

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHARMACISTS MUTUAL INSURANCE CO.	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 05-5216
BILLET & CONNOR., et al.	:	

MEMORANDUM

Baylson, J.

February 9, 2006

I. Introduction

Presently before this Court is a Motion to Dismiss pursuant to F.R. Civ. P. 12(b)(6). For the reasons set forth below, Defendants' Motion to Dismiss will be denied.

II. Background

A. Procedural Background

Plaintiff filed its original complaint on October 4, 2005, alleging breach of fiduciary duty and negligence. On November 21, 2005, the Defendants filed their Motion to Dismiss (Doc. No. 5). Plaintiff filed a Response (Doc. No. 10) on December 19, 2005, and Defendants filed a Reply brief (Doc. No. 12) on December 27, 2005.

B. Allegations in the Complaint

According to the Amended Complaint, Plaintiff Pharmacists Mutual Insurance Company ("Pharmacists Mutual" or "Plaintiff"), a car insurance company, retained the Defendants Billet & Connor, William M. Connor, Esquire and Scott Griffith, Esquire, a law firm and two of its attorneys (collectively, "Defendants"), to represent both Pharmacists Mutual and one of

Plaintiff's clients (the "insured") after an auto accident. During the course of representation, Plaintiffs aver that Defendants learned of information that created a conflict of interest between its two clients: that the insured was lying about the true cause of the accident.¹ At a November 2003 deposition of the insured, the Defendants stipulated as to the insured's liability. However, Defendants did not consult with Plaintiff before doing so; in fact, Defendants did not inform Plaintiff about the admission of liability or about the underlying conflict for many months (until shortly before trial). Instead, they continued to apprise Plaintiff that they planned to pursue the original "sudden emergency" defense. At a trial in the Chester County Court of Common Pleas, Defendants conceded the insured's liability and the jury rendered a \$1.1 mi. verdict against the insured, which is currently under appeal. (Amended Compl. at ¶¶ 7-37).

The Amended Complaint sets forth two causes of action. Count I asserts breach of fiduciary duty against all Defendants. *Id.* at ¶¶38-45. Count II asserts that all Defendants committed negligence against Plaintiff. *Id.* at ¶¶46-52. Plaintiff's allege Defendants failed to apprise them of important developments during the litigation, misled them about available defenses, misled them about the strength of the insured's claim, and impermissibly favored the insured rather than withdrawing from the representation of both parties. Plaintiff asserts the withheld information could have provided it with grounds to disclaim coverage for the insured and would likely have affected Plaintiff's judgment about the settlement value of the case. Plaintiff seeks relief in the form of compensatory and consequential damages, attorneys' fees, interests and costs and other relief as is reasonable and just. *Id.* at 9-10.

¹The insured originally maintained that the accident occurred when he swerved to avoid hitting a deer, but later admitted to his lawyers that he and his wife were engaged in "distracting" behavior in the car.

III. Jurisdiction and Legal Standard

A. Jurisdiction

This Court has diversity jurisdiction under 28 U.S.C. § 1332 because the matter in controversy exceeds \$75,000 and is between citizens of different states.

Venue is appropriate in this district, pursuant to 28 U.S.C. § 1391 because the claim arose in this judicial district.

B. Legal Standard

When deciding a motion to dismiss pursuant to F.R. Civ. P. 12(b)(6), the court may grant the motion only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, the plaintiff is not entitled to relief. Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183 (3d Cir. 2000). Accordingly, a federal court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001).

IV. Contentions

A. Contentions Regarding the Motion to Dismiss

Defendants contend that under Third Circuit and Pennsylvania caselaw, when an insurer retains counsel to defend an insured, the insured is the client. Thus, Defendants contend the insured, and not Plaintiff, was their client, and for that reason, Plaintiff cannot sue for legal malpractice under either a breach of fiduciary or a negligence theory.

As to breach of fiduciary duty, Defendants argue that any duty owed to the Plaintiff only existed until the conflict arose. Once it did, they had legal and ethical obligations to exclusively

represent the interests of their client, the insured, and to put aside any duties owed to Plaintiff. (Def's Mem. at 1-2, 6-9). In response, Plaintiff cites to Pennsylvania cases finding that both the insurer and the insured are the clients of retained counsel. Further, Plaintiff argues that much of Defendants' arguments are irrelevant, because they are dedicated to arguing why Plaintiff cannot maintain a legal malpractice claim against them. However, Plaintiff maintains it has not brought a malpractice claim, but rather: (1) breach of fiduciary duty and (2) negligence claims only, which are distinct causes of action from malpractice. (Pl's Response at 2-12). Defendants reply that, in fact, Plaintiff has asserted claims for legal malpractice by stating claims for negligence and breach of fiduciary duty (which are merely theories of legal malpractice), insofar as a purported attorney-client relationship forms the basis of both allegations. (Def's Reply at 1-2).

Next, as to the negligence claim, Defendants argue that an abundance of Pennsylvania cases hold that an attorney can be liable only to its client for negligence, which Defendants maintain it was not. Moreover, Plaintiff's filing a Certificate of merit, which are required only in professional malpractice claims, is inconsistent with its assertion that this is a simple negligence claim. (Def's Reply at 1-2). Plaintiff urges that Defendants owed duty of care not because of an attorney-client relationship, but because Plaintiff paid Defendants for their services, thus affording it standing to assert a negligence claim. (Pl's Response at 11-12).

Finally, Defendants maintain that Plaintiff failed to plead that Defendants' conduct proximately caused it any damages, thus barring its claims. Further, because the underlying case is on appeal, a favorable ruling on Plaintiff's behalf could completely negate any damages entirely. (Def's Mem. at 9-11; Def's Reply at 5). Plaintiff argues it *did* plead damages. Although the underlying verdict is currently being appealed, Plaintiff still currently must indemnify the

insured for 1.1 million dollars. Further, had it been fully informed, it could have settled the case for far less. Finally, Plaintiff urges that a breach of fiduciary duty claim — as opposed to professional malpractice — does not require a showing of strict “but-for” causation of financial loss. At the very least, they would be entitled to disgorgement and/or forfeiture of attorney’s fees. (Pl’s Response at 12-14).

V. Discussion

At the outset, it is important to note that F.R. Civ. P. 8(a)(2) articulates the liberal notice pleading requirements in the federal courts. Rule 8 simply requires that a pleading include “a short and plain statement of the claim showing that the pleader is entitled to relief” F.R. Civ. P. 8(a). “Generally, in federal civil cases, a claimant does not have to set out in detail the facts upon which a claim is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim.” Conley v. Gibson, 355 U.S. 41, 47-48 (1957); Weston v. Pennsylvania, 251 F.3d 420, 428 (3d Cir. 2001).

Under this standard, it is impossible for the Court to find that the Plaintiff’s Complaint fails to state a claim as a matter of law because there are significant issues of fact presented by the Plaintiff’s Complaint and allegations in the Defendants’ Motion to Dismiss, and the Plaintiff’s Response. Some of those issues are as follows:

1. Whether Plaintiff was in fact Defendants’ client, including (a) whether, when the Plaintiff retained the law firm, it clearly established an attorney-client relationship with the law firm or only desired the law firm to defend the insured, and (b) whether at any time the law firm itself believed that it had an attorney-client relationship with the insurer as well as the insured.
2. It appears that the Plaintiff’s claim for breach of fiduciary duty may be viable in

Pennsylvania even if the Plaintiff did not have an attorney-client relationship with the Defendants, because legal malpractice and breach of fiduciary duty are distinct causes of action.

Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1283 (Pa. 1992).

3. Count II, charging negligence, does not necessarily depend on the existence of an attorney-client relationship.

4. Plaintiff should consider whether it wishes to allege a breach of contract. The Court would be reluctant to allow a new theory of liability to come into the case at a subsequent time. If Plaintiff believes that such a claim is viable, it should amend its complaint now.

5. Defendants raise the question as to whether the Plaintiff has any damages at this time because the Plaintiff has not paid any money on the judgment that was entered in Chester County; however, Plaintiff has paid the Defendants legal fees and the Court believes that this is sufficient to Plaintiff's claim to go forward.

6. There are issues as to whether and when it was known to the parties that the Defendant law firm had a conflict of interest, and whether it could have been waived and whether it was waived.

VI. Conclusion

Defendants' Motion to Dismiss (Doc. No. 5) will be denied. An appropriate Order follows.

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ORDER

AND NOW, this **9th day of February 2006**, based on the foregoing memorandum and upon consideration of the pleadings and briefs, it is hereby ORDERED that Defendants' Motion to Dismiss (Doc. No. 5) will be DENIED.

BY THE COURT:

/s/ **Michael M. Baylson**

MICHAEL M. BAYLSON, U.S.D.J.

