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# Newsletters

## Lawyers' Professional Liability Update - May 2010

**May 27, 2010**

### Statute of Limitations

**Continuous Representation Rule Applied to Former Firms**
*Waggoner v. Caruso,* 68 A.D.3d 1, 886 N.Y.S.2d 368 (2009)

In *HNH Intern., Ltd. v. Pryor Cashman Sherman & Flynn LLP,* 63 A.D.3d 534, 881 N.Y.S.2d 86 (N.Y.A.D. 2009), the court applied the continuous representation to a predecessor firm and the successor firm "because the attorneys who initially handled the matter continued to represent plaintiffs in the matter, albeit at different law firms." In *Waggoner*, citing *HNH,* the court held that the statute of limitations remained tolled during the time the lawyer left his prior firm. The court was concerned that the prior firm could seek indemnity or contribution from the lawyer, interfering with his ongoing representation.

### Insurance

**Notice to Departed Lawyer Was Notice to the Law Firm for Coverage**
*Berry & Murphy, P.C. v. Carolina Cas. Ins. Co.,* 586 F.3d 803 (10th Cir. 2009)

In March 2006, Murphy left Berry & Murphy, P.C., taking with him the Ciri lawsuit. A motion to dismiss for failure to prosecute was subsequently granted. With new counsel, the case was reinstated. In January 2007, the new counsel put Murphy on notice of an intended legal malpractice action, which Murphy reported to Carolina Casualty. The demand was not sent to Berry, who continued to practice in his own name as a professional corporation, also insured by Carolina Casualty. In January 2008, Murphy, Berry, and Berry & Murphy were sued for legal malpractice. Berry was not served, however, until July 2008. His request for coverage was denied by Carolina Casualty.

### Insurance

**Personal Injury Coverage Trumped Willful Acts Exclusion**
*Liberty Ins. Underwriters, Inc. v. Camden Clark Memorial Hosp. Corp.,* 2009 WL 4825199 (S.D. W.Va.2009)

A federal district court in West Virginia held that an insurer was obligated to indemnify a malicious prosecution claim. The insuring agreement provided coverage for personal injury, which expressly included "false arrest, humiliation, detention or imprisonment, wrongful entry, eviction or other invasion of private occupancy, abusive litigation (criminal or civil), abuse of process, malicious prosecution." The court stated that this more specific coverage grant prevailed over the general exclusion for fraudulent, criminal, malicious and deliberately

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wrongful conduct. The court did not discuss public policy considerations of whether a malicious prosecution claim could be indemnified.

**Evidence**

**Alleged Misuse of Confidential Information in a Divorce Must Be Supported by Evidence of Disclosure or Misuse**
*Brown v. Green,* 302 S.W.3d 1 (Tex. App. Hous. (14 Dist. 2009)

Plaintiff sued defendant for representing his wife in their divorce and allegedly using confidential information gained over 12 years of prior representation. The court examined the evidence presented regarding the lawyer's motion for summary judgment. To the extent financial information had been disclosed as to subjects on which the parties agreed, there was no causation of injury. As to the claimed knowledge of the disparity in the parties' financial position, there was no evidence that defendant had actually used such information in an effort and strategy to wear down plaintiff "financially and emotionally." Regarding claims that the information was used to create dissension in the family so as to create an incentive to sue plaintiff concerning a charitable foundation, the evidence that a lawsuit concerning the foundation was filed did not establish that confidential information was used or disclosed. As to an alleged breach of the duty of loyalty, plaintiff failed to show a continuation of the attorney-client relationship.

**Damages**

**Indiana Federal Court Crafts a Remedy to Avoid Awaiting Future Damages Regarding a Trust**
*Kern v. Radez,* 665 F. Supp. 2d 982 (S.D. Ind. 2009)

A lawyer was instructed by his clients, a husband and his wife, to provide that the sole residual beneficiary of a trust of the husband's assets would be his daughter by a previous marriage if he predeceased the wife, but only upon the wife's death. Instead, the irrevocable trust divided the property equally among all of the couples' children, so that the daughter would receive only a one-sixth share. When the husband died, there was $1 million in assets. A certified public accountant offered evidence as to the probable value of the assets at the end of the wife's projected life expectancy. Conceding uncertainty of the measure of the daughter's loss, especially because the wife could withdraw assets for her own use, the court was concerned about the practical considerations in delaying resolution of the damage claims until the wife's death.

**Statutory Liability**

**FTC Lacks Authority to Regulate Lawyers Under the Fair and Accurate Credit Transactions Act**
*American Bar Association v. Federal Trade Commission,* 671 F. Supp. 2d 64 (D.D.C. 2009)

In summary, the statutory authority of the United States Federal Trade Commission (FTC) to regulate "creditors" in order to combat identity theft does not include the power to regulate lawyers. The power of a federal agency to regulate lawyers in the lawyer-client relationship would require evidence of clear congressional intent and consideration of a lawyer's ethical duties and the essential aspects of the attorney-client relationship.

**Conflicts**

**Joint Defense Agreements Give Rise to Unique Conflicts and Imputation Issues**
*District of Columbia Bar Legal Ethics Comm. Op. 349* (Sept. 2009)

In summary, a lawyer in a law firm who has participated in a joint defense agreement on behalf of a client may have contractual and fiduciary duties to the non-client parties to that agreement, which may give rise to conflicts of interest on subsequent substantially related matters. Such conflicts may be imputed from the lawyer to a firm unless there is an adequate screening mechanism.

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