

Newsletters

Lawyers' Professional Liability Update - November 2010

November 23, 2010

Statutory Liability

U.S. Supreme Court Holds That the Bona Fide Error Defense in the Fair Debt Collection Practices Act Does Not Include Mistakes of Law

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, ___ U.S. ___, 130 S.Ct. 1605 (2010)

In summary, the U.S. Supreme Court held, 7-2, that the Fair Debt Collection Practices Act (FDCPA) does not provide debt collectors and their attorneys with a good faith defense to liability for mistakes of law, even in the context of litigation. The FDCPA, 15 U.S.C. § 1692k, regulates interactions between commercial debt collectors and consumers. Attorneys engaged in debt collection litigation may be debt collectors for the purposes of the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291 (1995). Congress declared that the FDCPA's express purpose was "to eliminate abusive debt collection practices by debt collectors, [and] to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692k(g). A key provision in the FDCPA is a debt collector's potential defense to civil liability if the debt collector can show that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k (c).

Fees / Fee Agreements

U.S. Supreme Court Strictly Limits Enhancements of Attorney Fee Awards Above Lodestar Amounts

Perdue v. Kenny A. ex rel. Winn, ___ U.S. ___, 130 S.Ct. 1662 (2010)

In summary, the U.S. Supreme Court held, 5-4, that attorney fee awards may be enhanced under 42 U.S.C. § 1988 only in the rare circumstance of when the lodestar method fails to account for certain factors relevant to a fee award. The district court's enhancement was improper in the matter because it failed to use an objective and reviewable methodology to calculate its enhanced award.

Miscellaneous

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Illinois Supreme Court Holds That Ethical Rule Prohibiting Communication With a Represented Party Is Limited to the Same Matter, Regardless of Whether the Matters Are Factually Related

People v. Santiago, 236 Ill. 2d 417, 925 N.E.2d 1122 (2010)

In summary, the Illinois Supreme Court held that Rule of Professional Conduct (RPC) 4.2 (prohibiting communication with a represented party) is matter-specific. Where defendant was a party to substantially related civil and criminal proceedings, but was only represented in the civil proceeding, the Court held that criminal prosecutors could communicate directly with defendant without the consent of her civil attorney.

Settlements

New Jersey Supreme Court Holds Legal Malpractice Action Is Not Precluded by Acknowledgement That a Settlement Is “Acceptable”

Guido v. Duane Morris LLP, 202 N.J. 79, 995 A.2d 844 (2010)

Plaintiff sued the company of which he was chairman of the board and majority shareholder, claiming corporate governance improprieties. He and his wife filed a second action, which they settled while represented by the law firm, agreeing to and accepting the settlement in response to questions by the court. Although the trial court acknowledged a question whether plaintiffs were adequately advised regarding the impact of stock restrictions, it granted summary judgment for the law firm, citing *Puder v. Buechel*, 183 N.J. 428, 874 A.2d 534 (2005) and the clients' acknowledgement in response to the court's questions. The court explained that *Puder* was an equitable exception where the plaintiff had twice accepted the substantially same settlement, and knowing of the alleged malpractice, responded that the settlement was acceptable and fair. Here, plaintiffs were not subject to equitable estoppel because they did not state that the settlement was satisfactory or fair, only that it was acceptable. The court held that the failure to seek to vacate the settlement could be relevant to the failure to mitigate damages, but not as to whether there was a cause of action.

Statute of Limitations

The Need for a Closing Letter

Laclette v. Galindo, ___ Cal. App. 4th ___, ___ Cal. Rptr. 3d ___, 2010 WL 1949787 (2010)

A lawyer defended plaintiff, a real estate broker who was sued for advising a residential property buyer that she did not need an inspection. Ultimately, plaintiff and her brokerage were held liable on a jury verdict for \$275,000. On January 25, 2005, the parties worked out a settlement plan, requiring plaintiff to pay \$3,750 per month. On February 9, 2007, the plaintiff sued the attorney for legal malpractice, alleging a conflict in jointly representing both her and the real estate brokerage company.

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