Professional Liability Insurance

Law Firm's Malpractice Insurance Covers Attorney for Work Done after Leaving Law Firm

Client Remained Firm's Client after Attorney Left

Jolley v. Marquess, __ A.2d __, 2007 WL 1518114 (N.J. Superior, Appellate Division, May 25, 2007)

Case at a Glance

A law firm's professional liability policy, which defined "insured" to include former partners or former associates while acting solely in a professional capacity on behalf of the law firm, covered former partner's professional services rendered after leaving the firm, but the definition limited coverage to instances where the departed attorney was representing a party who remained a client of the insured firm. The former partner acted solely in a professional capacity on behalf of the firm and, therefore, was insured under its professional liability policy when he defended the law firm's client at the request of a current partner, even though the former partner directly billed the client's liability insurer.

Summary of Decision

Law Firm. There once was a New Jersey law firm named Marquess, Morrison, & Trimble, P.A. (MMT). Zurich Speciality London Limited (Zurich) insured the firm at all relevant times. At one point in time, Marquess was one of the partners in the firm. There was a quarrel; Marquess left the firm and established his own solo practice. The other two partners formed their own firm (MT).

Before the split-off, American Independent Insurance Company (AIIC) retained the firm to represent an insured. Marquess handled much of the pre-trial developments in the case.

The Accident. The insured failed to yield at a stop sign. She collided with another vehicle, driven by another woman. The second vehicle, in turn, collided into a postal truck operated by yet a third woman, who eventually became the named plaintiff in the case here under discussion.

Underlying Suit. Plaintiff sued the insured, and AIIC retained MMT to provide a defense. The answer to plaintiff's complaint designed Morrison as trial counsel, in accordance with New Jersey rules. A few months later, when [the defendant-insured] was served with interrogatories, Morrison asked Marquess to answer the interrogatories and handle all of the pre-trial discovery and motions, which he did.

Counsel for the plaintiff repeatedly tried to settle the case, MMT did not respond. Eventually, a little over two years after the accident, counsel for the plaintiff indicated that the plaintiff would not consider any offer of settlement thereafter. Several days later, Marquess notified counsel for the plaintiff that AIIC had authorized a settlement within policy limits. Nearly two weeks later, in early 1999, plaintiff's counsel responded that it was too late, and that his

client intended to pursue all of her claims for damages without any limitations and would be looking to the carrier "for payment of any damages in excess of the policy limits."

The fundamental rules governing this situation are found in *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 323 A.2d. 495 (N.J. 1994). There, the New Jersey Supreme Court held that an insurer, which has "contractually restricted the independent negotiating power of its insured, has a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage" by "offer[ing] its policy limits [and by] try[ing] to settle the matter if there is any possibility of a judgment above the [policy] limits." (Notice that in New Jersey, the insurer has a duty to press settlement forward, whereas in many jurisdictions, the insurer simply has a duty to respond reasonably to settlement offers which the plaintiff makes that are within policy limits. In addition, it is worth notice that in New Jersey a liability insurer defending an insured is a fiduciary of that insured. This is not true in a good number of states.)

The Firm Again. Eleven months after counsel for the plaintiff rejected the tardy offer from Marquess, a dispute erupted between Marquess and the other two partners. The other two bought Marquess out and he left approximately five months later in April 2000—almost exactly three years after the underlying case was filed. Marquess continued to represent the insured-defendant until he left the firm. Three months before Marquess left, the firm received notice that the trial would be set for May 15, 2000. That was approximately two weeks after Marquess left the firm. Less than a week before the trial was to begin, Marquess was asked by his former partners to try the case. He agreed to do so, but only if he could bill the insurer directly, since the law firm owed him money under the separation agreement.

The underlying case against the insured proceeded to trial, and a jury found the insured "100% responsible for the happening of the accident." Thereupon, Marquess entered into an agreement with counsel for the plaintiff for stipulated damages of $750,000 plus prejudgment interest. Marquess's client was not involved in the agreement; she had left the courthouse; she did not know about the settlement negotiations; she did not consent to the stipulation of damages. Her policy limits were $15,000/$30,000. Judgment was entered nearly a month later, on September 5, 2000, in favor of the plaintiff and against the defendant-insured, in the amount of $750,000, plus $128,475 in interest.

Between the time of the agreement and entry of the judgment, Marquess assured his client that counsel for the plaintiff had agreed not to actually seek money from her. Approximately six weeks after the entry of the judgment, the defendant-insured executed an assignment to the plaintiff of her right to pursue a claim against Marquess. The plaintiff then instituted litigation against both AIIC and Marquess, and agreed to withhold any action against the defendant/insured. Since claims for legal malpractice cannot be assigned in New Jersey, the plaintiff and the defendant/insured jointly filed suit now under discussion against Marquess and AIIC, with plaintiff named as subrogee. AIIC was sued for breach of the contractual duty of good faith and fair dealing; Marquess was sued for legal malpractice; he and the former firm were sued for breaches of express and implied covenants that attorneys of the firm representing the defendant-insured would be "knowledgeable and experienced"; and both Marquess and the former firm were sued for "the making of false, deceitful and fraudulent misrepresentations of fact[.]"

Malpractice Insurance. Zurich was the malpractice carrier for MMT, before Marquess left. It continued to provide professional liability insurance to MT after Marquess left, under a new policy. Marquess sought coverage from Zurich, but it denied his claim. Marquess filed a third-party complaint against Zurich. At the same time, Zurich provided a defense to MMT "for any acts of malpractice they may have committed, including their failure to respond to *Rova Farms* letters."

Approximately five years after the suit under discussion here was filed, both Zurich and Marquess filed cross-motions for summary judgment. These motions were filed in January 2006, and oral arguments were heard in mid-March 2006, whereupon the trial judge certified his order as final. This stayed the legal malpractice case, and gave Zurich an opportunity to appeal. The appellate court decided the case on May 25, 2007, and that is the opinion under discussion here.

Zurich Policy. The relevant policy defined the term "insured" as the firm, any of its partners, employed lawyers, any other employee, and/or any of

its shareholders, "but solely while acting in [a] professional capacity on behalf of such firm[.]" In addition, the policy also provided insurance to "any former partner, officer, director or stockholder, employee of the firm or predecessor firm named in the Declaration "while acting solely in a professional capacity on behalf of such firms[.]"

The question in the case was whether the just quoted language covered Marquess for his conduct in the underlying lawsuit after he left MMT. There was uncontradicted testimony from Marquess that he worked on the case on behalf of his former firm. There was also testimony from one of the partners that he could not have tried the case.

Zurich Policy Interpreted. The appellate court found that the relevant language in the policy was "neither clear, nor straightforward." In addition, the language was "vague and uncertain." Since the language was ambiguous under New Jersey law, it must be interpreted in favor of the insured. The court "discern[ed] from that language an intention to limit coverage to those instances where a former associate or former partner is representing a party who remains a client of the insured firm, as opposed to a successor firm." The court found that the move of MMT to MT qualified for coverage under this language. The court found that numerous facts in the record support that conclusion:

- Morrison was unprepared to try the case;

- Morrison asked Marquess to try it;

- Morrison forwarded the file to Marquess;

- The departure agreement between MMT and Marquess, plus the other two partners, did not allocate either the insurer or the insured-defendant as clients of Marquess;

- The defendant-insured was never asked to consent to "any change in the designation of the law firm responsible for representing her";

- No substitution of counsel was filed with the court;

- Marquess kept Morrison advised on all developments in the underlying case.

The fact that Marquess was paid a fee directly by AIIC for his work on the underlying case did not, in the court's view, change the result. Lawyers are not expected to work for nothing, even if their reason for doing the work is to assist their previous law firms. Thus, the fee did not make him other than working solely for the benefit of his former and currently insured firm.

Duty to Defend. The appellate court found that the complaint against Marquess triggered its duty to defend. The court goes on to say, however, that—under New Jersey law—"the duty to defend is not necessarily limited to what is set forth in the complaint. Facts outside the complaint may trigger a duty to defend.) *SL Indus. v. Am. Motorists Ins. Co.*, 607 A.2d 1266 (N.J. 1992). The court of appeals quotes the following language from *SL Industries*: "To allow the insurance company 'to construct a formal fortress of the . . . pleadings and to retreat behind its walls, and thereby successfully ignore true but unpleaded facts within its knowledge that require it, under the insurance policy to conduct the putative insured's defense, and' would not be fair." (The case *SL Industries* is quoting is *Associated Indem. v. Ins. Co. of N. Am.*, 386 N.E.2d 529, 536 (Ill. 1979). In addition, under New Jersey law, if it is unclear from a complaint whether there is a duty to defend, because the complaint is ambiguous, "doubts should be resolved in favor of the insured and thus in favor of coverage." *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255 (N.J. 1992).

The appellate court concluded that the language of the complaint was broad enough to include acts of Marquess before he left the MMT firm and acts he performed afterwards. On both of these grounds, the court found coverage for Marquess. The court found that this was true not only with respect to the claim of legal malpractice, but also with respect to other claims as well. Upon this basis, the court also found that *Jolley* was properly subrogated to the claims which Marquess's client might have against him.

Comment

The language from the Zurich policy which defines an "Insured" is so clear that it is hard to see why the appellate court thought it was vague, unclear,

or ambiguous. Indeed, it is so clear that it is hard to see why Zurich and its lawyers thought it could escape liability for the post-departure conduct of Marquess, given how he ended up with the underlying case. The reason has got to be the meaning of the word "solely" coupled with the fact that Marquess got a fee for himself defending the tortfeasor after he left MMT and was asked by MT to defend its client. The appellate court's reasoning must be that since lawyers are universally paid to defend cases, and since this clause has to be able to cover some lawyers some times, it could not have been intended that the receipt of a fee would override the word "solely." To bad that argument was not spelled out. // Quinn