

PROFESSIONAL LIABILITY UPDATE

DUTY ATTORNEYS FEES

By Glen R. Olson

Hartford Casualty Ins. Co. v. J.R. Marketing, LLC, 2015 WL 4716917 (August 10, 2015)

The California Supreme Court allows an insurer to sue Cumis counsel to recover allegedly unreasonable and unnecessary defense fees and costs.

J.R. Marketing, Noble Locks, and several of their employees, (J.R. Marketing”) were sued for intentional misrepresentation, breach of fiduciary duty, unfair competition, and other counts in California and in other states. Hartford Casualty Insurance Company (“Hartford”), the liability insurer for J.R. Marketing, denied a duty to defend the actions. In a separate coverage action, the trial court entered an enforcement order finding Hartford had breached its defense obligation by refusing to provide independent (“Cumis”) counsel for the insured. The order also established Hartford waived its right to assert the attorney billing rate provisions of California Civil Code § 2860. The order explicitly permitted Hartford to challenge fees and costs in a separate reimbursement action after the underlying suits were resolved.

After the liability suits against J.R. Marketing were settled, Hartford filed an action against J.R. Marketing’s Cumis counsel, Squire Sanders, alleging it charged excessive fees and costs. The trial court sustained Squire Sanders’s demurrer to Hartford’s complaint, concluding the insurer had no legal or equitable claim against non-insureds, including independent counsel for an insured. The California Supreme

Court reversed, holding, under the narrow facts of the case, that Hartford could pursue its right of reimbursement directly against Squire Sanders.

Squire Sanders argued Hartford was not entitled to restitution for a benefit it incidentally conferred on Squire Sanders while performing its pre-existing duty to its insureds. Hartford was contractually obligated to pay the defense costs as to potentially covered third party claims; Squire Sanders was merely the incidental beneficiary of Hartford’s performance of its obligations to its insureds. The Supreme Court disagreed, noting Hartford’s obligation to pay for Cumis counsel was not unlimited, and did not extend beyond the duty to pay reasonable fees and costs.

Squire Sanders asserted restitution based upon unjust enrichment would frustrate public policy, because Cumis attorneys are answerable solely to the insured, and have no attorney-client relationship with the insurer. Restitution, Squire Sanders argued, would have a chilling effect on counsel’s independence, zeal and undivided loyalty to the insureds. The Court disagreed, noting Cumis counsel’s duty of independence is not inconsistent with the obligation to justify the

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reasonableness of fees and costs. Attorneys must justify fees in other settings, such as awards pursuant to fee-shifting statutes, class action settlements, probate actions, and bankruptcy proceedings. The codification of *Cumis* at Civil Code § 2860 contemplates counsel will be called upon to justify their fees.

The Supreme Court also rejected Squire Sanders's argument that reimbursement actions should only be pursued under the "more collaborative" procedures of § 2860. Section 2860 only comes into play when there is a real and significant difference between the interests of the insurer and insured, and is not necessarily more collaborative in practice.

The Supreme Court was also troubled by Squire Sanders's claim a carrier should pursue its insureds for *Cumis* counsel's unreasonable or unnecessary fees, and the insured could in turn pursue *Cumis* counsel. Squire Sanders contended the exclusive attorney-client relationship between *Cumis* counsel and its clients mandated the client control unreasonable billing, and be subject to an insurer's reimbursement action. The Court responded that there was no reason to believe that any direct liability to Hartford for bill padding should fall directly on the insureds. Squire Sanders had drafted the order, and the Court would not "foist" all reimbursement responsibility onto the clients.

Finally, Squire Sanders argued Hartford's action violated California's established prohibition on assignment of legal malpractice claims. However, Hartford did not stand in the insureds' shoes to assert its counsel violated a duty to the insureds. Hartford was attempting to recover legal charges it paid under a court order for services rendered to the insureds. The Court emphasized it was the unique enforcement order that plainly permitted Hartford to pursue "someone" for reimbursement of allegedly excessive legal charges that distinguished Hartford's claim.

A concurring opinion noted Hartford was not blameless in its denial of the duty to defend, and

its obstinate approach to the coverage litigation. Moreover, the insureds were involved in the billing issues. The concurrence suggested that on remand Hartford should have to overcome a presumption that any fees billed by Squire Sanders - even fees later found to be unreasonable - were incurred primarily for the benefit of J.R. Marketing. If that rule were followed, it seems Hartford would face another hurdle - to establish that the questioned fees or costs did not benefit the insureds' defense.

Comment: Hartford Casualty is based on a unique set of facts: an order specifically allowed the insurer to file an action to recover unreasonable or unnecessary fees and expenses. Reimbursement from the lawyers appears appropriate to give effect to the enforcement order, since the fees and costs were already paid.

Typically, in a setting without an enforcement order, a dispute during the representation about the reasonableness and necessity of fees and costs is subject to arbitration pursuant to § 2860(c).