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Eleventh Circuit Finds Attorneys Owed No Duty to be Clairvoyant on Unsettled Law

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Reynolds v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., No. 20-13581, 2021 U.S. App. LEXIS 30162 (11th Cir. Oct. 7, 2021) (per curiam)

Brief Summary

On October 7, 2021, the United States Court of Appeals for the Eleventh Circuit affirmed summary judgment in favor of defendant law firm. The court held the attorneys owed no duty to advise the client to cease an activity where the law governing this activity was "unsettled."

Complete Summary

A clinical laboratory that analyzed blood specimens to determine a patients' cholesterol levels sought defendant's legal advice regarding the practice of paying physicians a fee for processing and shipping the blood samples to the laboratory for testing (P&H fees). At the time defendant rendered its advice, the Office of Inspector General (OIG) for the U.S. Department of Human and Health Services had issued some guidance: a 1994 Special Fraud Alert and a 2005 Advisory Opinion.

The 1994 Special Fraud Alert warned that paying "a source of referrals anything of value *not paid for at fair market value*" gives rise to an "inference . . . that the thing of value is offered to induce the referral of business." The alert left open the possibility that a laboratory could pay physicians up to the fair market value for their services.

The 2005 Advisory Opinion found that the practice of paying physicians three to six dollars for each blood draw ("draw fees") may violate federal law because Medicare only paid three dollars for each collection. The opinion did not address whether a laboratory was allowed to pay a physician a separate P&H fee set at the fair market value of processing and handling the specimen.

In 2008, the laboratory contemplated paying draw fees and P&H fees in order to stay competitive in the market. Its legal counsel at the time recommended limiting the draw fee to three dollars and conducting studies to determine the fair market value of P&H fees. The laboratory conducted market studies and determined that $7 was an appropriate P&H fee. It, therefore, began offering a $3 draw fee and a $7 P&H fee when a physician's office did the blood draw and

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sent it to the lab for testing.

In 2011, the laboratory discovered that one of its competitors was paying physicians a $20 P&H fee. The laboratory retained defendant to provide legal and regulatory advice in order to address the situation with its competitor. Defendant presented several options, including: reporting the competitor to federal or state authorities, filing a whistleblower case, or seeking an advisory opinion from the OIG. Defendant reviewed each option with the laboratory's board of directors, including their respective risks and benefits. The board was advised of the general legal risks associated with paying P&H fees; that the area of the law was "murky;" and that reporting the competitor was especially risky given that it, too, paid P&H fees, albeit at a lower rate.

Ultimately, the board "made a business decision" to report the competitor to the Department of Justice (DOJ). The DOJ eventually opened an investigation into clinical laboratory practice of paying physicians a P&H fee. In 2014, the DOJ notified the laboratory that it was a target of the investigation. After the DOJ opened its investigation, the OIG issued another Special Fraud Alert.

The 2014 Special Fraud Alert warned that it was a violation of federal law for laboratories to pay physicians a P&H fee, even at fair market value, when "one purpose of the payments is to induce or reward referrals of Federal health care program business." After the alert, the laboratory stopped paying its referring physicians a P&H fee.

In 2016, the laboratory filed for bankruptcy. The bankruptcy trustee for the laboratory and its holding company thereafter filed a legal malpractice action against defendant in the United States District Court for the Northern District of Alabama. Plaintiff asserted that defendant breached its duty by failing to "advise [plaintiff] to stop paying P&H fees." Defendant contended that it satisfied its duty to plaintiff and moved for summary judgment. The district court granted defendant's motion after finding that no genuine issue of material fact existed "about whether [defendant's] legal advice was unreasonable."

Plaintiff appealed to the United States Court of Appeals for the Eleventh Circuit. The court began its analysis by noting that under Alabama law, the existence of a duty is a legal question to be determined by the court, and concluded that plaintiff's appeal "turns on the legal question of whether [defendant] had a duty to direct [the laboratory] to stop paying P&H fees." Plaintiff conceded that the standard of what constitutes "reasonable advice" is lower when it concerns areas of unsettled law, but argued that when defendant rendered advice to the laboratory the law was settled that it was illegal to pay P&H fees.

The Eleventh Circuit court reviewed the OIG guidance available in 2011 and held that the law was not settled at the time defendants rendered their advice. The court also found that plaintiff could not rely on expert testimony to create an issue of fact on whether the law was settled. To allow expert testimony on the issue, the court reasoned, would be to treat "the question of the scope of [defendant]'s duty as a question of fact" and ignore Alabama law which states "questions of duty are legal questions to be determined by the court."

Plaintiff also argued that defendant breached its duty of care by failing to (a) quantify the risks and (b) put its legal advice in writing. The appellate court subtly derided these arguments by disposing of them in a single footnote, stating "[w]e agree with the district court's treatment of them in its well-reasoned order." The district court, for its part, managed to both introduce and summarily reject these arguments in a single, two-sentence paragraph.

Significance of Decision

The decision illustrates that the element of duty in a legal malpractice action is a question of law and that an attorney is not negligent simply because their advice on an area of unsettled law later turns out to be incomplete or incorrect. *See also Buchanan v. Young*, 534 So.2d 263 (Ala. 1988).

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