Lawyers' Professional Liability UPDATE

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Duty

Law Firm That Represented Limited Partnership Does Not Owe Fiduciary Duties to Limited Partners

Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553 (2009)

In summary, the court held that a law firm which represented a limited partnership did not owe fiduciary duties to the limited partners. The law firm, Seward & Kissel, LLP, drafted the offering memorandum and regular updates for hedge fund Wood River Partners, LP (Wood River). Wood River's general partner then violated the terms of the offering memorandum and was ultimately convicted of securities fraud. The fund's limited partners then sued Seward & Kissel, alleging, *inter alia*, fraud and breach of fiduciary duty because the law firm knew of and aided in the general partner's transgressions.

The New York Court of Appeals sided with the appellate division in dismissing plaintiff's fraud claim for failure to plead with adequate particularity. The Court held that the pleadings did not give rise to the requisite reasonable inference of fraud because plaintiffs failed to allege when Seward & Kissel became aware of the general partner's wrongdoing.

The Court also held that no fiduciary relationship existed between Seward & Kissel and the limited partners. It noted that partners are analogous to shareholders in a corporation and that a corporation's attorney only represents the entity, not the shareholders. This finding was supported, according to the Court, by the New York appellate division authority, federal courts applying New York law, and Section 26:8 of the treatise, Mallen and Smith, "Legal Malpractice" (2009). The Court also noted that other factors typical to a fiduciary relationship were missing, such as direct contact or a contractual relationship between the parties.

This opinion continues the trend of insulating attorneys from direct fiduciary liability to non-client third parties.

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Insurance

Court Holds That Statute Trumps Policy Limitations

McCabe v. St. Paul Fire and Marine Ins. Co., 25 Misc.3d 726, 884 N.Y.S.2d 634 (2009)

A New York trial court held that N.Y. Ins. Law § 3420(a) prevailed over the requirement that the claim be reported within the specified time in the policy. The statute stated that it applied to policies "insuring against liability for injury to person . . ." If so applicable, N.Y. Ins. Law § 3420(a)(4) provides:

> A provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, an injured person or any other claimant if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible thereafter.

The court found that, as is typical of lawyers' professional liability policies, the St. Paul policy provided coverage in the insuring agreement for claims for damages arising out "of an error, omission, negligent act or personal injury" in the rendering of or the failure to render legal services." On the facts of this case, the client had diligently attempted to communicate with the insured lawyer, who ignored all efforts, and did not learn of the insurer's identity until more than 90 days after the reporting period expired. The court cited *Romano v. St. Paul Fire and Marine Ins. Co.*, 65 A.D.2d 941, 410 N.Y.S.2d 942 (4th Dep't 1978), which concerned a 35-day delay. That decision, however, did not indicate that the reporting was after the claims-made and reported date had passed.

Insurance

California Adopts Disclosure of No Professional Liability Insurance Rule

On August 26, 2009, the Supreme Court of California entered an order adopting new Rule of Professional Conduct 3-410, effective January 1, 2010. Rule 3-410 requires attorneys to inform a client in writing, at the time of the client's engagement, if the lawyer does not have professional liability insurance.

Discipline / Sanctions

Attorney Sanctioned for Moving for Sanctions

Northwest Bypass Group v. U.S. Army Corps of Engineers, 569 F.3d 4 (1st Cir 2009)

In summary, an attorney who moved for sanctions based on uninvestigated allegations of criminal misconduct was himself sanctioned because his motion lacked any factual basis. The Northwest Bypass Group was formed to challenge a bypass project in Concord, New Hampshire. Attorney Gordon Blakeney spearheaded the group. After the group sued the Army Corps of Engineers and the city of Concord in federal court, two of the supposed members of the group, the Tuttles (who were engaged in separate negotiations with the city), told the city that they were not involved in the lawsuit.

The city contacted Blakeney to clarify whether the Tuttles were plaintiffs. In response, Blakeney filed a motion for sanctions and a motion to disqualify the city's counsel, alleging conduct rising to the level of criminality. The city then filed its own motion for sanctions, alleging that Blakeney's motion was vexatious.

The United States Court of Appeals for the First Circuit upheld the district court by granting the city's motion under 28 U.S.C. § 1927 and denying Blakeney's motion. The court noted that given the city's history of negotiations with the Tuttles, the city was justified in seeking to determine whether Blakeney represented them. The court also held that Blakeney's claims lacked even a remote basis, and ordered him to pay the city's attorneys' fees for failure to adequately investigate his claims. The city was not required to establish bad faith because the sanction sought was not punitive. Nevertheless, the court denied the city appellate fees because Blakeney's arguments on appeal were fair and made solely for the purpose of reversal.

This opinion serves as a reminder that there is a limit to the acceptable level of "zeal" with which a lawyer may represent a client. The opinion is also notable for its holding that a showing of bad faith is not required to procure non-punitive sanctions under 28 U.S.C. § 1927.

"But for" Causation

Client's Failure to Pursue Alternative Forum Does Not Excuse Attorney Negligence

Williams v. Joynes, 278 Va. 57, 677 S.E.2d 261 (2009)

In summary, in a legal malpractice action based on a law firm's untimely filing of a lawsuit, the court held that the client's failure to bring suit in an alternative forum with a longer statute of limitations was not a superseding cause. The client, Leo Williams, retained legal counsel to pursue a personal injury action in Virginia against two drivers, one from Virginia and the other from Maryland. Williams' counsel failed to timely file the Virginia action but advised him that a Maryland action could still be timely filed against the Maryland resident. After trying and failing to engage a Maryland attorney, Williams brought a legal malpractice action against his Virginia attorneys.

The trial court granted summary judgment to the attorneys, reasoning that Williams' failure to bring a Maryland action broke the causal link between the attorneys' negligence and Williams' harm. The Supreme Court of Virginia reversed on two grounds. First, Williams' failure to file suit in Maryland was not a superseding cause, the high court held, because an intervening act is not superseding if the initial tortfeasor's negligence set the intervening act in motion. The Court found that Williams' failure to file was set in motion by defendants' negligence. Second, because the Virginia driver was not subject to suit in Maryland, Williams' loss of his cause of action against the Virginia driver had nothing to do with his failure to file suit in Maryland.

This opinion limits the availability of superseding cause arguments in attorney malpractice actions that arise out of untimely filings. Nevertheless, the availability of alternative forums in such situations may be relevant to other issues of proximate causation or to the issue of mitigation of damages.

Miscellaneous / Vicarious Liability

Law Firm Cannot Be Directly Liable for Malpractice and Can Only Be Vicariously Liable If One of Its Principals or Associates Is Liable

National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St. 3d 594, 913 N.E.2d 939 (2009)

In summary, under Ohio law, a law firm cannot be held directly liable for malpractice and can only be held vicariously liable if one or more of its attorneys is liable for malpractice. National Union Fire Insurance Company (National Union) retained a law firm, Lane, Alton & Horst, L.L.C. (Lane Alton), to represent several of National Union's insureds. Lane Alton assigned the case to Richard Wuerth, who subsequently had to be replaced midway through litigation due to a health issue. After Lane Alton lost the lawsuit, National Union sued both Wuerth and Lane Alton for legal malpractice. The district court dismissed Wuerth, but not Lane Alton, on statute of limitations grounds.

In light of Wuerth's dismissal, however, the district court then dismissed the vicarious liability claim against Lane Alton. The district court further held that Lane Alton could not be held directly liable for legal malpractice and therefore granted summary judgment to defendants. On appeal, the United States Court of Appeals for the Sixth Circuit certified two issues to the Ohio Supreme Court regarding the potential malpractice liability of law firms: whether a law firm may be held directly liable for malpractice, and under what circumstances a law firm may be held vicariously liable for malpractice.

The Ohio Supreme Court first held that under Ohio law, law firms cannot be held directly liable for malpractice. The high court drew from precedent in the area of medical malpractice in determining that professional malpractice claims apply to individual professionals rather than to entities. The Court noted that only individuals are capable of being admitted to practice law in Ohio and thus only they can have direct liability for legal malpractice.

The Court then held that under Ohio law, a law firm cannot be held vicariously liable for malpractice "when no individual attorneys are liable or have been named." The Court adopted this holding based on principles of agency law.

This opinion clarifies when and how a law firm may be liable for malpractice in Ohio. At least in Ohio: "A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice." It remains to be seen whether, or to what extent, this case will cause plaintiffs' legal malpractice lawyers in Ohio or other jurisdictions to seek to name all potentially involved lawyers as individual defendants in addition to naming their law firms.

Duty

Class Counsel Do Not Automatically Owe a Heightened Duty to Less Capable Class Members

***Martorana v. Marlin & Saltzman*, 96 Cal. Rptr. 3d 172 (Cal App. 2009)**

In summary, the court held that class counsel did not breach any duty to a class member who failed to claim his portion of the class settlement because class counsel had complied with the judicially approved settlement notice procedure and did not know of the class member's alleged inability to comply with settlement notice procedures.

Defendants in this case, including a law firm, Marlin & Saltzman, were plaintiffs' counsel in a class action against Allstate Insurance Company (Allstate) that had settled. Ron Martorana, a member of the class, failed to submit a claim for his portion of the settlement allegedly because he was suffering from prostate cancer. Martorana sued class counsel, alleging legal malpractice based on the inadequacy of the settlement notice procedure and based on counsel's failure to contact him personally about the submission of claim forms. Class counsel demurred, and the trial court dismissed Martorana's claims.

The California Court of Appeal affirmed and held that Martorana was collaterally estopped from attacking the settlement notice procedure because it had been judicially approved during the class action proceeding. The court asserted that Martorana could and should have challenged the settlement notice procedure during a fairness hearing held by the class action court. The court also held that class counsel did not breach any duty to Martorana by failing to contact him personally because Martorana had not alleged that class counsel knew he was ill or otherwise incapable of responding to the notice.

Martorana also filed a complaint against Allstate. The trial court granted Allstate's demurer and awarded the insurer sanctions because Martorana's complaint was devoid of merit. The appellate court reversed the sanctions order because Allstate had not given Martorana the requisite 21-days' notice required under California's sanction law, Cal. Civ. Proc. Code § 128.7(c)(1).

This opinion limits lawyer liability in the context of judicially approved class action settlements to situations in which the lawyer knows or at least should have known of circumstances requiring special notice procedures for specific class members.

Privilege

Scope of "At Issue" Waiver of Attorney-Client Privilege Is Limited

***Nomura Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 62 A.D.3d 581, 880 N.Y.S.2d 617 (2009)**

In summary, a client put the advice of its former law firm at issue in litigation, thus waiving the attorney-client privilege. The client then sued the former law firm (second litigation), and the former firm was denied discovery of attorney-client communications from the first litigation because such communications were never at issue.

A law firm, Cadwalader, Wickersham & Taft LLP (Cadwalader), represented Nomura Asset Capital Corporation (Nomura) in creating a trust that was to comply with the IRS Real Estate Mortgage Investment Conduit (REMIC) regulations. The trustee later sued Nomura alleging that one of the assets transferred to the trust, a mortgage, did not comply with REMIC standards. After Nomura settled with the trustee, Nomura sued Cadwalader, alleging in part that Nomura relied on Cadwalader's erroneous advice regarding the non-compliant asset.

Cadwalader moved to compel production of Nomura's attorney-client communications relating to the trustee litigation. It cited the rule that a client waives attorney-client privilege when it places the attorney's advice at issue in litigation. The Appellate Division, First Department, upheld the lower court's denial of Cadwalader's motion. The court noted that although Cadwalader's legal advice was "at issue" in both the trustee litigation and the present litigation, the communications between Nomura and its counsel during the trustee litigation were never "at issue."

This opinion marks a limit to the scope of "at issue" waiver of the attorney-client privilege.