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

GOVERNMENT EMPLOYEES INSURANCE COMPANY	:	CIVIL ACTION
v.	:	
ANDREW J. FORBES, ESQ., et al.	:	NO. 99-881

MEMORANDUM AND ORDER

FULLAM, Sr.J. JUNE , 1999

This is a malpractice action brought by the Government Employees Insurance Company (GEICO) against an attorney (and his law firm) retained by the insurer to defend its insured in an underlying action arising from a motor vehicle accident. GEICO claims that attorney Forbes mishandled the defense of its insured, resulting in a multimillion-dollar jury verdict for the plaintiff. GEICO eventually settled the claim for an amount substantially in excess of the policy limits. Among other things, Forbes allegedly failed to serve expert interrogatories, failed to introduce expert testimony to rebut the underlying plaintiff's expert, failed to obtain that plaintiff's employment, educational or medical records, and failed to keep GEICO fully informed concerning the case.

Defendants have moved to dismiss counts I (negligence), III (breach of fiduciary duty) and IV (naming the law firm as defendant, based upon principles of agency). Defendants

claim that they cannot be liable to GEICO for malpractice because they had no attorney-client relationship with the insurer.

There are three elements that must be shown in order to establish legal malpractice under Pennsylvania law: (1) employment of the attorney or other basis for a duty owed to the client; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) that such failure was the proximate cause of damage to the client. *See* Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 616-17 (3d Cir. 1991), *cert. denied*, 504 U.S. 955 (1992). The general rule is that an attorney-client relationship is a condition precedent of a malpractice action. There are exceptions, such as situations involving a named beneficiary under a will. *See* Guy v. Liederbach, 459 A.2d 744 (Pa. 1983)(decided under third-party beneficiary contract principles). In Allstate Ins. Company v. LaBrum and Doak, C.A. No. 88-8448, 1989 WL 51553 (E.D. Pa. May 12, 1989), the late Judge McGlynn held that an insurance company is also a client of the law firm it hires to represent its insured, and so has a separate malpractice claim. While this decision was based on the New Jersey case of Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J. 1980), there are several reasons to believe that the Supreme Court of Pennsylvania would concur.

First, while it is true that when there is a conflict between the insured and the insurer, the attorney clearly owes his primary allegiance to the former, there is here no allegation of any such conflict. Second, the current version of the forthcoming Restatement of the Law Governing Lawyers takes the position that regardless of whether the jurisdiction regards the insurer as a co-client with the insured, "a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer

and the insured are not in conflict." Id. at §73 cmt. g (Tentative Draft No. 8, 1997). Third, in a case such as this, where the insurer paid an amount in excess of the policy limits and the insured consequently suffered no pecuniary loss, the insured has no incentive incur the expense involved in bringing a malpractice action. The only person who benefits from a rule preventing the insurer from doing so is the malpracticing attorney. *See* Unigard Ins. Grp. v. O'Flaherty & Belgum, 38 Cal.App.4th 1229, 1236 (1995)(*quoting* Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 298 (Mich. 1991)).

An Order follows.

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O R D E R

AND NOW, this day of June, 1999, IT IS ORDERED that defendants' motion to dismiss is DENIED.

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Fullam, Sr.J.