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Ill. Boosts Malpractice Coverage For Forthright Professionals

By **Bibeka Shrestha**

Law360, New York (November 15, 2012, 9:16 PM ET) -- An Illinois appeals court recently ruled that an attorney who admitted a mistake without his insurer's permission was still owed malpractice coverage because his policy's voluntary payments provision interfered with his ethical obligations — a rare decision that policyholders in other professions should point to when trying to win malpractice coverage, experts say.

In a case of first impression, the appeals court affirmed that Illinois State Bar Association Mutual Insurance Co. must defend Frank Greenfield of Frank M. Greenfield & Associates PC against a malpractice lawsuit over his costly omission of a provision from a client's will.

ISBA contended the attorney had broken the policy's voluntary payments provision by admitting his error in a letter to impacted beneficiaries, without first getting the insurer's written consent.

Noting the scarce case law on the issue, the majority ruled Nov. 9 that the provision ran against public policy because it could stand in the way of an attorney's ethical obligation to let clients know about major case developments.

"That is a sacrosanct bond that involves both the obligation of the attorney and the right of the client, and the insurance company can't get in the way in an effort to save themselves some money," Diana Gliedman, an Anderson Kill & Olick PC shareholder who represents policyholders in professional liability insurance disputes, said. "I think that it is a great decision, and I think that it's likely to be followed by many other courts."

According to Gliedman, attorneys could cite the case as precedent in coverage cases involving legal and other kinds of malpractice. It could help them back up the argument that insurance companies can't demand that policyholders act in a way they believe is unethical or violates the rules of professional practice.

John Gibbons, deputy leader of Dickstein Shapiro LLP's insurance coverage practice, said the decision safeguards lawyers' ethical duties. The court's acknowledgment that admissions of fault are not equivalent to admissions of liability will be important for lawyers and other policyholders, Gibbons said.

"Anywhere where you have an ethical obligation that is recognized by the court to be of importance and worthy of a public policy protection, it would apply," Gibbons said. "It could be used anytime the insurance company is trying to make you choose between acting ethically as a professional and your insurance coverage."

Gliedman said the voluntary payments provision usually turns up in a professional liability coverage case where an attorney facing a malpractice suit admits liability or settles without the insurer's consent and then seeks coverage.

"I've never seen an insurance company try to say that an attorney's honest attempt to do right by his or her clients constituted a violation of the insurance policy," Gliedman said. "In part the decision is notable because the position taken by the insurance company was so egregious."

Without getting ISBA's permission, Greenfield admitted in a letter he sent to four beneficiaries that he had made a mistake when drafting the will, according to the ruling. Those beneficiaries had received a total of about $920,000, instead of the nearly $1.8 million intended, it said.

ISBA argued it had no duty to defend against the malpractice claim because its voluntary payments provision barred insureds from admitting liability, making payments or settling claims without first getting its permission in writing.

According to the decision, both ISBA and Greenfield agreed he had a duty to inform the beneficiaries of his mistake. But ISBA claimed Greenfield had overreached and also admitted the elements of a legal malpractice action.

The insurer insisted it would not have interfered with Greenfield's duty to disclose the error, but could have advised him on how to fulfill his ethical obligations without compromising his defense against a malpractice case.

But the appeals court declined to give the insurer that kind of free rein.

"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," the majority opinion said. "Absent instruction from the rules of professional conduct or the Attorney Registration & Disciplinary Commission, it is the attorney's responsibility to comply with the ethical rules as he understands them."

In a concurring opinion, Judge Rodolfo Garcia took a somewhat different tack, agreeing ISBA had a duty to defend, but declining to come down against the voluntary payments provision.

Garcia stressed that the issue at hand was whether Greenfield had admitted any liability in violation of the voluntary payments provision. He refused to hold that the voluntary payments provision violated public policy because it could limit an attorney's disclosure to his clients.

"While it is clear that an attorney must disclose a professional omission to his client, it is far less clear how much detail an attorney must disclose to meet that ethical obligation," Judge Garcia said. "I am certain, however, that an attorney has no ethical duty to 'admit any liability' to third parties to whom he failed to fulfill his legal duty, which renders the 'admit any liability' prohibition no threat to the public's interest."

According to Judge Garcia, ISBA owed Greenfield a defense because the voluntary payments provision affected only the insurer's duty to indemnify when an attorney admits liability, and not its broader duty to defend.

Gliedman said the concurring judge seemed to be suggesting an insurer could insert its own opinion on how and what an attorney should communicate with its clients. She said she'd be surprised if other courts would instruct attorneys to be anything less than entirely forthright with their clients.

"I think that's a slippery slope, and I think that it's unlikely that many courts would find that," Gliedman said. "It's really up to an attorney to decide what information is relevant and important to his or her own clients."

Representatives for ISBA and Frank M. Greenfield & Associates were not immediately available for comment Thursday.

Counsel information for the parties was not immediately available.

The case is Illinois State Bar Association Mutual Insurance Co. v. Frank M. Greenfield and Associates PC et al., case number 1-11-0337, in the Appellate Court of Illinois, First Judicial District.

--Editing by Kat Laskowski and Andrew Park.