IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SUN LIFE ASSURANCE COMPANY OF CANADA Plaintiff,	)	
v.	)	
WILMINGTON SAVINGS FUND SOCIETY, FSB, Solely as Securities Intermediary Defendant.	)	
_____	)	**C.A. No. N18C-08-074 PRW CCLD**
WILMINGTON SAVINGS FUND SOCIETY, FSB, Solely as Securities Intermediary Counterclaim-Plaintiff,	)	
v.	)	
SUN LIFE ASSURANCE COMPANY OF CANADA Counterclaim-Defendant.	)	

Submitted: July 13, 2020
Decided: August 5, 2020

ORDER CERTIFYING AN INTERLOCUTORY APPEAL

This 5th day of August, 2020, upon consideration of Plaintiff and Counterclaim-Defendant Sun Life Assurance Company of Canada's application under Rule 42 of the Supreme Court for an order certifying an appeal from the interlocutory orders of this Court, dated December 19, 2019, and April 9, 2020 it appears to the Court that:

(1) This is a contract action between Sun Life Assurance Company of Canada and the Wilmington Savings Fund Society FSB ("WSFS") focusing on the legality and enforceability of a life insurance policy Sun Life issued to non-party Gordon Bartelstein, and whose beneficial interest was then acquired by non-party investor Ocean Gate Life Settlement LP using WSFS as a securities intermediary. Sun Life alleges that Bartelstein procured the policy at the behest of investors, making it a void wager on Bartelstein's life, while WSFS alleges that Bartelstein authentically purchased insurance on his own life for the benefit of his family, and later sold it to Ocean Gate in an arms-length transaction.

(2) Sun Life is represented in this matter by attorneys with the firm Cozen O'Connor. Ocean Gate engaged different attorneys with that same firm on the matter of its investment strategy of purchasing the beneficial interest in life insurance policies. In the course of that earlier engagement, the Cozen attorneys investigated Ocean Gate's practices in executing this investment strategy, relating to a group of policies acquired after the Bartelstein policy in various jurisdictions throughout the United States. On the basis of this prior representation, WSFS moved to disqualify Cozen as counsel in this case. The Court granted the motion and disqualified Cozen.[1]

[1] *Sun Life Assur. Co. of Canada v. Wilmington Savings Fund Soc'y, FSB*, 2019 WL 6998156, at *8 (Del. Super. Ct. Dec. 19, 2019).

(3) Sun Life requests certification of the Court's December 19, 2019 Order disqualifying Cozen and the Court's April 9, 2020 Order denying reargument[2] for interlocutory appeal.[3] The Court considers Sun Life's application under Supreme Court Rule 42's "rigorous standard."[4]

(4) Under Rule 42, the Court must: (a) determine that the order to be certified for appeal decides a substantial issue of material importance that merits appellate review before a final judgment; (b) decide whether to certify via consideration of the eight factors listed in Rule 42(b)(iii); (c) consider the Court's own assessment of the most efficient and just schedule to resolve the case; and then (d) identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice.[5]

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[2] *Sun Life Assur. Co. of Canada v. Wilmington Savings Fund Soc'y, FSB*, 2020 WL 1814758 (Del. Super. Ct. Apr. 9, 2020).

[3] D.I. 133; *see also Acierno v. Hayward*, 859 A.2d 617, 619 (Del. 2004) ("[A]n appeal from a disqualification ruling is interlocutory and may only be filed in compliance with Supreme Court Rule 42.").

[4] *Steadfast Insurance Co. v. DBi Services, Inc.*, 2019 WL 3337127, at *2 (Del. Super. Ct. July 25, 2019); *see TowerHill Wealth Mgmt., LLC v. Bander Family P'ship, L.P.*, 2008 WL 4615865, at *2 (Del. Ch. Oct. 9, 2008) (citing Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 14.04 (2008) (noting that Rule 42 contains "rigorous criteria" and the Supreme Court requires "strict compliance with Rule 42")).

[5] Del. Supr. Ct. R. 42(b)(iii) (2020). Those "probable costs" are informed, in part, by Rule 42(b)(ii), *i.e.*, interlocutory appeals "disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources." Del. Supr. Ct. R. 42(b)(ii) (2020).

(5) The first consideration—whether the order seeking certification decides a substantial issue of material importance that merits appellate review before a final judgment—is a threshold finding without which certification is inappropriate.[6] A substantial issue is usually understood as one that "decides a main question of law which relates to the merits of the case, and not to collateral matters."[7]

(6) Though, strictly speaking, the representation of a party is immaterial to the merits of the underlying case, Delaware trial courts have found this criterion satisfied by disqualification of an entire firm in a case, and the Delaware Supreme Court has decided such an interlocutory appeal even after the underlying dispute was mooted by settlement.[8] With that history, the Court concludes that its order

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[6] *Traditions, L.P. v. Harmon*, 2020 WL 1646784, at *1 (Del. Apr. 2, 2020).

[7] *Sprint Nextel Corp. v. iPCS , Inc.*, 2008 WL 2861717, at *1 (Del. Ch. July 22, 2008) ("The 'substantial issue' requirement is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters.").

[8] *See Dunlap v. State Farm Fire and Cas. Co. Disqualification of Counsel*, 2008 WL 2415043, *1 (Del. May 6, 2008) ("Pursuant to Supreme Court Rule 42 and the independent standing conferred upon counsel in *In re Infotechnology*, [Counsel] timely applied for an interlocutory appeal. The case settled, in the interim, however, mooting this appeal. Given the seriousness of the issue to Delaware lawyers and the lack of any other means of review, however, we will look to the public interest exception to mootness and act on [Counsel's] appeal."); *see also In re Appeal of Infotechnology*, 582 A.2d 215, 217–18 (Del. 1990) (although litigant retained different counsel raising "significant questions of standing and mootness," the trial court certified and the Supreme Court accepted interlocutory review."). By contrast, where a disqualification is limited only to specific lawyers but the firm remains able to represent the litigant, Delaware courts may find that no substantial matter of material importance is implicated. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Stauffer Chem. Co.*, 1990 WL 161717, at *2 n. 1 (Del. Super. Ct. Oct. 16, 1990) ("[The] sanction does not give rise to a substantial issue or establish legal rights" where "my Orders only disqualified two attorneys from the [disqualified] firm, not the entire firm, and numerous other counsel have been retained by [the litigant] to bring this action.").

disqualifying Cozen from representing Sun Life in this instance disposes of a substantial issue of material importance.[9]

(7) The Court next considers the eight factors identified in Rule 42(b)(iii).[10] This case implicates the first and eighth factors, relating respectively to issues of first impression and to the considerations of justice.

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[9] But given the specifics that led to disqualification here, the Court assigns little weight to Cozen's belated plaintive cries that it has such "wide-reaching implications . . . that materially curtail the opportunity for lawyers to move between firms." Sun Life's Application for Certification of Interlocutory Appeal at 1, 9–10 (D.I. 133).

[10] Those factors are:

> (A) The interlocutory order involves a question of law resolved for the first time in this State;
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> (B) The decisions of the trial courts are conflicting upon the question of law;
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> (C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order;
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> (D) The interlocutory order has sustained the controverted jurisdiction of the trial court;
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> (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice;
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> (F) The interlocutory order has vacated or opened a judgment of the trial court;
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> (G) Review of the interlocutory order may terminate the litigation; or
>
> (H) Review of the interlocutory order may serve considerations of justice.

Del. Supr. Ct. R. 42(b)(iii) (2020).

(8) As to the first factor, this case is a rare instance in which this Court had to broach the question of the extent of its authority to address allegations of violation of the Rules of Professional Conduct after a party satisfied the *In re Appeal of Infotechnology, Inc.*[11] standing requirements.

(9) Under *Infotechnology*, standing to challenge another's representation requires a non-client party[12] to show by clear and convincing evidence that the disputed representation taints the proceeding.[13] Absent such a showing, the trial court lacks jurisdiction to consider disqualification.[14] But, once that test for standing is satisfied, the trial court "has full power to employ the substantive and procedural remedies available to properly control the parties and counsel before it, and to ensure the fairness of the proceeding."[15]

(10) Cozen attorneys in the course of representing Ocean Gate interviewed both its personnel and that of the intermediary it used to identify and acquire

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[11] 582 A.2d 215 (Del. 1990).

[12] WSFS is also a Cozen client, but waived that concurrent conflict by agreement. *Sun Life*, 2019 WL 6998156, at *2. But, as a stranger to the attorney-client relationship between Ocean Gate and Cozen, WSFS is a non-client party for these purposes.

[13] *In re Infotechnology*, 582 A.2d at 221.

[14] *Id.*

[15] *Id.*

insurance policies.[16] Based on those interviews, and on other documents and statements they obtained in the course of their investigation, Cozen attorneys found that the insureds originated their life insurance policies prior to any contact with Ocean Gate or the intermediaries.[17] The Court found this to be relevant and probative evidence of Ocean Gate's habitual business practices and thus "strong evidence which a fact finder can consider in determining how Ocean Gate behaved in the specific instance of acquiring the Policy."[18]

(11) What is more, the Court found that WSFS might specifically need to seek or introduce Cozen-generated material fact evidence as to Ocean Gate's business practices related to its obtaining and dealing in the type of life insurance policy transaction at issue here; that evidence, the Court found, could be relevant to whether the Policy is void or was validly obtained by Ocean Gate.[19] In such a circumstance, introduction of Cozen attorney work product or even testimony may be properly sought by one party, while Cozen represents the adverse party.[20]

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[16] Aff. of Douglas B. Fox ex. D at 2 (D.I. 86).

[17] *Id*. at 3.

[18] *Sun Life*, 2019 WL 6998156, at *6.

[19] *Id*. at *6.

[20] *Id*. at *6-7.

(12) Cozen's representation of Sun Life in the present suit disrupts the jury's reasoned consideration of that evidence. Having one party submit evidence produced by the firm representing the adverse party gives the firm the appearance of standing on both sides of the same matter. This produces a direct avenue for unfair prejudice, and so WSFS has *Infotechnology* standing because its own rights as a litigant are prejudiced.[21]

(13) The novel question of law is whether the remedies available are cabined exclusively to ameliorating the taint producing *Infotechnology* standing, or if the motion by a party with *Infotechnology* standing permits the Court to remediate the threatened violation more broadly.

(14) Though Sun Life never raised the possibility of lesser remedies in its response to the disqualification motion[22] and raised them only belatedly in its request for reargument,[23] the Court considered and rejected the possibility *sua sponte*.[24] In the Court's view, even if the jurors could somehow be shielded from knowledge that

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[21] *See Matter of Estate of Waters*, 647 A.2d 1091, 1095–96 (Del. 1994) ("[T]his Court's corollary holding in *Infotechnology* was that a non-client litigant *does have standing* to enforce the Delaware Rules of Professional Conduct in a trial court when they can demonstrate to the trial judge that the 'opposing counsel's conflict somehow prejudiced *his* or *her* rights' and calls into question the 'fair or efficient administration of justice.'") (italics in the original).

[22] D.I. 86.

[23] D.I. 123.

[24] *Sun Life*, 2019 WL 6998156, at *7.

both Sun Life's attorneys and those who produced the Ocean Gate material evidence were with Cozen, the firm's dual role still prejudiced WSFS and threatened public confidence in the administration of justice.[25]

(15) Answering this inquiry implicates the eighth factor—considerations of justice—for two key reasons. *First*, the deference owed to the Supreme Court to decide novel questions of law[26] sharpens in matters of attorney ethics and conduct since the Delaware Supreme Court is the sole final authority to act as regulator of the practice of law in this State.[27] *Secondly*, as the challenged orders in this case granted the harsh remedy of disqualification, Sun Life can obtain meaningful appellate review only on an interlocutory basis. To obtain a final judgment, Sun Life would have to obtain new counsel and fully litigate the case. At that point, Cozen's disqualification would be moot.

(16) After analysis of the eight Rule 42(b)(iii) factors, the Court must next consider the underlying case's scheduling for efficiency and justice.

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[25] *Id*.

[26] *See Criden v. Steinberg*, 2000 WL 354390, at *4 (Del. Ch. Mar. 23, 2000) (refusing to "usurp the Supreme Court's role to make new law or clarify the old" during motion practice).

[27] *See In re Green*, 464 A.2d 881, 885 (Del. 1983) ("This Court, alone, has the responsibility for licensing and disciplining persons admitted to practice in Delaware. This tenet is of historic proportions, having been transplanted to Delaware by the colonists. It is based on the concept, taken from England, that the courts possess the exclusive right to govern the practice of law.").

(17) Even absent appellate review, the litigation necessarily faces at least some delay for Sun Life to retain new counsel. Further mitigating any delay attributable to appellate review, the parties separately agreed between themselves to stay both the case and enforcement of the disqualification order while they undertake settlement negotiations.[28] In its opposition to Sun Life's request for a stay, WSFS identifies no particular injury from a delay in the resolution of this case.[29] In opposing interlocutory review, WSFS likewise identified no prejudice and relied instead on its view that denial did not prejudice Sun Life.[30]

(18) On balance, the benefits of interlocutory review outweigh the probable costs. The party opposing review alleges no prejudice from delay. The delay for appellate review is already partially mitigated by the parties' ongoing negotiations. The issue is novel, uniquely within the province of the Supreme Court, and can only obtain meaningful review on an interlocutory basis rather than waiting for a final judgment.

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[28] WSFS Response to Sun Life's Mot. for Stay at ¶¶ 1,6 (D.I. 134).

[29] *Id*. at ¶¶ 1–7.

[30] WSFS Opp'n to Sun Life's Application for Certification of Interlocutory Appeal at 6 (D.I. 135).

NOW, THEREFORE, IT IS HEREBY ORDERED that Sun Life Assurance Company of Canada's Application for Certification of Interlocutory Appeal is hereby **GRANTED.**

/s/ *Paul R. Wallace*

Paul R. Wallace, Judge

Original to Prothonotary
cc: All counsel via File & Serve