

Is Honesty Always the Best Policy? Illinois Appellate Court Holds Attorney's Ethical Obligations Trump Professional Liability Policy Term

Deborah M. Minkoff • 215.665.2170 • dminkoff@cozen.com

Abby Sher • 215.665.2761 • asher@cozen.com

In a case of first impression, the Illinois Appellate Court considered whether a professional liability insurer can deny a defense to its insured, an attorney who admits he erred in providing legal services. *Ill. State Bar Assoc. Mut. Ins. Co. v. Greenfield & Assocs., P.C.*, No. 1-11-0337, 2012 Ill. App. LEXIS 921 (Ill. Ct. App. Nov. 9, 2012). The court held the insurer had a duty to defend its insured against a legal malpractice claim. The court rejected the insurer's reliance on the prohibition against admitting liability in its Voluntary Payments condition.

The underlying suit arose out of attorney Greenfield's representation of his clients, Leonard and Muriel Perry. Greenfield served as Mr. and Mrs. Perry's estate planning attorney. Mr. Perry executed a Power of Appointment, which permitted Mrs. Perry to make changes to the distribution of her husband's trust. After Mr. Perry's death, Mrs. Perry exercised her Power of Appointment and directed Greenfield to draft a will permitting distribution of Mr. Perry's trust in accordance with the terms of her trust. In 2008, Mrs. Perry amended her trust to change certain of the distributions. When Mrs. Perry died, Greenfield recognized he omitted a provision in the 2008 will that affected the distribution of funds. Greenfield sent a letter to the trust beneficiaries advising that his error caused them to receive less money than his client intended. Greenfield sent the letter before notifying his professional liability insurer of the situation.

The trust beneficiaries filed suit against Greenfield seeking compensatory damages. After Greenfield tendered the suit, the insurer filed a declaratory judgment action, seeking a declaration it had no duty to defend because Greenfield failed to comply with the policy's Voluntary Payments provision. The Voluntary Payments provision stated:

The INSURED, except at its own cost, will not admit any liability, assume any obligation, incur any expense, make any payment, or settle any CLAIM, without the COMPANY's prior written consent.

In seeking summary judgment, Greenfield argued he had an ethical duty to inform the beneficiaries of his mistake, and the insurance company acknowledged he had such a duty. The court noted it is the attorney's responsibility to comply with the ethical rules "as he understands them." *Id.* at *24. The court did not analyze whether those ethical duties were owed to the beneficiaries of the attorney's clients or the scope of disclosure required by any such ethical duty.

In response, the insurer argued that the letter included more detail than necessary and it was prejudiced because Greenfield's action interfered with the insurer's right to control the claim.

The trial court granted the insured's motion for summary judgment, holding the insurer had a duty to defend. On appeal, the appellate court affirmed, holding the Voluntary Payments provision was unenforceable as against public policy.

Before addressing the arguments on appeal, the court quoted the insured's letter, in which he stated he "drafted the 2008 Will and inadvertently omitted a provision that had been contained in the 2007 Will." *Id.* at *7. He further explained this "oversight" decreased the amount of distributions owed to the beneficiaries.

With respect to whether the Voluntary Payments provision in the legal professional liability policy was enforceable, the court noted that more typical provisions permit the insurer to deny reimbursement for voluntary

payments, and do not allow the insurer to deny a defense. The court also noted that only one Illinois court previously addressed a similar provision, and that provision appeared in an automobile liability policy. See *Blake v. Continental Cas. Co.*, 278 Ill. App. 232 (Ill. Ct. App. 1934).

The *Greenfield* court acknowledged the *Blake* decision was instructive and explained that in the context of an attorney, even stronger interests should prevent an insurer from regulating the insured's conduct. The court considered, but rejected, the insurer's explanation that it would not have prohibited Greenfield from complying with the attorney's ethical duty to communicate with his clients, but it would have controlled the manner in which the information was disclosed. The court rejected the argument:

[W]e are uncomfortable with the idea of an insurance company advising an attorney of his ethical obligations to his clients, especially since, as in the case at bar, the insurance company may advise the attorney to disclose less information than the attorney would otherwise choose to disclose.

Id. at *23. On this reasoning, the court held the insurer owed a defense and the Voluntary Payments provision was unenforceable.

Justice Garcia issued a concurring opinion, in which he disagreed with the majority's analysis but not its conclusion. Justice Garcia explained that under the plain language of the Voluntary Payments provision, it applied

only to the duty to indemnify such that a duty to defend existed. The majority's decision to express its holding in more sweeping terms where a more narrow basis to require a defense was available reflects the appellate panel's interest in making clear public policy can trump even unambiguous language in an insurance policy.

We expect two consequences of the opinion. First, we expect other courts, if confronted, will find that an attorney's performance of ethical obligations cannot vitiate coverage. Second, anticipating this result, we expect insurers will interpret Voluntary Payment provisions narrowly, and in accordance with the traditional approach—with which courts are comfortable—that insofar as the prohibition relates to the insurer's defense obligations, it bars coverage only for costs incurred without the insurer's consent, and it is not implicated in evaluating the insurer's duty to defend.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Deborah M. Minkoff at dminkoff@cozen.com or 215.665.2170 or Abby Sher at asher@cozen.com or 215.665.2761.