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Newsletters

Lawyers' Professional Liability Update - September 2010

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Duty

Duty to Disclose Financial Problems With Securitizations

Grant Thornton, LLP v. FDIC, 694 F. Supp. 2d 506 (S.D. W.Va.2010)

A 2010 West Virginia federal decision concerned how much credit Grant Thornton, LLP was entitled to receive on a judgment against it for $25,080,777 from a settling law firm. The Kutak law firm's settlement was based on an alleged failure to advise a bank's board of "red-flag" risks concerning securitizations, the transactions and the parties involved. The court listed nine red flags and other frauds against the bank, while Kutak continued to assist the bank's management in closing transactions, which the law firm knew were harmful to the bank. The Federal Deposit Insurance Corporation (FDIC) had contended, based on substantial evidence, that the law firm was responsible for more than $292 million in damages attributable to securitizations. The settlement was for $22 million, funded by the primary insurer's remaining policy limits of $8 million. The law firm signed a $4 million promissory note payable to the FDIC in four equal annual installments of $1 million, plus interest. They agreed to cooperate in pursuing a $10 million claim from the law firm's excess insurance policy with Reliance Insurance Company, which was in receivership in Pennsylvania. If the FDIC received less than $8 million as a result of the Reliance claim, the law firm would pay the difference based on a formula. Thus far, the FDIC had received $12,942,521, which included interest, under the settlement agreement, where total losses were $565 million. The court awarded a credit to Grant Thornton of $1,343,750.57, which is the product of multiplying the amounts presently received plus the additional guaranteed recovery ($15,692,521) times the ratio of damages caused by Grant Thornton ($25,080,777) to the total damages for which the law firm could have been liable ($292,899,685.20), which is 8.563 percent.

Attorney Hired by Guardian Has an Attorney-Client Relationship With the Ward

Branham v. Stewart, 307 S.W.3d 94 (Ky. 2010)

A 2010 Kentucky Supreme Court decision examined a lawyer's duties when retained in multiple capacities. Gary Ryan Stewart suffered severe injuries in a car accident in which his father and brother were killed. He was a minor at the time of the accident. His mother, Vicky Backus, retained attorney Ira Branham to

Service Areas

Appellate

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represent her in three capacities: (1) individually, (2) as Next Friend of Gary Ryan Stewart, and (3) as administrator of the deceased brother's estate in filing tort claims. Shortly after filing suit, Branham represented Backus on her petition for appointment as the statutory guardian of Stewart, who was then still a minor. Backus was required to post a $5,000 bond, but no surety was required. After her appointment as guardian, Backus settled all tort claims for $1.3 million. Backus and Branham allocated one-half of the total settlement to Stewart and the other half to Backus, individually, and to Stewart's deceased brother's estate. After deducting expenses, Branham apparently paid the net proceeds for Stewart's claims to Backus as Stewart's guardian. Backus apparently never filed any accounting in the guardianship proceedings and allegedly dissipated the funds belonging to or intended to benefit Stewart.

Insurance

Policy Rescinded for Failing to Disclose Pending Disciplinary Investigation

Continental Cas. Co. v. Law Offices of Melbourne Mills, Jr., PLLC, 2010 WL 996472 (E.D. Ky. 2010)

Although a Kentucky lawyer knew that a disciplinary investigation was pending concerning the handling of a Fen-Phen action, in 2003, he answered: "no" in his insurance application about whether "any attorney [had] been disbarred, suspended, formally reprimanded or subject to any disciplinary inquiry, complaint or proceeding for any reason other than non-payment of dues during the expiring policy period?" In 2005, the lawyer and others were sued by FenPhen clients concerning their handling of settlements, and the court eventually ruled that the lawyers favored their fee interests over their clients' interests, and consequently awarded damages of $42 million.

Privilege

Pennsylvania Supreme Court Splits on Rationale for Subject Matter Waiver; Avoids Decision on Scope of Privilege for In-House Counsel-to-Client Communication

Nationwide Mutual Ins. Co., et al v. Fleming et al., 992 A.2d 65 (2010)

In summary, a split decision by the Pennsylvania Supreme Court informed, but did not finally decide, the important principal issue on appeal: whether and under what circumstances the attorney client privilege applies to communications by in-house counsel relating to litigation and reflecting confidential information from the client as well as legal advice to the client. The court instead decided the case by finding subject matter waiver, while disagreeing on the application of that rule here as well.

Conflicts

Expert Witness Work Leads to Conflict of Interest, Imputed Disqualification

Outside the Box Innovations, LLC v. Travel Caddy, Inc., 369 Fed. Appx. 116 (Fed. Cir. 2010)

In summary, a law firm was disqualified on appeal because one of its partners had submitted a declaration as an expert witness on attorneys' fees for the opposing party at trial.

Court Rejects a Mandatory Disqualification Rule for a Law Firm's Current-Client Conflict of Interest, and Denies Motion to Disqualify the Firm

Wyeth v. Abbott Laboratories, 692 F. Supp. 2d 453 (D.N.J. 2010)

In summary, even though a law firm was deemed to have a current-client conflict of interest under Rule of Professional Conduct 1.7 — the rule regulating current-client conflicts of interest — disqualification in a major patent infringement case was not an appropriate remedy. Rather than automatically disqualifying the firm, the court assessed a number of factors, including: prejudice to the parties; complexity of the case; whether the two matters were related or there was any risk of use of confidential information; whether there was any overlap in the firm's personnel working on each matter; the amount of time the firm had invested in each matter and the cost and time involved with retaining new counsel; and whether both matters were active.

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