PROFESSIONAL LIABILITY UPDATE

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This newsletter is intended to summarize the most significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every case involving professional liability issues during the period or of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the author and do not necessarily reflect the views of Shannon, Gracey, Ratliff & Miller, L.L.P.

***Joseph & Debra Domino v. Allmand & Lee, PLLC,* NO. 02-13-00252-CV, 2014 Tex. App. LEXIS 8061, (Tex. App.- Fort Worth, July 24, 2014, no pet. h.)**

Attorney prevailed on summary judgment and appeal in a legal malpractice claim arising out of the attorneys' representation of a client in an underlying bankruptcy based upon a statute of limitation defense.

The client asserted in the malpractice action that limitations were tolled under *Hughes v. Mahaney & Higgins,* 821 S,W,2d 154 (Tex, 1991 and *Apex Towing Co. v. Tolin,* 41 S.W. 3d 118, (Tex. 2001). The client's theory was they had not sustained a damage until they were forced to liquidate by converting their subsequently filed a Chapter 11 case to a Chapter 7, as that was when they "had suffered from defendants' errors in a non-appealable way." The attorneys represented the client in a Chapter 11 proceeding from November 2009 to February 24, 2010. The clients chose to retain new counsel in February 2010 and filed another Chapter 11 which was converted to a Chapter 7, which was closed in October 2012. The clients argued limitations did not start to run until July 19, 2011, the date they had to liquidate. Under *Hughes,* "an attorney commits malpractice in the prosecution or defense of a claim that resulting in litigation the statute of limitations on the malpractice claim against the attorney is tolled until appeals on the under claim are exhausted." *Id.* at 157. The Supreme Court reaffirmed the *Hughes* rule in *Apex* and added that limitation is tolled either until all appeals on the underlying claim are exhausted or "the litigation is otherwise finally concluded." *Apex Towing Co. v. Tolin,* 41 S.W.3d 118, 118-119 (Tex. 2001).

The appellate court rejected the client's position that their alleged damage was the conversion of the subsequent Chapter 11 to Chapter 7 and the liquidation of property, as limitation was triggered at the dismissal of the second bankruptcy where the attorneys' concluded their representation of the clients. Furthermore, the clients failed to articulate why they could not pursue their malpractice claim while their subsequent Chapter 11 case proceeded with other counsel or why that would have forced them into the untenable position of having to adopt inherently inconsistent litigation posture.

***Thompson & Knight v, Patriot Exploration, LLC, et al,* NO. 05-13-00104-CV, 2014 Tex. App. Lexis 9164 (Tex.App-Dallas, Aug. 19, 2014, no pet. h.)**

Law firm prevailed at bench trial, where there was no evidence of firm's negligence proximately causing any damage (liability was stipulated).

The client sued the law firm for failing to discover a gap in client's legal title in their oil and gas working interest, causing a delay in the selling of those interests by five months. The parties settled the liability aspect of the malpractice action and agreed to proceed to a bench trial on the client's claim it was entitled to recover economic damages. The client attempted to show through expert testimony that it was damaged as a result of the delay to cure the gap in client's legal title, which the law firm failed to discover. The client asserted if the sale had gone through five months earlier, it would have sold their oil and gas working interest for an additional $960,000.

In a legal malpractice action, the general measure of damages is the difference between the amounts the plaintiff probably would have recovered in the absence of the amount recovered. However, in a case that does not involve malpractice in the handling of litigation the measure of damages may be generalized to the difference between the result obtained for the client and the result that would have been obtained but for the attorney's negligence. *Elizondo v. Krist,* 415 S.W. 3d 259, 263 (Tex 2013). The client's expert opinions were based upon assumptions or a hypothetical the client could have sold their interests five months earlier to a potential buyer. The trial court found that such assumptions were invalid as they were not based upon any fact. The Court of Appeals agreed, as an expert opinion on damages which is based upon invalid assumption constitutes legally insufficient evidence of any damage proximately caused by the law firm's negligence.

***Eric M. Sanders v, Harold H,. Flanders*, NO 13-50235, 565 Fed, Appx, 742; 2014 U.S. App., LEXIS 7516 (April 22, 2014), Unpublished Opinion.**

Trial Court granted a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), due to the client's failure to present legally sufficient evidence of causation and damages.

The client retained the attorney to file a number of patent applications on his behalf. The attorney filed the applications, however none were approved. The client asserted the attorney failed to keep him apprised of the events and had mis-represented the status of the applications. As a result of the attorney's failures, the client brought a legal malpractice action against the attorney, asserting professional liability, fraud, negligent misrepresentation and breach of fiduciary duty.

While the Federal Circuit has exclusive jurisdiction over claims arising under federal patent law, claims as asserted by the client fail to carry the level of significance with respect to federal patent law to establish jurisdiction exclusively in the Federal Circuit. Consequently, the 5th Circuit has appellate jurisdiction over this diversity action.

The Fifth Circuit affirmed the lower court's ruling that the client failed to present legally sufficient evidence of causation and damages, as the client failed to provide sufficient lost profit evidence, failed to make an offer of proof, failed to provide supporting evidence of any alleged costs incurred, and finally failed to offer any evidence to support his claim for recovery of his attorney's fees, other than his own testimony.

***Dernick Resources, Inc. v. David Wilstein and Leonard Wilstein, individually and as Trustee of the Leonard and Joyce Wilstein Revocable Trust*, No 01-13-00853-CV, 2014 Tex. App. LEXIS 9148 (Tex. App.-Houston [5th Dist.], August 19, 2014, no pet. h.)**

The suit involves a claim for breach of fiduciary duty between parties to an oil and gas joint venture. The jury found the Wilsteins should recover $162,194 from Dernick for their share of the joint venture. The trial court also held a bench trial and heard evidence on the issue of Wilsteins' request for equitable fee forfeiture. The trial court found the Wilsteins should recover $1,709,421 for equitable fee forfeiture for Dernick's actions and $727,324 for attorney's fees. The issue before the Court of Appeals was the amount of the cash deposit in lieu of a supersedeas bond. Dernick paid $583,427 in lieu of the bond.

The amount of a bond, deposit or security to supersede the judgment must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal and costs awarded. Tex. R. App. P. 24.2(a)(1) and Tex. Civ. Prac. & Rem. Code Ann § 52.006(a).

The position the Wilsteins took was the amount of equitable fee forfeiture should be included as a part of the compensatory damages and therefore included in the cash bond. The Court found that equitable fee forfeitures do not constitute compensatory damages for purposes of the Civil Practice & Remedies Code Chapter 52, as an equitable forfeiture is distinguishable from an award of actual damages incurred as a result a breach of fiduciary duty, and therefore the main purpose of a forfeiture was not to compensate the injured principal, even though it may have that effect, but to protect relationships of trust by discouraging agent's disloyalty. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999). To determine if the trial court had given the fee forfeiture to the Wilsteins as compensatory damages, the Court only had to review the trial court's findings which indicated the primary purpose of the fee forfeiture was not to compensate the Wilsteins but rather to punish Dernick for breaching its fiduciary duty. Consequently, the Appellate Court affirmed the trial court's denial of the Wilsteins' motion to increase the bond.