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ALERT

Attorney's Admission of Error Without Insurer's Approval Did Not Relieve Insurer of Duty to Defend In Legal Malpractice Action

December 5, 2012

Illinois State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield and Associates, P.C., 2012 IL App (1st) 110337, ___ N.E.2d ___, 2012 WL 5471875

Brief Summary

A professional liability insurer filed a declaratory judgment action against its insured attorney, seeking a declaration that the lawyer's admission of an error without the insurer's approval relieved the insurer of its duty to defend the attorney in a legal malpractice action. In a case of first impression, the appellate court held that the voluntary payments clause in the policy was unenforceable as against public policy.

Complete Summary

The attorney admitted to making a mistake in drafting a client's will, which affected the distribution of funds from a trust established by his client. According to a letter that was sent to all of the trust's beneficiaries, the mistake resulted in several of the beneficiaries receiving less money than they otherwise would have had the client's wishes been properly implemented. The beneficiaries sued the attorney and his firm for legal malpractice.

The attorney had a professional liability insurance policy through the insurer, but did not inform the insurer prior to sending the letter to the beneficiaries. The insurer claimed that by failing to inform it of the letter prior to sending it, the attorney violated a provision of his policy and, consequently, the insurer had no duty to defend him in the subsequent legal malpractice action. The insurer filed an action for declaratory judgment, seeking an order that it had no duty to defend the attorney. The trial court granted the attorney's motion for summary judgment, finding that the insurer had a duty to defend because the attorney did not admit to liability in the letter and consequently did not violate his insurance policy. The trial court also found that even if he had violated the policy, the insurer was not prejudiced by the breach. The appellate court affirmed.

The insurer alleged that its policy contained a provision entitled "Voluntary Payments," which provides:

> The INSURED, except at its own cost, will not admit any liability, assume any obligation, incur any expense, make any payment, or settle any CLAIM, without the COMPANY'S prior written consent.

The insurer argued that it had no duty to defend the firm and the attorney in the legal malpractice action because the attorney admitted liability in his letter. The appellate court disagreed, noting that the public

policy considerations at issue included the attorney's ethical obligations to his client. The insurer claimed that it would not have interfered with the attorney's discharge of his professional duties, but argued that it "would certainly have played a role in his disclosure of his error and its consequences, even if only by advising the attorney in how to fulfill his ethical obligations in a way that would not compromise his defense to a malpractice case." The court rejected this argument and stated:

> However, we are uncomfortable with the idea of an insurance company advising an attorney of his ethical obligation to his clients, especially since, as in the case at bar, the insurance company may advise the attorney to disclose less information than the attorney would otherwise choose to disclose. Instead, absent instruction from the rules of professional conduct or the Attorney Registration and Disciplinary Commission, it is the attorney's responsibility to comply with the ethical rules as he understands them. Accordingly, we find that a provision such as the one at issue here is against public policy, since it may operate to limit an attorney's disclosure to his clients. Consequently, since the voluntary payment clause does not provide a defense to [the insurer], we affirm the trial court's grant of summary judgment in [the attorney's] favor.

Significance of Opinion

This decision is significant because the court held that enforcement of the voluntary payments clause of the policy was against public policy because it would essentially allow an insurer to dictate what a lawyer should tell his client(s) after discovering he or she may have erred. Although there are various reasons why insurers should not be providing ethics advice, most defense lawyers retained to defend legal malpractice actions are qualified to provide such advice, and many insurers have instituted hotlines to provide pre-claim and risk management advice to their insured lawyers.

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