

## Alerts

### Contingent Fee Agreement Does Not Compensate Lawyer for Defense Against Potential Counterclaims

August 10, 2010

*Lawyers for the Profession® Alert*

*In re Solis*, \_\_\_ F.3d \_\_\_, 2010 WL 2696518 (7th Cir. 2010)

#### Brief Summary

The U.S. Court of Appeals for the Seventh Circuit held that a contingent fee agreement that grants the attorney a percentage of amounts “recovered” does not encompass amounts that were already in the client’s possession, even if the lawyer protects such funds from potential counterclaims.

#### Complete Summary

Luis Solis (the “client”) hired an attorney to file a workers’ compensation claim, which ultimately settled for \$107,980. The lawyer’s secretary only sent \$62,410 to the client, keeping the rest for herself. The client hired another attorney, O’Callaghan, to recover the remainder. They agreed that O’Callaghan would receive 40 percent “of any gross amount recovered[,]” and “gross amount” was defined as “the total amount of money received on [the] case before deduction of any expenses.”

O’Callaghan filed suit for money damages for the unpaid portion of the workers’ compensation settlement and for a declaration that Solis was entitled to the money he had already received. They obtained a settlement of \$60,000, plus an agreement that defendants would relinquish any claims to the \$62,410 already in the client’s possession.

Before the client received the settlement funds, he declared bankruptcy. In the bankruptcy proceeding, O’Callaghan sought 40 percent of not only the \$60,000 settlement but also the \$62,410 that was already in Solis’ possession from the original case. The court allowed O’Callaghan’s claim only to the 40 percent of the \$60,000. The district court affirmed, and O’Callaghan appealed.

The Seventh Circuit affirmed, relying on Illinois contract law, which calls for contingent fee agreements to be construed strictly in favor of the client. The court held that the attorney’s entitlement to a percentage of amounts “recovered” did not encompass the funds that were already in the client’s possession. The court recognized that the attorney had arguably benefited the client by protecting against potential counterclaims related to the \$62,410. But it opined that the onus is on attorneys to draft contingent fee agreements to encompass the defense of any claims or counterclaims. On this last point, the

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court assumed, without deciding, that such fee agreements may be permissible.

**Significance of Opinion**

This opinion demonstrates the importance of clearly drafting fee agreements — especially when dealing with clients who do not regularly retain lawyers. That importance is particularly pronounced when there is potential for uncertainty, ambiguity or even unfairness in the fee agreement in the context of relatively unusual circumstances such as declaratory judgments and counterclaims.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*