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Division of Fees

Nonlawyer Gets Chance to Enforce Alleged Legal Fee-Split Pact

A fractured ruling from the Pennsylvania Supreme Court highlights a fundamental debate on whether nonlawyers can recover on contracts to split legal fees with lawyers—a practice prohibited by legal ethics rules.

The issue has split courts in other states, with a majority holding that these agreements are unenforceable since they are prohibited by state rules patterned on Model Rule 5.4.

The sharply divided court decided Dec. 19 that a nonlawyer consultant can try to enforce an alleged profit-sharing agreement with a law firm despite the ethics rule that forbids lawyers to share legal fees with nonlawyers. Public policy doesn't automatically prevent nonlawyers from suing lawyers for breach of fee-splitting contracts in Pennsylvania, the court ruled.

The decision breathes new life into a lawsuit by SCF Consulting LLC, a nonlawyer consulting firm, which claims that Barrack, Rodos & Bacine promised SCF five percent of the law firm's annual profits from cases that SCF originated and worked on.

A majority of the six justices who heard the case (one justice didn't participate) agreed that the suit shouldn't have been dismissed. However, the court didn't produce a majority opinion or even a plurality opinion, but instead handed down an "Opinion Announcing the Judgment of the Court" (AOJC).

The fractured ruling highlights a fundamental debate as to whether and when nonlawyers should be able to recover on fee-splitting contracts with lawyers notwithstanding state rules patterned on Model Rule 5.4, which prohibit fee-sharing with nonlawyers. The issue has split courts in other states, with a majority holding that these agreements are unenforceable.

The wide range of views among the justices in this case isn't surprising, according to Thomas G. Wilkinson Jr. of Cozen O'Connor LLP, Philadelphia, who co-authored an amicus curiae brief for the Pennsylvania Bar Association along with Amy J. Coco of Weinheimer Haber & Coco P.C., Pittsburgh, and James C. Sargent of Lamb McErlane, West Chester, Pa.

"The Justices' opinions reflect the same range of views that were expressed within the bar association committees that collaborated in preparing the amicus brief," Wilkinson told Bloomberg Law.

"There's no one 'right' answer. It's a matter of how you weigh the competing considerations," Wilkinson said.

Plaintiff's Take "We of course are delighted with the ruling," SCF's lead counsel, George Bochetto, said in comments emailed to Bloomberg BNA. He practices with Bochetto & Lentz P.C. in Philadelphia.

"Even though there were multiple opinions, it is fair to say all the Justices regarded as repugnant the law firm's attempt to avoid financial responsibility to a lay person by their own wrongdoing," Bochetto said.

"The Court appropriately opined that the remedy lies with the Disciplinary Board, not the civil courts," Bochetto said.

"While some may regard this holding as representing the minority view amongst the 50 states, I believe it will ultimately become the overwhelming majority view," he said.

To do otherwise is to incentivize underhandedness by the legal profession, Bochetto said.

Law Firm Denies Agreement However, Raymond A. Quaglia, lead counsel for Barrack, Rodos & Bacine, said the firm has always denied that there was any fee-sharing agreement with SCF. Quaglia is a partner with Ballard Spahr LLP, Philadelphia.

"We're not trying to renege on an agreement," Quaglia said. "There never was a fee-sharing agreement and there is no evidence of one," he said.

The trial court never made factual findings about the alleged fee-sharing agreement, because it stopped the case at an early point based on BR&B's "preliminary objections" to the complaint. "Preliminary objections," similar to a motion to dismiss, are used to challenge whether the complaint states any valid claim at all.

The allegations in the complaint had to be taken as true in the appeal because the trial court ruling came at the preliminary objections stage, Chief Justice Thomas G. Saylor said in a footnote in the AOJC.

Motion for Sanctions In an interview with Bloomberg Law, Quaglia said that in the trial court, BR&B responded to the suit in two ways. The firm filed a motion seeking sanctions against SCF and its counsel for filing a complaint unsupported by facts, and it also sought dismissal on the ground that under Pennsylvania case law, the complaint failed to state a claim.

The trial court denied the motion for sanctions without addressing it when it dismissed the suit as contrary to public policy, but BR&B intends to pursue the defenses raised therein once SCF goes forward with the case, Quaglia said.

Quaglia said that on appeal, BR&B contended that it was correct under Pennsylvania law for the trial court to dismiss the suit on public policy grounds. However, the firm's primary defense has always been that there

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was no fee-sharing agreement with SCF in the first place, he said.

"This isn't a case where there was a fee-sharing agreement that the law firm was attempting to repudiate, Quaglia said.

Two Ways for Law Firm to Win In an email to Bloomberg Law, Wilkinson said, "The law firm would still appear to have two opportunities to prevail: first, by demonstrating that the plaintiff was complicit in engaging in an improper fee splitting deal; and two, if there never was any such deal."

"It is clear that some fee splitting arrangements may be enforced despite the disciplinary rule prohibiting it, but unclear precisely what circumstances will invalidate them or give rise to discipline," Wilkinson said.

"The Court's guidance could be read to require that the trial court engage in factfinding before dismissing a complaint whenever a nonlawyer seeks to enforce a fee splitting agreement, he said. "If so, then few such cases will be dismissed outright."

"The Court seems to have wisely left for another day whether all or some Rules of Professional Conduct constitute expressions of public policy," he said.

"The strong views of several justices that discipline is warranted for improper fee splitting should serve as a warning to lawyers who engage in these practices to cease doing so," Wilkinson also said.

Amicus Brief Describes Quandary In the AOJC, Chief Justice Saylor said the Pennsylvania bar association's amicus brief crystallized the quandary in this area of law. The brief stated:

> "The PBA notes that it is clearly this Court's prerogative to declare, as have the courts in a majority of jurisdictions, that the paramount objective of protecting clients is a matter of public policy, and that this policy will be advanced by declaring all fee sharing agreements that are inconsistent with Rule 5.4 to be void as a matter of law. . . .
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> "On the other hand, the PBA recognizes that a lawyer should not be permitted to intentionally take advantage of an innocent nonlawyer, by entering into an agreement violating Rule 5.4, and then raising that violation as a defense to a claim for the agreed upon compensation . . . . It is unreasonable for our courts to be placed in a circumstance where they may be perceived as aiding in attorney misconduct."

In the AOJC, Saylor gave this summary of a possible middle ground suggested in the amicus brief: "As a middle ground, the PBA suggests that perhaps the Court might wish to consider implementing a *per se* rule that contracts in violation of Rule 5.4 are void as against public policy, but to also temper this approach by permitting quasi-contractual remedies, recovery under the theory of unjust enrichment, or a disgorgement practice implemented through the Disciplinary Board."

Two Opinions A majority of the court agreed that SCF's contract action shouldn't have been dismissed.

In the AOJC, Chief Justice Saylor said that "the ultimate outcome of this case may turn on factual findings concerning Appellant's culpability, or the degree thereof, relative to the alleged ethical violation." Justice Kevin M. Dougherty joined Saylor's opinion.

Dougherty also wrote a concurring opinion in which he agreed that fee-splitting arrangements between lawyers and nonlawyers shouldn't be held automatically unenforceable, and he noted an additional danger of a bright-line per se rule.

"[I]t is my view that a *per se* rule might have the effect of emboldening unscrupulous attorneys—who are often in a superior negotiating posture as compared with their non-attorney contracting counterparts—to enter into illusory fee-splitting agreements with full knowledge the agreement may never be enforced," Dougherty wrote.

Two More Opinions Justice Max Baer filed a concurring and dissenting opinion joined by Justice Debra McCloskey Todd.

"In my view, this Court can both avoid the perils arising from unethical fee-sharing contracts and preserve contractual agreements so as to ensure that the parties obtain the fair and reasonable compensation to which they are entitled by enforcing such fee-sharing contracts, but sanctioning, swiftly and harshly, attorneys who violate the disciplinary rules in this regard," Baer wrote.

Justice David N. Wecht, joined by Justice Christine Donohue, filed a dissenting opinion. The court should adopt a bright-line rule barring fee-splitting agreements with nonlawyers as uneforceable at law, but allowing nonlawyers to seek judicial relief in equity, Wecht said.

In substance, that approach is endorsed in the Pennsylvania bar association's amicus brief, Wecht said.

Justice Sallie Updyke Mundy didn't take part in considering or deciding the case.

The case is *SCF Consulting, LLC, v. Barrack, Rodos & Bacine*, Pa., No. 7 EAP 2017, 12/19/17.

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