



**MORRISON MAHONEY LLP**  
*Legal Malpractice Law Update*



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A Bi-Weekly Review Of Decisions Throughout The Country

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**U.S. COURT OF APPEALS (9<sup>th</sup> Circuit)**

***Litigation Privilege Bars Plaintiff's Action  
Against Defendant's Attorney For Submitting  
Allegedly Misleading Evidence***

**Buonanoma v. Sierra Pac. Power Co.  
2009 U.S. App. LEXIS 9171 (4/29/09)**

Plaintiff brought an age, race, and gender discrimination action against his employer and a fraud, defamation and malpractice action against the employer's attorney based on the attorney's submission of alleged misleading materials to the Equal Employment Opportunity Commission. The attorney moved for summary judgment, which the district court granted, holding that plaintiff's claims were barred by the litigation privilege that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy. Plaintiff appealed, and the 9th Circuit affirmed, holding that district court did not make an erroneous view of the law or that it engaged in a clearly erroneous assessment of the evidence.

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**U.S. DISTRICT COURT (N.D. TEXAS)**

***Professional Liability Insurance Coverage Applies To An Action  
Against The Underlying Plaintiff's Attorney  
By The Underlying Defendants***

**Westport Ins. Corp. v. Cotten Schmidt , LLP  
2009 U.S. Dist. LEXIS 21880 (3/1/09)**

Defendants represented a client in two successful lawsuits against Russell and Empire, which resulted in the sale of equipment at auction. Russell and Empire brought an action against defendants for wrongful conversion, levy, execution and sale based on various alleged improprieties in the underlying actions. Defendants sought insurance coverage from a professional liability insurance policy issued by plaintiff, which filed a declaratory judgment action, claiming that it had no duty to defend or indemnify defendants. Both parties filed motions for summary judgment. Plaintiff argued that there was no "wrongful act" as required by the policy, because defendants (1) owed no duty to Russell and Empire, (2) were not in privity with them, and (3) were not sued in their capacities as lawyers, but for their participation in wrongful sale of equipment. The court denied plaintiff's wrongful act argument for three reasons. First, it found that the equipment was subject to auction because of what defendants did as attorneys in obtaining default judgments, obtaining a writ of attachment, and executing upon the equipment.

Therefore, defendants' actions fit within the definition of "wrongful act." Second, if an attorney cannot be held liable by a third party for conduct in representing a client, the parties to a malpractice insurance policy could not intend for such acts to be covered. However, the plain language of the policy does not limit coverage to claims of breach of duty nor to clients of defendants, but extends to "any act, error, [or] omission . . . in the rendition of legal services for others in the INSURED's capacity as a lawyer." (emphasis in original). Third, if the lack of duty owed by defendants was a valid defense to the underlying action, then the attorney that plaintiff provided defendants in the underlying action can raise it as a defense in the underlying action. The fact that a valid defense to the underlying suit exists is not a basis for finding no duty to defend. Plaintiff also argued that defendant' actions fell within the policy's prior-knowledge exclusion because defendants knew or could have reasonably foreseen that their actions might be the basis of a claim against them. The court held that a reasonable attorney in the position of defendants would not necessarily anticipate that their conduct might result in a claim against them. The court also held that a property damage - loss exclusion and a conversion exclusion did not apply. Finally, plaintiff argued that the policy's Exclusion A applies, which provides that the policy does not cover "any criminal, dishonest, malicious or fraudulent act, error, omission or PERSONAL INJURY committed by an Insured." Both sides agreed that this exclusion is only applicable to the duty to indemnify because it only applies when the insured has been adjudged to have committed the named acts. Having concluded that plaintiff had a duty to defend defendants, the court did not address exclusion A or the indemnity issue.

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## **ALABAMA SUPREME COURT**

### ***Failure To Prove The Case Within A Case***

**Bonner v. Lyons, Pipes & Cook, P.C.**  
**2009 Ala. LEXIS 64 (4/7/09)**

Plaintiff, a franchisee, was sued by the franchisor because the franchise's renewal notice expired and the franchisee had not paid the franchisor the franchise fee. Plaintiff sued defendant, its attorney, for failing to timely send the renewal notice. During the trial, defendant moved for judgment as a matter of law, because even if defendant had timely sent the renewal notice, the franchise would not have been renewed because of plaintiff's failure to pay the franchise fee. The trial court granted judgment to defendant, and plaintiff appealed. The Alabama Supreme Court affirmed, holding that plaintiff's attempt to renew the franchise agreement without paying 50% of the initial franchise fee at the time of renewal, as specified in the renewal-

option provision, would have been ineffective to form a binding renewal contract, even had the notice of renewal been timely. Therefore, plaintiff could not prevail on its malpractice claim for failing to timely provide notice of renewal.

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## **PENNSYLVANIA SUPREME COURT**

### ***Plaintiff Failed To Plead Breach Of Contract To Extend The Statute Of Limitations***

**Steiner v. Markel  
2009 Pa. LEXIS 666 (4/29/09)**

Plaintiff brought a complaint against defendants in Pennsylvania Court of Common Pleas. The complaint contained three counts: count one - malpractice; count two - third party beneficiary; and count three - breach of good faith and fair dealing. The complaint did not contain a breach of contract claim, which has a four year statute of limitations, 42 Pa.C.S. 5525. Defendants moved for judgment on the pleadings regarding count one because the action was barred by the two year statute of limitations, 42 Pa.C.S. 5524. The court granted judgment, and plaintiff filed a motion for reconsideration, which did not allege breach of contract. The court denied the motion, and plaintiff appealed to the Pennsylvania Superior Court, again not alleging breach of contract. The Superior Court reversed and remanded, holding, *sua sponte*, that the complaint stated a timely claim for breach of contract, despite the fact that plaintiff did not plead it, because the complaint contained the statement: "At closing, the Steiners also paid a fee to Nikolaus & Hohenadel for 'services' allegedly rendered by attorney Markel." Defendants appealed, arguing that the Superior Court's *sua sponte* action constituted reversible legal error. The Pennsylvania Supreme Court phrased the issue as "whether an appellate court may, *sua sponte*, search within a complaint to find a cause of action that the plaintiffs never argued was present in the complaint." The court found that an appellate court cannot reverse a trial court judgment on a basis that was not properly raised and preserved by the parties; and that where the parties fail to preserve an issue for appeal, the Superior Court may not address that issue *sua sponte*. The court determined the Superior Court could properly evaluate the breach of contract issue only if the following was true: whether the broad language in the complaint was sufficient to preserve this issue for appeal; and the trial court had the duty to discern this claim in the complaint. In this case, neither proposition is true. The court determined that the claim for breach of contract was waived and, therefore, should not have been raised *sua sponte* by the Superior Court, concluding that the court improperly evaluated whether the complaint contained an entirely different, previously

unstated, theory of recovery; and it did not have a "duty to scour the complaint to find a breach of contract claim therein."

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**CALIFORNIA APPELLATE COURT**

***Decedent's Attorney Owed No Duty  
To A Beneficiary Of The Decedent's Estate***

**Chang v. Lederman  
2009 Cal. App. LEXIS 360 (3/16/09)**

Decedent, the husband of plaintiff, hired defendant to create a trust regarding, *inter, alia*, how his home would be sold. Decedent died, and plaintiff claimed decedent told defendant to revise the trust and leave plaintiff the entire estate. Plaintiff sued defendant for, *inter alia*, malpractice and breach of fiduciary duty. Defendant filed a demurrer, arguing that, as decedent's attorney, he owed no duty to a beneficiary like plaintiff. The trial court granted the demurrer and the appellate court affirmed, holding that defendant did not have a duty to plaintiff.

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**LOUISIANA APPELLATE COURT**

***The Court Denied Plaintiff's Action Against His Insurer  
And His Insurance Defense Attorneys  
For Settling An Underlying Action Against Plaintiff,  
Because The Insurer Had The Contractual Right To Settle***

**Teague v. St. Paul Fire & Marine Ins. Co. Et Al  
2009 La. App. LEXIS 470 (4/7/09)**

Plaintiff, a doctor, was sued for medical malpractice, and his insurer, St. Paul, hired insurance defense counsel to represent him. St. Paul settled the action, and plaintiff brought an action against St. Paul for settling the action without his consent and an action against his insurance defense counsel for, *inter alia*, facilitating the settlement without his knowledge or consent. The policy did not contain a consent to settle clause and specifically stated: "We have the right to investigate, negotiate and settle any suit or claim if we think that's appropriate." Plaintiff claimed damages consisting of injury to business reputation and unwarranted expense associated with obtaining malpractice insurance at a higher premium, loss of income, past and future, embarrassment, humiliation, and mental anguish. Plaintiff received a verdict in his favor, and defendants appealed. The court held, *inter alia*, that because plaintiff did not possess the right to oppose the insurer's settlement of the medical malpractice action, he failed to prove that the insurance defense attorneys' alleged malpractice or breach of ethical duties was the

legal cause of his claimed damages related to the insurer's settlement of the action.

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**NEW YORK APPELLATE DIVISION COURT**

***Estate Lacked Privity To Bring A Malpractice Action***

**Estate of Saul Schneider v. Finmann**

**2009 NY Slip Op 2319 (3/24/09)**

Decedent transferred ownership of a life insurance policy on his own life from a limited liability partnership, which he controlled, to himself. He allegedly acted on the advice of defendant. Decedent died, and the transfer of ownership of the policy allegedly resulted in increased estate tax liability. Decedent's estate sued defendant for malpractice. Defendant moved to dismiss, and the trial court and appellate court affirmed, holding that inasmuch as the estate was not in privity with defendant, and there is no allegation that one of the exceptions to the privity requirement was applicable, the estate could not maintain a malpractice action in its own right. Since decedent did not have a claim during his lifetime against defendant for malpractice, as the only alleged damage suffered from the alleged malpractice was the increase in estate tax liability, which could not have been incurred while decedent was alive, the estate could not maintain the action under EPTL 11-3.2(b).

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**OHIO APPELLATE COURT**

***Plaintiff Failed To Plead Fraud  
To Extend The Statute Of Limitations***

**Warman v. Mulligan**

**2009 Ohio 1940 (4/17/09)**

After being convicted and sentenced, plaintiff brought an action against his criminal defense attorneys, alleging that their representation was ineffective, incompetent, and prejudicial to his interests; had deprived him of any possibility of obtaining bail; and violated his Sixth Amendment constitutional rights. The first count was titled fraud, and the second count was titled negligence." Defendants moved for summary judgment on the ground that the action was barred by the one year statute of limitations, R.C. 2035.11(A). Plaintiff conceded that the action would be barred by R.C. 2035.11(A), but argued that the four year statute of fraud, R.C. 2305.09(C), applied. The trial court granted summary judgment, ruling that plaintiff's claim for fraud did not alter the fact that the gist of the plaintiffs' claims

related to the alleged inappropriateness of the legal advice given and that the label given to the cause of action was immaterial. Plaintiff appealed, and the court ruled that while there may be circumstances in which an attorney provides services that may constitute a cause of action for fraud separate from a malpractice claim, when the alleged fraudulent conduct is integral to a malpractice claim, the conduct does not independently extend the statute of limitations for malpractice. The court determined that the first claim, although captioned as 'fraud,' sounded in malpractice and that the necessary elements for a fraud claim were not alleged.

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MORRISON MAHONEY LLP

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Morrison Mahoney's reputation for success in legal malpractice defense has allowed us to have the opportunity to defend more attorneys in the Northeast than any other law firm practicing in this area. Our clients range from sole practitioners to multi-national firms and have involved us in the defense of civil, administrative and criminal matters. We also represent clients before professional licensing boards and state and federal administrative agencies regarding all types of disciplinary matters. We enjoy a high rate of success in handling dispositive motions, trials and appeals. The attorneys handling attorney malpractice matters are acutely aware of the burdens of representing fellow members of the bar, some of whom are excellent trial lawyers themselves, and we strive to be sensitive to the specific demands of each client.

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