

Public Policy Precludes Enforcement of Voluntary Payments Clause in Lawyers Professional Liability Policy

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The Appellate Court of Illinois has held that a legal malpractice insurer owed a duty to defend an attorney who admitted to making a mistake in a client's will because a provision of the policy precluding the attorney from admitting liability without consent of his insurer violated public policy. *Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C.*, 2012 WL 5471875 (Ill. App. Ct. Nov. 9, 2012). The court was concerned that such a provision could limit an attorney's ability to comply with the ethical obligation of disclosure to his clients.

The attorney purchased an insurance policy for his law firm containing a "Voluntary Payments" provision, which prohibited the insured, "except at its own cost," from "admit[ting] any liability" without the prior written consent of the insurer. The attorney prepared a will but failed to include language directing distribution of funds to certain beneficiaries. Consequently, several beneficiaries of the trust received less money than they would have received if the will had been prepared according to the testator's instructions. The attorney wrote a letter to the beneficiaries explaining the oversight, and the beneficiaries sued him and his firm for malpractice. The insurer agreed that the attorney was ethically bound to send the letter but nonetheless construed the letter to the beneficiaries as an admission of liability relieving the insurer from its duty to defend under the Voluntary Payments provision of the policy.

The insurer then sought a declaratory judgment that it had no duty to defend, but the trial court granted summary judgment for the insured. The appellate court affirmed on public policy grounds. The court reasoned that it is the attorney's obligation to comply with the ethical rules as the attorney understands them. The court stated that it was "uncomfortable" with the insurer's argument that it could have advised the attorney to comply with his ethical duties in a way that would not compromise his malpractice case, especially since the insurer might advise the insured to disclose less information than the attorney believed was ethically required. The court held that since the Voluntary Payments provision might limit an attorney's compliance with the ethical obligation of disclosure to the client, it was unenforceable as against public policy.