of care. Defendants also argued that Hartford failed to state a claim upon which relief might be granted in its claim for equitable subrogation. Defendants asserted that the claim was not viable under Florida law because the state's courts prohibited the subrogation of legal malpractice claims.

As an initial matter, the district court found that the factual premise of defendants' motion, i.e., that Hartford retained Koepfel only to represent the Insureds, was not supported by the allegations in Hartford's complaint. The facts Hartford alleged indicated that the attorney-client relationship was between Koepfel and Hartford, not the Insureds. For example, Hartford alleged that Oliveri's attorney "issued a time-sensitive Policy limit demand letter to HARTFORD, offering to settle the Oliveri claim . . ." and that "HARTFORD decided to accept the [demand letter and] retained STEVEN KOEPEL . . . to properly accept [the demand letter] . . ." Hartford further alleged that at least four months before Hartford retained Koepfel, it advised the Insureds to retain their own attorney to represent their interests and that the Insureds in fact hired an attorney.

The court concluded that based on those facts, it appeared that Hartford was in privity of contract with Koepfel, and that there would be no question as to whether Koepfel could be held liable to Hartford for the alleged negligence in the performance of his professional duties. The court thus held that Hartford had standing to pursue its legal malpractice claim. The court then addressed whether Hartford had standing if defendants' factual assumption was correct, i.e., that Hartford retained Koepfel to represent the Insureds only.

The district court noted that neither the Florida Supreme Court nor the state's appellate courts had expressly addressed the issue of whether an insurer could bring a legal malpractice or breach of contract claim against an attorney hired to represent its insured. The Supreme Court had held that an attorney's liability for negligence is limited to clients with whom he or she shares privity of contract or with a plaintiff who was an intended third-party beneficiary of the attorney-client relationship. *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1379-80 (Fla.1993). Yet, the Court had not decided whether privity of contract exists between an insurer and the attorney it retained to represent its insured or whether the insurer is an intended third-party beneficiary of the relationship between the attorney and the insured. The district court stated that the majority of jurisdictions that have decided the issue have concluded that the insurer is in privity of contract with the attorney hired to represent insured individuals or is a third-party beneficiary of the relationship between the attorney and the insured. The court noted that the U.S. District Court for the Eastern District of Virginia had summarized the majority and minority views with respect to this issue in *General Security Ins. Co. v. Jordan, Coyne & Savits LLP*, 357 F. Supp. 2d 951 (E.D. Va. 2005). As the court provided: "In most jurisdictions, the retaining insurer may sue the law firm directly as its client."

After analyzing the arguments regarding lack of standing, lack of privity and certain exceptions, the district court stated that it "guesse[d]" that the Florida Supreme Court would embrace the majority view and recognize an attorney-client relationship between an insurer and the lawyer or law firm it retained to represent an insured or find that the insurer is an intended third-party beneficiary of the relationship between the attorney or law firm and the insured. The court thus concluded that Hartford had standing to pursue its legal malpractice and breach of contract claims against defendants. The court similarly held that a duty of care ran from Koepfel to Hartford.

With respect to Hartford's equitable subrogation claim, the district court noted that the Florida Court of Appeals has ruled that such a claim is not available to an insurer suing its insured's attorney for legal malpractice. *Nat'l Union Fire Ins. v. Salter*, 717 So. 2d 141 (Fla. Ct. App. 1998). The district court found, however, that the facts of Salter were clearly distinguishable from the case before the court, and, as Hartford had pointed out, that the Florida Supreme Court has retreated to some extent from the holding in that case. See *Cowan Liebowitz & Latman P.C. v. Kaplan*, 902 So. 2d 755 (Fla. 2005). Nevertheless, because the court concluded that Hartford could pursue its other causes of action against defendants, it found it unnecessary to "guess" whether the Florida courts would recognize an equitable subrogation claim here.

Fee Agreements / Fees

Court Declines to Meddle With Fee Sharing Agreement Despite Unequal Sharing of Workload

Samuel v. Druckman & Sinel, LLP, 12 N.Y.3d 205, 906 N.E.2d 1042 (N.Y. 2009)

In summary, in a fee sharing dispute between a referring attorney and the lawyer to whom he referred the case, the referring attorney was entitled to a share of an enhanced fee award even though the enhancement was primarily attributable to the work performed by the latter attorney. Attorney Elliot Sinel referred a medical malpractice case to attorney Steven Samuel. The referral agreement called for Sinel to be “compensated at the rate of one-third of the entire legal fee recovered.” Samuel then brought in another attorney, Steven Pegalis, and together they tried the case and recovered a settlement of \$6.7 million. Due to the amount of work they had performed, Samuel and Pegalis successfully moved for an enhanced fee of \$1.9 million. They split the fee, and Samuel forwarded one-third of his share to Sinel.

Sinel rejected the payment and asked for one-third of the total \$1.9 million. Samuel then sought a declaratory judgment that Sinel was not entitled to any fee because he had violated what was then New York DR 2-107. Sinel counterclaimed for his one-third share. The issue under DR 2-107, which required informed consent from clients for fee sharing arrangements, was whether Sinel had violated the rule by failing to advise the client that both Sinel and Samuel would be responsible for the representation. The Court of Appeals upheld the Appellate Division finding that Sinel had complied with DR 2-107. The Court of Appeals’ holding was based on the fact that Sinel had informed the client that he would assist and consult with Samuel, and that the client consented to the involvement of Samuel. The Court also noted that Samuel, who was bound by the same ethical rules as Sinel, could not seek to avoid the fee sharing agreement on ethical grounds when he freely agreed to be bound by, and benefited from, the agreement. The court did not address any potential issues related to the involvement of Pegalis.

The more contentious issue, which had divided the Appellate Division, was whether Sinel was entitled to one-third of the enhanced fee (\$1.9 million) or merely one-third of the regular statutory fee. The Court of Appeals held that the plain meaning of the fee sharing agreement called for Sinel to receive one-third of the enhanced fee. This holding modified the Appellate Division’s opinion, which provided that Sinel should merely be entitled to a share of the unenhanced fee because he had not participated in the extra work that led to the enhanced fee.

The Court exhibited a degree of deference to attorney freedom of contract in the realm of fee sharing.

Fee Agreements / Fees

Court Denies Prevailing Party Fees Due to Client’s and Lawyer’s Lack of Collegiality

Sahyers v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241 (11th Cir. 2009)

In summary, the court denied legal fees and costs of litigation to the prevailing plaintiff because plaintiff and her lawyer had demonstrated a lack of collegiality and wasted judicial resources by failing to give notice to, or attempt to settle with, defendant law firm prior to filing suit. A paralegal, Christine Sahyers, sued her former employer, the law firm of Prugh, Holliday & Karatinos, P.L. (Prugh), for failure to pay overtime. Sahyers asked her lawyer simply to file suit under the Fair Labor Standards Act (FLSA) and not to inform Prugh of the issue or attempt to settle the issue pre-filing. Defendants tendered an offer of judgment — without admitting wrongdoing — under Fed. R. Civ. P. 68, and Sahyers accepted. Sahyers then moved for litigation expenses. Although reasonable fees and costs are usually available to prevailing plaintiffs under the FLSA, the district court exercised its inherent power and awarded nothing to Sahyers.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit held that the district court did not abuse its discretion. Both the trial and appellate courts found it determinative that Sahyers and her lawyer exhibited a lack of collegiality and wasted judicial time and resources on unnecessary litigation by failing to give defendants any advance notice of the suit. The appellate court was careful to note that pre-suit notice is not required, and that the court’s holding created no judicial duties or presumptions. It also held that the conduct of Sahyers’ lawyer amounted to bad faith, although the court did not clarify whether a showing of bad faith is required for a fee denial. Finally, and in line with the opinion’s reliance on the need for lawyer collegiality, the court limited its holding to cases where lawyers are parties.

Although the appellate court only upheld the district court’s exercise of discretion, the opinion arguably suggests new limits on a client’s rights to decide how a case may be handled.

Assignments

Illinois Court Allows Assignment of Legal Malpractice Claim

Learning Curve Intern., Inc. v. Seyfarth Shaw, LLP, 392 Ill. App. 3d 1068, 911 N.E.2d 1073 (1st Dist. 2009)

Acknowledging the rule against assignments of malpractice claims, an Illinois appellate court found an exception where a company assigns its cause of action to its former shareholders as part of a commercial corporate merger. The lawyers unsuccessfully defended a trade secret lawsuit with a resulting judgment for \$6 million in compensatory damages. But the trial court granted judgment notwithstanding the verdict (JNOV), and plaintiff appealed. While an appeal was pending, Learning Curve merged with RC2, leaving essentially a shell corporation. Shortly thereafter, the appellate court reversed the underlying matter, reinstated the verdict, and remanded for calculation of exemplary damages.

Learning Curve then agreed to pay \$11.1 million to settle. It also agreed to pursue a legal malpractice action, with 10 percent of the proceeds to RC2, and 90 percent to its former shareholders. If RC2 and the shareholders believed that Learning Curve was not using reasonable efforts, they could assume complete control over the claim. In the legal malpractice action, the trial court ruled that that provision was an impermissible assignment. Despite disclaimer language that it was “not” an assignment, the appellate court agreed that the arrangement was an assignment of part of the cause of action.

Nevertheless, the court concluded that public policy did not preclude assignment to the Learning Curve’s shareholders, who had suffered the loss by receiving much less value because of the alleged malpractice. Citing *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I. 1999), the court explained:

Illinois courts have not addressed assignment of a legal malpractice claim as part of a transfer of assets in a merger. Here, as in *Richter* and *Cerberus Partners*, the assignment formed a minor part of a transaction that encompassed a panoply of other rights and obligations. Learning Curve did not assign the claim to an unrelated third party; instead, Learning Curve assigned part of the claim to the persons who actually suffered the loss due to the alleged malpractice. We find that public policy does not prohibit the assignment of the malpractice claim under these specific circumstances. Hence, the rule barring the assignment of Learning Curve’s claim is not applicable; therefore, the defendants were not entitled to judgment as a matter of law.

Fees / Fee Agreements

Court Reduces Attorney Fee Despite Skillful Representation

White v. DaimlerChrysler Corp., 57 A.D.3d 531, 871 N.Y.S.2d 170 (N.Y.A.D. 2 Dept. 2008)

In summary, the court was authorized to reduce a contingent fee for the representation of infants. In doing so, the court will determine suitable compensation for the attorney in light of all facts and circumstances. An attorney, Kerry E. Connolly, sued DaimlerChrysler (Daimler), among others, on behalf of five infant passengers who were injured in a car accident. In her retainer agreement, Connolly contracted for a one-third contingent fee. When the parties settled, Connolly moved the trial court to approve the settlement and award her fee. The court approved the settlement but reduced Connolly’s award to one-fourth of the net amount.

The appellate court affirmed the fee reduction. The court applied New York Judiciary Law § 474, which calls for the court to assess suitable compensation for attorneys who represent infants. In assessing suitable compensation, the statute compels courts to determine the value of the attorney’s services. Further, case precedent implies that this determination shall be done in light of all facts and circumstances. The court noted that Connolly “handled the case with skill, diligence, and expertise.” But it nevertheless held the fee reduction appropriate because, while the amount recovered was commensurate with the number of plaintiffs, the amount of effort Connolly expended was not. Much of Connolly’s work, the court noted, pertained to issues such as causation and liability, which were common to all of the plaintiffs. The court further noted that Connolly’s requested one-third contingent fee was near the upper limit of what court rules deemed reasonable.

This opinion gives the court broad discretion in determining suitable compensation for attorneys who represent infants.

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