



## Alerts

### Judgmental Immunity or "Error in Judgment" Rule Bars Legal Malpractice Liability

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*Whirlpool Corp. v. Faegre Drinker Biddle & Reath, LLP*, 2020 IL App (1st) 191042-U No. 1-19-1042 (May 19, 2020)

#### Brief Summary

The appellate court affirmed the trial court's entry of judgment for defendants, an attorney and his firm ("defendants"), after a jury verdict in their favor. The appellate court held that in providing an informed opinion for a client concerning a new rule on importation of goods, judgmental immunity or the "error in judgment" rule precluded legal malpractice liability, even though the opinion was later determined to be incorrect.

#### Complete Summary

In September 2010, the U.S. Department of Commerce ("the Department") issued preliminary determinations announcing new antidumping and countervailing duties ("AD/CV duties") on certain aluminum extrusions imported from China. After learning of those preliminary determinations, Whirlpool, a large manufacturer of home appliances, contacted defendants for an opinion on whether certain aluminum door handles it imported from China would be subject to the new AD/CV duties. Two days later, defendants determined that the handles were not subject to AD/CV duties because they fell under an exclusion for parts fully and permanently assembled at the time of entry since the handles were final and finished at the time of importation. Whirlpool gave defendants more information about the manufacturing process and asked if that changed the analysis. Defendants responded that they still believed the handles were not subject to duties.

After the Department issued its final determination in May 2011, Whirlpool again contacted defendants. Although the determination had changed slightly, defendants did not believe that the changes affected the opinion on the handles. From 2010 to May 2012, Whirlpool continued to import the handles without paying AD/CV duties. However, on May 3, 2012, U.S. Customs & Border Protection ("Customs") flagged one of Whirlpool's shipments of handles as being subject to the AD/CV duties. Whirlpool was required to pay duty deposits of 407% of the value of the handles, and again reached out to defendants about this. In response, defendants stated that based on recent developments, the

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interpretation of AD/CV duties and recent actions by Customs, it appeared that the handles might be within the scope of the final determination, which meant that duties might need to be paid back to September 2010. Defendants suggested a number of mitigating actions Whirlpool could take.

Whirlpool sued defendants in 2015, alleging legal malpractice based on the "unequivocal" opinion about the handles and failing to advise of a scope review. Defendants moved for summary judgment, arguing that the informed judgment defense precluded Whirlpool's legal malpractice claims. Defendants argued that the state of the law was unsettled at the time the advice was given, and the advice was an exercise of the attorneys' informed judgment, which cannot be considered negligence. The trial court denied summary judgment, finding that although the law was unsettled, there was a genuine issue of material fact with respect to whether defendants exercised an informed judgment.

At trial, both Whirlpool and defendants had experts testify regarding the applicable standard of care, and what was required by a reasonably well-qualified attorney in these circumstances. In closing arguments, defendants relied upon the informed judgment defense because they had reviewed all the materials, and judgment regarding the opinions was informed and they could not be found liable for malpractice. Defendants also raised other arguments, such as Whirlpool's contributory negligence and the statute of limitations. Following the jury returning a verdict in favor of defendants, Whirlpool appealed.

Whirlpool's contended that the trial court erred in instructing the jury on the informed judgment defense. However, the appellate court determined that the "two-issue rule" precluded any conclusion that such an error resulted in the jury's verdict for defendants. Under the two-issue rule, where the jury returns a general verdict, multiple claims or defenses were presented to the jury, and the challenging party did not request a special interrogatory that would test the basis of the jury's verdict, the verdict will be upheld so long as there was sufficient evidence to support any one of the presented claims or defenses. When this occurs, the challenging party must demonstrate that the jury's verdict cannot be sustained on any basis. Defendants argued against Whirlpool's claims on the bases that defendants rendered an informed judgment; the opinion satisfied the standard of care; Whirlpool was contributorily negligent; and Whirlpool failed to prove causation. On appeal, Whirlpool had to demonstrate that none of those bases supported the jury's verdict. Whirlpool tried to argue that the two-issue rule did not apply, but was unsuccessful.

The appellate court noted that the jury was given a jury instruction on the "error in judgment" rule. In particular, the jury instruction included a statement that an attorney is liable if he or she fails to exercise a reasonable degree of care and skill, but is not liable for mere errors in judgment. The instruction went on to explain that it would be an error in judgment—and not professional negligence—if the attorney gave an informed judgment about an unsettled question of law. The court concluded that as the jury was instructed, a finding that defendants' judgment was informed was the equivalent to finding that defendants exercised reasonable care and skill. The court had already determined that defendants issued an opinion on an unsettled area of the law. So the jury needed to decide whether defendants acted reasonably when they made a judgment with reasonable care and skill, considering the relevant legal principles and facts at issue.

The court determined that if the jury found that defendants exercised informed judgment, it necessarily found that defendants exercised reasonable care and skill, satisfying the general standard of care. The appellate court concluded that the record contained sufficient evidence from which the jury could have reached a conclusion that defendants exercised informed professional judgment.

## Significance of Decision

The judgmental immunity defense or "error in judgment" rule can in some legal malpractice actions be a useful defense, particularly where the law is new or the issue involves a novel or an unsettled area of the law. Here, defendants exercised their professional and informed judgment to an unsettled area of the law such that they were not liable for malpractice.