

PROFESSIONAL LIABILITY UPDATE

Fall 2020

Troy D. Okruhlik

Kyle K. Weldon

HARRIS, FINLEY & BOGLE, P.C.

This newsletter is intended to summarize significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every recent case involving professional liability issues nor of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice.

Wulchin Land, L.L.C. v. Ellis, No. 13-18-00156-CV, 2020 WL 1303230 (Tex. App.—Corpus Christi Mar. 19, 2020, pet filed) (mem. op.).

Case Summary: In 2001, Wulchin Land, L.L.C. (“Wulchin Land”) purchased property in South Texas. As part of the initial transaction, Wulchin Land was represented by Michael Sartori (“Sartori”), the sellers were represented by Schneider & McWilliams, P.C. (“Schneider”), and Thomas R. Forehand d/b/a Forehand Title Company (“Forehand”) served as the title company. The sellers represented that they owned, and were conveying: (1) the entire surface estate; (2) 50% of the mineral estate, subject to a 25% nonparticipating royalty interest; and (3) 100% of the executive rights in the mineral estate. In actuality, the sellers only owned 25% of the mineral estate and 50% of the executive rights.

In 2009, Pioneer Natural Resources USA, Inc. (“Pioneer”) approached Wulchin Land to negotiate a mineral lease. Wulchin Land hired Schnieder and Forehand to represent it in the negotiation and leasing of the property to Pioneer. In July 2009, Wulchin Land executed an oil and gas lease with Pioneer as if it owned 100% of the executive rights in the mineral estate.

Three years later, Pioneer informed Wulchin Land of a “title issue” with the mineral estate conveyed. Wulchin Land again hired Schnieder and Forehand to look into the title issue. After review, and before attempting to resolve the title issue, both Schnieder and Forehand withdrew from representing Wulchin Land, noting that a conflict of interest had arisen because (1) Schnieder had represented the seller in the initial transaction, and (2) Forehand served as the title agent. Wulchin Land subsequently hired new counsel who determined that Wulchin Land only owned 25% of the mineral estate and 50% of the executive rights.

Wulchin Land filed suit against the sellers, in addition to its prior attorneys (Sartori, Forehand, and Schneider), for fraud and breach of fiduciary duty. Sartori, Forehand, and Schneider moved for summary judgment based on the anti-fracturing rule, limitations, and no evidence of damages. The trial court granted their motions and Wulchin Land appealed. On appeal, Wulchin Land contended the accrual date of its legal malpractice claims had been extended by application of the discovery rule. The court of appeals held that the discovery rule applies to legal-malpractice cases, so that “limitations does not begin to run until the client discovers or should have discovered through the exercise of reasonable care and diligence the

facts establishing the elements of a cause of action.”

Wulchin Land’s malpractice claims against Sartori, Forehand, and Schneider included (1) a failure to disclose a conflict of interest, and (2) “bad legal advice.” Looking first at the conflict of interest claim, the court of appeals found that the discovery rule applied because the claim did not implicate Wulchin Land’s constructive notice of the public record. Therefore, the burden was on Sartori, Forehand, and Schneider to establish that there was “no genuine issue of material fact about when Wulchin Land discovered or in the exercise of reasonable diligence should have discovered the nature of its injury.” Because Sartori, Schneider, and Forehand did not establish the accrual date for this claim, the court of appeals held that summary judgment was improper.

The court of appeals also applied the discovery rule to the “bad legal advice” claim. Because of the fiduciary relationship between the attorney and the client, the court of appeals held that a client is not charged with “constructive notice that their attorney’s title advice is contrary to the chain of title in the public record.” Again, because Sartori, Forehand, and Schneider did not establish the accrual date of these claims as a matter of law, the court of appeals held it was improper for the trial court to grant summary judgment based on limitations.

Practice Point: The discovery rule applies to legal malpractice claims. To obtain summary judgment on limitations, the defendant must establish the accrual date of as a matter of law.

***NexBank, SSB v. Winstead PC*, No. 05-18-01345, 2020 WL 1921683 (Tex. App.—Dallas 2020 Apr. 21, 2020, no pet.) (mem. op.).**

Case Summary: NexBank, SSB (“NexBank”) sued Winstead PC (“Winstead”) for professional negligence and negligent misrepresentation arising out Winstead’s representation of NexBank regarding a \$62 million loan. In 2007, NexBank entered into a loan agreement with TCI Park West II, Inc. (“TCI”) to finance a \$62 million loan for the purchase of a property. The loan agreement was guaranteed by Transcontinental Realty Investors, Inc. (“Transcontinental”). More than a year later, TCI informed NexBank that it would not be able to repay the loan. Winstead was hired by NexBank to assist with the loan and foreclose on the property. For the next two years, Winstead represented NexBank in matters related to the loan. In 2011, the property was sold for \$29.5 million at a non-judicial foreclosure sale.

NexBank then sued Transcontinental to recover the post-foreclosure deficiency (approximately \$33 million). Winstead did not represent NexBank in this litigation. As part of that litigation, Transcontinental asserted an affirmative defense of wrongful foreclosure. The trial court denied dispositive motions filed by both NexBank and Transcontinental, and the lawsuit was eventually settled for approximately \$7 million. Following the settlement, NexBank sued Winstead for professional negligence and negligent misrepresentation arising from its representation of NexBank in handling the loan and foreclosure of the property. NexBank alleged that Winstead made several mistakes—including wrongfully foreclosing on the property—which precluded NexBank from fully recovering against Transcontinental.

Winstead filed a hybrid motion for summary judgment on NexBank's professional negligence and negligent misrepresentation claims. The trial court granted Winstead's motion in its entirety and dismissed all of NexBank's claims with prejudice. NexBank appealed.

Among the issues raised by NexBank on appeal, NexBank asserted that its negligent misrepresentation claim was not barred by the anti-fracturing rule. The anti-fracturing rule prevents a plaintiff from converting what are actually professional negligence claims against an attorney into other claims. A court will look at the "gravamen of the plaintiff's complaint" and if the claim is focused on the quality or adequacy of the attorney's representation, the anti-fracturing rule applies and the only valid claim is a negligence cause of action.

In its negligent misrepresentation claim, NexBank alleged that Winstead (1) negligently supplied false information for the purpose of guiding Nexbank in foreclosing on the property, and (2) did not exercise reasonable care or competence in obtaining or communicating the information provided in its legal advice. Because this claim goes to the quality and adequacy of Winstead's representation of NexBank, the court held that NexBanks' negligent misrepresentation claim against Winstead was properly characterized as a malpractice claim; therefore, they were barred by the anti-fracturing rule and summary judgment was proper.

Practice Point: The anti-fracturing rule bars claims other than professional negligence when the focus of the claim is an attorney's failure to exercise the normal degree of care, skill, or diligence in representing the plaintiff.