

PROFESSIONAL LIABILITY UPDATE

February 9, 2004

Issue No. 173

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By Anna Kapetanakos

A bankruptcy court's allowance of a claim in an uncontested proceeding does not satisfy the damages element of a legal malpractice claim.

Edward M. Wolkowitz v. Redland Insurance Company, et al. (2003) 112 Cal.App.4th 154

Anthony Choy filed a personal injury lawsuit against Shamrock. Shamrock's insurer, Redland, retained Zinder, Blackburn, Park, Clements & Keenan to defend Shamrock. Redland refused Choy's demand to settle for policy limits of \$500,000. Zinder then failed to communicate to Shamrock Choy's offer for an agreement not to execute on a stipulated judgment against Shamrock in exchange for an assignment of Shamrock's bad faith claim against Redland.

Shamrock subsequently filed a Chapter 7 bankruptcy petition. Wolkowitz, the Chapter 7 bankruptcy trustee, agreed that Choy had a \$26,225,000 unsecured claim against Shamrock's bankruptcy estate. They also agreed that Wolkowitz and Choy shared a common interest in maximizing the value of the bankruptcy estate by recovering a judgment against Redland for an amount in excess of Shamrock's policy limit. Choy agreed not to seek recovery from Shamrock, only from Redland. The bankruptcy court granted Wolkowitz' unopposed

motion to approve the settlement agreement, and allowed the claim.

Relying on the court's allowance order, Wolkowitz sued Zinder for legal malpractice arguing that Zinder failed to inform Shamrock of Choy's settlement offers and improperly advised Shamrock to file for bankruptcy in order to protect Redland from liability for an excess judgment. Zinder filed a demurrer, which the trial court sustained without leave to amend, on grounds that Wolkowitz' complaint did not allege sufficient facts to establish damages resulting from the attorney's alleged malpractice. The Court of Appeal agreed.

The bankruptcy court's approval of Shamrock's settlement was not a final judgment in the personal injury action. It did not determine the validity or amount of Choy's claim after a contested evidentiary hearing. The court simply granted the trustee's unopposed motion to allow Choy's claim. Thus, the order was not a judicial finding of Shamrock's

actual liability. A bankruptcy court's approval of an uncontested claim without an evidentiary hearing cannot establish the damages in a legal malpractice action.

Furthermore, the judicially noticed bankruptcy records demonstrated that Shamrock does not have sufficient assets to pay any judgment in excess of Redland's policy limits. Even if a judgment had been entered in excess of policy limits in Choy's personal injury action, Shamrock's pre-existing insolvent status establishes that it would suffer no compensable harm from any act or omission by Zinder.

Comment: A bankruptcy court's allowance order following an uncontested proceeding does not satisfy the damages element necessary in a legal malpractice claim.