



Alerts

Louisiana Law Does Not Require an Appeal of an Adverse Judgment Before Filing Malpractice Action, But Expert Testimony Required

December 14, 2011

Lawyers for the Profession® Alert

MB Industries, LLC v. CNA Insurance Company, ___ So. 3d ___, 2011 WL 5865487 (La. 2011)

Brief Summary

The Supreme Court of Louisiana held that Louisiana law does not impose a *per se* rule requiring an appeal of an adverse judgment before a legal malpractice action may be filed. However, the plaintiff must introduce expert testimony to establish the standard of care except in those rare cases involving malpractice so egregious that a lay jury could infer negligence.

Complete Summary

The complex series of events leading up to plaintiff client's lawsuit began in 1998 and led to litigation which commenced in February 2000. Ultimately, an adverse judgment was entered in the underlying litigation on December 2, 2003, against the client. One of the client's attorneys sent an email to one of the client's other attorneys stating the chances of a successful appeal were less than 50 percent, and that he would only file an appeal if he were paid by the hour. The client did not appeal in the underlying case.

The client filed its malpractice action on March 16, 2004. Defendant attorneys filed motions for summary judgment, which were granted. On appeal, the court of appeal reversed. The Supreme Court of Louisiana granted defendants' writs.

Defendants argued that under the principles of equitable estoppel, a defendant who fails to perfect an appeal effectively waives his or her right to seek a remedy in malpractice. This doctrine is sometimes referred to as "abandonment." *Mallen and Smith, Legal Malpractice*, §22.12 (2011 ed.). The Court found that the issue was more properly framed as a failure to mitigate damages. The scope of a party's duty to mitigate depends on the particular facts of the individual case, and a party is not required to take actions which would prove unduly costly or futile.

The Court refused to adopt a *per se* rule requiring an appeal on all cases before a legal malpractice action may be pursued, holding that a *per se* rule

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would be untenable because there are many types of malpractice which would effectively preclude any possibility of a successful appeal. Although as a general principal a client has a duty to mitigate damages caused by its attorney's malpractice, such a duty cannot require the client to undertake measures that are unreasonable, impractical or disproportionately expensive considering all the circumstances. The Court also noted that generally a failure to pursue an appeal or other legal review is "not a defense unless pursuit of the remedy would have made a difference." *Mallen & Smith, Legal Malpractice*, §22.12 (2011 ed.). The Court concluded that a party does not waive its right to file a malpractice suit by not filing an appeal unless it is determined that a reasonably prudent party would have filed an appeal given the facts known at the time and avoiding the temptation to view the case through hindsight.

Defendants then argued that plaintiff's failure to introduce any expert testimony meant it failed to meet its burden. Plaintiff contended that it had no obligation to retain an expert witness at that point in the proceedings because the trial court had not yet set a deadline for completing expert discovery. The Court disagreed and held that once a defendant's motion for summary judgment is filed, the plaintiff must present sufficient factual support to prove every essential element of its claim. Plaintiff then asked the Court to accept its attorney's affidavit as expert testimony. The Court held that the affidavit did not demonstrate that plaintiff's attorney had special "knowledge, skill, experience, training, or education" in the area of legal malpractice and thus did not meet the necessary prerequisites. The Court then held that expert testimony is required unless the malpractice is so obvious that a lay person would recognize it as falling beneath the necessary standard of care.

Significance of Opinion

The Supreme Court of Louisiana followed the majority approach and held that the failure to perfect an appeal of an adverse judgment does not necessarily preclude a party from pursuing a malpractice action. The Court also held that expert testimony is necessary to establish the standard of care and any breach, unless the malpractice is obvious.

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