

PROFESSIONAL LIABILITY UPDATE

August 27, 2004

Issue No. 192

Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

Chip B. Cox

Kim O. Dincel

Edward F. Donohue, III

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

Joseph P. McMonigle

Douglas J. Melton

Jessica B. Rudin

Steven Sharafian

Ann L. Strayer

Jennifer W. Suzuki

Jeanette Traverso

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Kevin Whittaker

Irene K. Yesowitch

DUTY

California Law

By Jessica B. Rudin

*Janik v. Rudy, Exelrod & Zeiff*, 04 C.D.O.S. 5507

*Division Three of the First District holds that class counsel owes a duty of care to members of a certified class with respect to claims beyond the scope of the class certification order.*

Rudy, Exelrod & Zeiff was class counsel in *Bell v. Farmers Insurance Exchange* (“Bell”). The Bell complaint alleged one cause of action for violation of overtime rights under Labor Code § 1194. The court certified a class and approved Rudy, Exelrod & Zeiff’s appointment as class counsel. Stanley Janik was a member of the class. Rudy, Exelrod & Zeiff established Farmer’s liability via a motion for summary adjudication and obtained a verdict in excess of \$90 million at trial on damages.

Janik filed a class action for legal malpractice against Rudy, Exelrod & Zeiff alleging the firm breached a duty of care to him and the class when it failed to pursue an unfair competition claim under Business and Professions Code § 17200. Janik asserted an unfair competition claim would have enlarged the period of time for which overtime wages could have been recovered.

Rudy, Exelrod & Zeiff successfully demurred to Janik’s complaint arguing it

owed no duty of care as to claims beyond the scope of the court’s class certification order. The defendant attorneys analogized the class certification order to a retainer agreement and argued that an attorney cannot be sued for failing to raise a claim beyond the scope of the agreement.

The Court of Appeal agreed that a class certification order was the equivalent of a retainer agreement but found attorneys can be liable for failing to raise a claim beyond the scope of a retainer agreement. In *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, an attorney agreed to represent a plaintiff in a workers’ compensation action but did not inform plaintiff of a potential third party claim. Because the attorney was in a position to analyze the client’s legal needs he owed the client a duty of care to advise of all possible remedies.

Class representatives and absent class members are entitled to assume their counsel will consider and bring to the

attention of the class representatives additional claims that they will be precluded from pursuing if not asserted in the pending action. The unfair competition claim would have been based on the same set of facts and subject to the same legal analysis as the claims certified by the court. The attorneys had a duty to consider the advantages and disadvantages of adding the claim; bring these considerations to the attention of class representatives; and take or recommend action.

The court also rejected Rudy, Exelrod & Zieff's argument that FRCP 23, pertaining to class certification, provided the only procedure by which Janik could have challenged the adequacy of its representation. The court distinguished the judicial inquiry made when certifying a class and appointing class counsel from the inquiry made when certifying a settlement class and/or approving a class settlement. When certifying a class and appointing class counsel, a court merely determines class counsel is free from conflicts and will fairly and adequately protect the interests of the class. When certifying a settlement class or approving a class settlement, the court determines whether class counsel has in fact adequately protected the interests of the class. Because the underlying case was tried and not settled, the court never assessed whether Rudy, Exelrod & Zeiff fairly and adequately protected class members or whether it had good reasons to forego an unfair competition claim.

*Comment:* While class actions have always been considered a high-risk area of practice, this case raises significant additional concerns regarding a class member's ability to pursue class counsel for legal malpractice.