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Client Alert

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Illinois Appellate Court Finds Malpractice Policy's "No Admission of Liability" Clause Void as against Public Policy

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In *Illinois State Bar Association Mutual Insurance Co. v. Frank M. Greenfield & Assocs., et al.*, 2012 IL App (1st) 110337 (Ill. Ct. App. Nov. 9, 2012), the Illinois Appellate Court (First District), Mary L. Mikva, P.J., upheld the trial court's ruling finding that an insurer had a duty to defend a lawyer who had admitted making a mistake in drafting a will. The lawyer had disclosed his error to his former client's beneficiaries and then sought a defense from his insurer when the beneficiaries sued him. The insurer denied coverage on the basis of a policy provision prohibiting the lawyer from admitting liability without the insurer's consent, and sought a declaratory judgment that it had no duty to defend. In affirming summary judgment for the lawyer, the Illinois Appellate Court found the provision unenforceable and against public policy, as it interfered with the lawyer's duties of disclosure under the ethics rules.

BACKGROUND

Attorney Frank Greenfield had represented Muriel and Leonard Perry for estate planning purposes for many years. He drafted wills and trusts for both of them. Before he died, Leonard gave Muriel the power of appointment to make changes in the distribution of his trust. After Leonard died, Greenfield drafted a will for Muriel in 2007 that specifically exercised that power to distribute the assets of Leonard's trust according to the terms of Muriel's trust. When Muriel amended her will in 2008, Greenfield failed to include the language that Muriel was exercising her power of appointment regarding the assets of Leonard's trust. After Muriel died, Greenfield discovered the discrepancy and sent a letter to the beneficiaries, admitting that he had made a "scrivener's error" in the 2008 will and that, but for that error, the beneficiaries would have been entitled to $863,900 more than they were actually entitled to receive under the 2008 will. While Greenfield encouraged the other family members to implement Muriel's intentions rather than

the letter of the 2008 will, they apparently did not, and the beneficiaries sued Greenfield.

THE DECLARATORY JUDGEMENT SUIT

Greenfield tendered his defense to his legal malpractice insurer, the Illinois State Bar Association Mutual Insurance Company ("ISBA Mutual"). ISBA Mutual filed a declaratory judgment action seeking a declaration that it had no duty to defend Greenfield because he had sent the letter to the beneficiaries without ISBA Mutual's consent. The insurer relied on the following provision of the policy, which is standard in most professional liability policies:

> 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.

On cross motions for summary judgment, the trial court held that ISBA Mutual had a duty to defend since Greenfield did not admit to liability in the letter and consequently did not violate his insurance policy. The trial court also found that even if Greenfield had violated the policy, ISBA Mutual was not prejudiced by the breach. ISBA Mutual appealed.

Admitting Fault is Not Admitting Liability

In addressing this question of first impression under Illinois law, the First District Appellate Court first made a distinction between admitting fault, that is, admitting the truth of facts, and admitting or assuming legal liability. Here, Greenfield's letter to the beneficiaries did no more than state factually what had occurred. The court went on to rule, however, that even if Greenfield had breached the policy provision, it was not enforceable for public policy reasons. *Id.* at ¶ 22-23.

Ethical Obligations Trump Policy Provision

In affirming the trial court's decision, the appellate court gave great weight to public policy considerations, primarily the attorney's ethical obligations to disclose his error. ISBA Mutual argued that, had Greenfield discussed the letter with his insurer before sending it to the beneficiaries, the insurer would not have interfered with his compliance with his ethical obligation to disclose. The court noted, however, that

> we are uncomfortable with the idea of an insurance company advising an attorney of his ethical obligation 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 ¶ 24. The court concluded that, as "it is the attorney's responsibility to comply with the

ethical rules as he understands them," the policy provision is against public policy because it may operate to limit an attorney's ethically-required disclosures. *Id*.

In a concurrence, Justice Garcia concurred with the result – that ISBA Mutual has a duty to defend – but disagreed with the holding that the policy provision was against public policy. Rather, he opined that the policy provision is not exclusionary and, therefore, is relevant only to the insurer's duty to indemnify. As such, the insurer should not be able to rely on the policy provision to deny its duty to defend. *Id.* at ¶ 37-38.

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