

IN THE SUPERIOR COURT OF THE STATE DELAWARE

IN AND FOR NEW CASTLE COUNTY

ATTORNEYS LIABILITY PROTECTION )	
SOCIETY, INC., a Risk Retention Group, )	C.A. No. N10C-08-277 JTV
)	
Plaintiff / Counterclaim )	
Defendant, )	
)	
v. )	
)	
JAY W. EISENHOFER, GRANT & )	
EISENHOFER, P.A., and RICHARD P. )	
GIELATA, )	
)	
Defendants / Counterclaim )	
Plaintiffs. )	

*Submitted: February 5, 2014*

*Decided: May 28, 2014*

Robert J. Katzenstein, Esq., Smith Katzenstein & Jenkins, LLP, Wilmington, Delaware. Attorney for Plaintiff Attorneys Liability Protection Society, Inc.

James E. Semple, Esq., and Corinne Elise Amato, Esq., Morris James, LLP, Wilmington, Delaware. Attorneys for Counterclaim Defendants Attorneys Liability Protection Society, Inc.

John G. Harris, Esq., Berger Harris, Wilmington, Delaware. Attorney for Defendants / Counterclaim Plaintiffs Jay W. Eisenhofer and Grant & Eisenhofer, P.A.

*Upon Consideration of  
Plaintiff's Motion for Summary Judgment*  
**GRANTED**

**VAUGHN, President Judge**

**OPINION**

On August 27, 2010, plaintiff Attorneys Liability Protection Society, LLC (“ALPS”) filed this action for declaratory relief against defendants Jay W. Eisenhofer, Grant & Eisenhofer, P.A. (collectively, the “Law Firm”), and Richard Gielata (“Gielata”).<sup>1</sup> The complaint seeks a ruling that ALPS has no duty to defend or indemnify the Law Firm under a professional liability insurance policy that ALPS issued to the Law Firm (the “Policy”).

On November 22, 2010, the Law Firm filed an Answer and Counterclaim. On March 7, 2013, the Law Firm filed an Amended Counterclaim. The Law Firm’s Counterclaim as amended contains two counts: (1) bad faith, and (2) breach of contract.

This is ALPS’s Motion for Summary Judgment.

**FACTS**

This insurance coverage case relates to an underlying consolidated securities class action (the “Securities Action”).<sup>2</sup> In the Securities Action, the Law Firm was lead counsel for the plaintiffs’ class. In July 2007, the Securities Action settled. The court approved the settlement which included proposed fee payments to the Law Firm and two other firms that represented the plaintiffs’ class. Subsequently, Gielata, who was allegedly a member of the plaintiffs’ class, filed an action in the Delaware District Court against the Law Firm alleging that the fees collected in the settlement

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<sup>1</sup> Gielata was dismissed by stipulation on December 20, 2012. File & ServeXpress, Trans. ID 48529002 (Dec. 24, 2012).

<sup>2</sup> *In re Tyco Securities Litigation*, Case No. 02-md-01335-PB, United States District Court, District of New Hampshire.

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violated a 2004 fee arrangement (the “Gielata Action”).<sup>3</sup> In response to the Gielata Action, the Law Firm sought coverage under the Policy.

Although ALPS denied coverage under the Policy, ALPS agreed to provide a defense for the Law Firm in the Gielata Action subject to a reservation of rights. The Law Firm, however, refused to accept ALPS’s choice of counsel in the matter and chose instead to pay for its own counsel.

In this declaratory action, ALPS asks the Court to:

- (1) Declare that the Law Firm is not entitled to coverage under the Policy with respect to the Gielata Action;
- (2) Declare that the Law Firm breached its obligations under the Policy by refusing ALPS’s efforts to appoint defense counsel;
- (3) Declare that ALPS has no further obligation to defend or indemnify the Law Firm in connection with the Gielata Action or any proceedings related thereto;
- (4) Declare that ALPS is entitled to reimbursement by the Law Firm for any and all amounts paid by ALPS in defending the Law Firm in connection with the Gielata Action; and
- (5) Award to ALPS the costs of this action and such other and further relief as the Court deems just.

**STANDARD OF REVIEW**

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>4</sup> “[T]he

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<sup>3</sup> *Richard P. Gielata, on behalf of himself and all other similarly situated v. Jay W. Eisenhofer, and Grant & Eisenhofer, P.A.*, Case No. 1:10-cv-00648-GMS.

<sup>4</sup> Super. Ct. Civ. R. 56(c).

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moving party bears the burden of establishing the non-existence of material issues of fact.”<sup>5</sup> If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.<sup>6</sup> In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.<sup>7</sup> Thus, the Court must accept all undisputed factual assertions and accept the non-movant’s version of any disputed facts.<sup>8</sup> Summary judgment is inappropriate “when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.”<sup>9</sup> On the other hand, “[w]hen the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.”<sup>10</sup>

**CONTENTIONS**

ALPS contends that it is entitled to summary judgment because the Gielata Action is a fee dispute that arises out of the allegation that the Law Firm received fees in the Securities Action settlement that were substantially higher than the maximum fees that the Law Firm allegedly promised in a 2004 agreement that it

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<sup>5</sup> *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at \*1 (Del. Super. May 2, 2007).

<sup>6</sup> *Id.*

<sup>7</sup> *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

<sup>8</sup> *Id.* at 99-100.

<sup>9</sup> *Mumford & Miller Concrete, Inc. v. New Castle Cnty.*, 2007 WL 404771, at \*1 (Del. Super. Jan. 31, 2007).

<sup>10</sup> *Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 WL 3926195, at \*4 (Del. Super. Aug. 31, 2011).

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would seek; and that the Policy unambiguously excludes coverage for fee disputes.

The Law Firm contends that summary judgment should not be granted because under Delaware law, an insurer has a duty to defend unless the insured can show that a policy exclusion acts as a complete bar to coverage for every allegation of the underlying complaint; that the Gielata Action alleges claims for breach of fiduciary duty, breach of contract, professional malpractice, and *respondeat superior*, and at least one of these claims triggers coverage under the Policy; that this is not a simple fee dispute, which would be excluded under the Policy; that the Gielata Action does not concern a ministerial act of billing but involved a fee award made by the court after the Law Firm submitted a motion and filed a supporting brief in the Securities Action; that the Gielata Action asserts a legal malpractice claim which by definition, can only arise from services preformed by an attorney and on a client's behalf; that the underlying complaint challenges the Law Firm's conduct in performing activities for and on behalf of the class that the Law Firm represented in the Securities Action; that since the Law Firm allegedly failed to adequately advance the class interests, this constitutes acts, errors, or omissions in professional services, and therefore, falls under the Policy's coverage; that ALPS cited non-Delaware cases that involved ministerial acts of billing and fee-setting, which is different than the case here where there are allegations of malpractice or other misconduct committed by attorneys in the course of performing legal work for clients (such as filing the fee motion in the Securities Action); that the court set the fees in the Securities Action after considering legal arguments that the Law Firm made in its motion, and the Gielata Action challenges the making of those legal arguments as wrongful; and that the Gielata

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Action seeks damages well beyond the fees received in the Securities Action and therefore, there is a genuine issue of material fact that precludes a finding that coverage is barred.

**DISCUSSION**

The interpretation of a contract is purely a determination of law.<sup>11</sup> When interpreting a contract, the Court will give priority to the parties' intentions and will construe the contract as a whole, giving effect to all provisions therein.<sup>12</sup> Clear and unambiguous language will be given its ordinary and usual meaning.<sup>13</sup> A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.<sup>14</sup> Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to two or more different interpretations.<sup>15</sup>

The Policy reads in pertinent part as follows:

[T]he **Company** [ALPS] agrees to pay on behalf of the **Insured** [the Law Firm] all sums . . . that the Insured becomes legally obligated to pay as **damages**, arising from or in connection with a **CLAIM** . . . provided that . . . the

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<sup>11</sup> *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

<sup>12</sup> *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

<sup>13</sup> *Id.* at 780.

<sup>14</sup> *Id.* (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

<sup>15</sup> *Id.* (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

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claim arises from or is in connection with:

1.1.1 an act, error or omission in **professional services** that were or should have been rendered by the **Insured** . . . .<sup>16</sup>

The parties dispute whether the Gielata Action is covered under the Policy. The first area of contention is whether the Law Firm’s alleged conduct in the Securities Action constituted “professional services.” The Policy defines professional services in pertinent part as follows:

2.22.1 services or activities performed for others as an attorney in an attorney-client relationship on behalf of one or more clients; . . . .<sup>17</sup>

ALPS contends that the Law Firm was not performing professional services when it submitted its motion for attorneys fees in the Securities Action because this was not on behalf of a client but was submitted for the benefit of the Law Firm. Furthermore, ALPS contends that ministerial acts of billing, as occurred here, do not constitute professional services. Alternatively, the Law Firm contends that it was performing professional services when it submitted the motion for attorneys fees because the motion contained a supporting legal brief that was submitted to the court in the Law Firm’s role as an attorney for the plaintiffs’ class. Therefore, Law Firm contends that this was not a ministerial act of billing.

After considering the parties arguments and the terms of the Policy, I find that

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<sup>16</sup> Def.’s Ans. Br. in Opp. to Pl.’s Mot. for Summ. J., Ex. F, §§ 1.1-1.1.1 (emphasis in original).

<sup>17</sup> *Id.*, Ex. F, § 2.22.1.

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when the Law Firm submitted its motion for attorneys fees in the Securities Action this did not constitute professional services as the Policy defines the term. The Policy unambiguously requires that an activity or service be performed “on behalf of one or more clients ....”<sup>18</sup> I am not persuaded that when the Law Firm submitted its motion for attorneys fees this was on behalf of the plaintiffs’ class.

Assuming, *arguendo*, that the Law Firm’s actions did constitute professional services, the next threshold question is whether the Gielata Action seeks “damages,” as the term is defined in the Policy. As to damages, the Policy states the following:

2.6 **Damages** means any monetary award by way of judgment or final arbitration, or any settlement, but does not include: . . .

2.6.4 restitution, reduction, disgorgement or set-off of any fees, costs, consideration or expenses paid to or charged by an **Insured**, or any other funds or property presently or formerly held by an **Insured**.<sup>19</sup>

The plaintiff in the Gielata Action seeks recovery from the Law Firm for \$215 million on a number of grounds, including breach of fiduciary duty, breach of contract, and legal malpractice.<sup>20</sup>

ALPS contends that Gielata Action seeks the return of fees, which the Policy explicitly excludes from coverage. The Law Firm, however, contends that the Gielata

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, Ex. F, §§ 2.6, 2.6.4 (emphasis in original).

<sup>20</sup> *Id.*, Ex. C.



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Action does not simply seek the return of fees because the Gielata Action seeks damages “not less than \$215 . . . .”;<sup>21</sup> that the Law Firm received approximately \$129 million in fees from the Securities Action which is at least \$86 million less than the \$215 million in damages that the plaintiff seeks in the Gielata Action; and that the Court must deny summary judgment because there is a disputed material fact as to whether at least part of the Gielata Action is covered under the Policy. The Law Firm cites *Unified Western Grocers, Inc. v. Twin City Fire Insurance Co.*,<sup>22</sup> to support its contention that while the Gielata Action alleges that the Law Firm wrongfully received funds, other allegations seek damages proximately caused by the Law Firm’s actions in an amount greater than the amount of money that the Law Firm allegedly received and therefore, there is a genuine issue of material fact that precludes a finding that coverage is barred under the Policy.<sup>23</sup>

After reviewing the parties’ arguments, and the terms of the policy, I find that at its core, the Gielata Action is a fee dispute that is not covered under the Policy. Although the plaintiff brings claims under a number of theories and seeks damages in excess of the amount of fees that the Law Firm actually received in the Securities Action, the core of the dispute concerns fees. In *Unified Western*, a law firm sought recovery under a professional liability insurance policy. The complaint underlying the coverage dispute sought \$13.5 million in damages, \$8.5 million of which was

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<sup>21</sup> *Id.* at 2.

<sup>22</sup> 457 F.3d 1106 (9th Cir. 2006).

<sup>23</sup> Def.’s Ans. Br. in Opp. to Pl.’s Mot. for Summ. J., 17-18.

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alleged to have been wrongfully acquired.<sup>24</sup> The Ninth Circuit Court in *Unified Western* reversed the district court's grant of summary judgment because, *inter alia*, there was a genuine issue of material fact as to extent that the underlying complaint sought restitution of money wrongfully acquired.<sup>25</sup> I find that the *Unified Western* case is distinguishable from the case here because in *Unified Western*, the professional liability insurance policy contained a provision that required the insurance company to fairly and reasonably allocate coverage between covered loss and uncovered loss.<sup>26</sup> Here, the Law Firm does not contend that the Policy contains such a provision that would require an allocation of coverage.

In addition to the Policy lacking a provision that would require an allocation of coverage, under Section 3.1.15, the Policy contains an explicit exclusion to claims even indirectly related to fee disputes. Pursuant to Section 3.1.15, the Policy excludes from coverage:

“[a]ny dispute over fees or costs, or any claim that seeks, whether directly or indirectly, the return, reimbursement or disgorgement of fees, costs, or other funds or property held by an **Insured**.”<sup>27</sup>

The claims in the Gielata Action either directly or indirectly relate to a fee dispute,

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<sup>24</sup> *Unified Western Grocers, Inc.*, 457 F.3d at 1115.

<sup>25</sup> *Id.* at 1115-16.

<sup>26</sup> *Id.* at 1115.

<sup>27</sup> Def.'s Ans. Br. in Opp. to Pl.'s Mot. for Summ. J., Ex. F, § 3.1.15 (emphasis in original).

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which the Policy explicitly excludes from coverage. After considering this explicit coverage exclusion and the Policy in its entirety, I find that the Policy unambiguously excludes coverage for the Gielata Action.<sup>28</sup>

**CONCLUSION**

For the foregoing reasons, ALPS's Motion for Summary Judgment is ***granted***.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

oc: Prothonotary  
cc: Order Distribution  
File

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<sup>28</sup> One additional area of contention that the parties discussed in their briefs was whether the Gielata Action was excluded under § 3.1.14 of the Policy, which excludes from coverage "[a]ny obligation assumed by contract, other than the obligation to perform professional services; . . . . Because I found that the Gielata Action is excluded from coverage on other grounds, no discussion on this issue is necessary.