

PROFESSIONAL LIABILITY UPDATE

April 13, 2007

Issue No. 252

Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

Chip B. Cox

Kim O. Dincel

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

Jessica R. MacGregor

Joseph P. McMonigle

Douglas J. Melton

Glen R. Olson

Jordan Rojas

Steven Sharafian

Ann L. Strayer

John B. Sullivan

Jennifer W. Suzuki

Jeanette Traverso

Beth A. Trittipio

Karen L. Uno

Seth E. Watkins

Kevin Whittaker

Irene K. Yesowitch

SETTLEMENT AND FRAUD

CALIFORNIA LAW

By Jennifer A. Becker

Charnay v. Cobert (2006) 145 Cal.App.4th 170

The Second District holds that a client may pursue a claim that she could have settled an underlying action even absent allegations of what settlement would have been acceptable to the underlying parties. In addition, the client was permitted to pursue fraud claims based on the attorneys' opinion about the outcome of the underlying case.

Martha Charnay retained Joseph Cobert to defend her in a limited jurisdiction complaint filed by her neighbor over her obligation to pay for a common benefit pursuant to conditions, covenants, and restrictions that contained a prevailing party attorney fee provision. Cobert's fee agreement had a "no guarantees" provision and a ten-day billing dispute provision.

Charnay alleged that Cobert initially recommended she settle the action but later changed his recommendation and suggested she defend the lawsuit and pursue a cross-complaint against the plaintiff and other neighbors. Cobert did not tell Charnay of her potential exposure to liability for the opposing parties' attorney fees.

Eventually Charnay was ordered to pay nominal amounts on the claims being defended, but over one half million dollars as the non-prevailing party under the attorney fee provisions. Cobert

billed Charnay more than \$360,000 for his services.

Charnay filed causes of action for failure to advise settlement in light of the prevailing party attorney fees provisions, for fraudulent billing, and for fraud and deceit based on Cobert's statements that she would be the prevailing party and would recover all of her fees.

The trial court sustained a demurrer to the complaint without leave to amend concluding each of the claims was legally deficient.

Generally claims that an underlying lawsuit would have settled for an amount different than the actual resolution are considered too speculative. However, the Court of Appeal concluded that settlement in Charnay's matter was not too speculative because the underlying lawsuit was filed in the limited jurisdiction court and demanded less than the maximum limit. In any event the case could have resolved even

without the underlying plaintiff's consent by allowing a default judgment to be entered. Finally, Charnay should be allowed, regardless of any settlement, that she could have achieved a more favorable result than the \$600,000-plus judgment rendered against her.

The court disagreed with the trial court's alternative grounds that the CC&R's attorney fee provision was "constructive notice" of Charnay's obligation to pay the opposing parties' attorney fees cutting off causation. The trial court relied on cases holding that a party to an unambiguous written agreement is presumed to understand it as a matter of law. While that is true in disputes between contracting parties, it has no application to a legal malpractice action where a client retains counsel for the specific purpose of advice about the meaning of an agreement.

Charnay's claims that Cobert billed her for tasks not performed and used inflated rates stated a claim for breach of fiduciary duty notwithstanding the retainer agreement's ten-day dispute provision. Charnay's failure to raise a dispute under the contract did not immunize Cobert's breach, which is based on a duty arising from the attorney-client relationship itself and not the retainer agreement.

Nor did the dispute provision limit Charnay's right to file a lawsuit challenging the fee statements absent a dispute; it just allowed Cobert to assume the statement was accurate. If the provision were interpreted to shorten the applicable limitations period to ten days, it would be unreasonable as a matter of law and thus unenforceable. A contractually shortened limitation period has never been applied in an action

against a professional or skilled expert where breach of a duty is more difficult to detect. Enforcement of the notice provision would abrogate the well-established delayed discovery rule in breach of fiduciary duty cases.

The Court of Appeal also allowed Charnay to pursue her claims for intentional fraud and negligent misrepresentation based on Cobert's assurances that she need not be concerned about her escalating attorney's fees because she would prevail and recover those fees from the opposing parties at the end of the action. The "no guarantees" clause in the retainer agreement did not mean that Charnay could not reasonably rely on Cobert's subsequent oral representation declaring her victory certain and her ability to recover all of her attorney fees a foregone conclusion. Her claim was not barred under the parole evidence rule because she did not seek to contradict the "no guarantee" provision of the retainer agreement. Charnay's allegations involve promises made subsequent to the execution of the parties' retainer agreement, not a prior or contemporaneous oral agreement, and thus the rule is inapplicable.

Comment: This is a classic example of extreme facts making bad law. Under prior case law, "bad settlement" claims fail because the client cannot show that the underlying opponent would have settled or would have settled for different amount, that is, the claim is too speculative. This case opens a crack in that defense because the Court held that there are circumstances where a different underlying settlement is not inherently speculative. In addition, the client was also allowed to pursue a claim that the attorney's *opinion* that the client would

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. None of the material is intended to imply or establish standards of care applicable to any attorney in any particular circumstance. The reader must consult with counsel to determine how the concepts and decisions discussed herein may apply to specific circumstances.

prevail and recover her attorney's fees was fraud. Note that because this was a ruling on a demurrer, there is no record of Cobert's substantive response to Charnay's allegations.

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. None of the material is intended to imply or establish standards of care applicable to any attorney in any particular circumstance. The reader must consult with counsel to determine how the concepts and decisions discussed herein may apply to specific circumstances.