IN THE SUPERIOR COURT OF THE STATE DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| 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: June 9, 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**

***Attorneys Liability Protection Society, Inc. v. Jay Eisenhofer, et al.***
C.A. No. N10C-08-277 JTV
June 9, 2014

**VAUGHN, President Judge**

## OPINION

In this action Plaintiff Attorneys Liability Protection Society, LLC ("ALPS") seeks declaratory relief against defendants Jay W. Eisenhofer, Esquire, and the law firm of Grant & Eisenhofer, P.A. (collectively, G&E), and Richard Gielata.[1] The case involves ALPS's duty to defend and coverage issues arising from a professional liability insurance policy which ALPS issued to G&E.

This is ALPS's Motion for Summary Judgment.

## FACTS

G&E was one of three law firms that served as co-lead counsel for the plaintiffs in a class action known as the Tyco litigation. At the commencement of the case, in 2002, G&E entered into a fee agreement with its lead plaintiff which provided that G&E would receive between 15% and 22.5% of any amount recovered.

In 2004 the parties were preparing for mediation. Because the mediation was occurring relatively early in the litigation, G&E and its lead plaintiff agreed that if the mediation produced a large settlement, G&E would seek fees that were less than those provided for in the 2002 agreement. The parties entered into a new fee agreement which provided for attorneys fees ranging from 5% to 15% of the amount recovered with a 10% enhancement for significant corporate governance reforms up to $25 million. The agreement also provided that if any other law firm representing

[1] Gielata was dismissed by stipulation on December 20, 2012. File & Serve*Xpress,* Trans. ID 48529002 (Dec. 24, 2012).

the plaintiff class sought a higher fee, G&E would oppose such request. The mediation was unsuccessful.

After three more years of litigation, the Tyco litigation was settled. G&E and its co-lead counsel then sought and received court approval for a fee award of 14.5% of the settlement, or $464 million. Of that amount, $129 million went to G&E, with the rest going to the other co-lead counsel.

Shortly after the Tyco litigation was concluded, Gielata brought suit against G&E. His contention was that the 2004 fee agreement was still a valid agreement, despite the contention of both G&E and its lead plaintiff that the 2004 agreement applied only if the mediation was successful and became moot when it was not. He further contended that under the 2004 fee agreement, the proper amount of fees was $249 million, and because of G&E's promise in the 2004 fee agreement to oppose any fee in excess of that amount, G&E was liable for the difference between $249 million and $464 million, or $215 million. He alleged that he and the class suffered damages in an amount to be determined at trial, but "not less than" $215 million. He sought judgment for compensatory and punitive damages, pre-judgment and post-judgement interest, and costs.[2]

## 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.[3] "[T]he

[2] At oral argument, it was reported that the Gielata suit has been settled.

[3] Super. Ct. Civ. R. 56(c).

moving party bears the burden of establishing the non-existence of material issues of fact."[4] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[5] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[6] Thus, the Court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[7] 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."[8] 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."[9]

## CONTENTIONS

ALPS contends that it is entitled to summary judgment because it had no duty to defend and there was no coverage for the Gielata lawsuit under several policy provisions, including a provision defining damages, a provision defining professional services, a provision excluding fee disputes from coverage, and a provision excluding

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[4] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[5] *Id.*

[6] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

[7] *Id.* at 99-100.

[8] *Mumford & Miller Concrete, Inc. v. New Castle Cnty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).

[9] *Tyson Foods, Inc. v. Allstate Ins. Col.,* 2011 WL 3926195, at *4 (Del. Super. Aug. 31, 2011).

an obligation assumed by contract, other than an obligation to perform professional services.

G&E 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 suit alleged claims for breach of fiduciary duty, breach of contract, professional malpractice, and *respondeat superior*, and at least one of those claims triggered the duty to defend and coverage under the Policy; that this is not a simple fee dispute; that the Gielata suit did not concern a ministerial act of billing but involved a fee award made by a court after G&E submitted a motion and filed a supporting brief in the Tyco litigation; that the Gielata suit asserted a legal malpractice claim which by definition, could only arise from services preformed by an attorney and on a client's behalf; that the Gielata suit challenged G&E's conduct in performing activities for and on behalf of the class that G&E represented in the Tyco litigation; that G&E's alleged failure to advance adequately the class interests constitutes acts, errors, or omissions in professional services, and therefore, falls under the Policy's coverage; that ALPS cites non-Delaware cases which involved ministerial acts of billing and fee-setting, which are 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 Tyco litigation); that the court set the fees in the Tyco litigation after considering legal arguments that G&E made in its motion, and the Gielata suit challenged the making of those legal arguments as wrongful; that the Gielata suit

does not simply seek the return of fees because the Gielata sought damages of "not less than $215 . . . ."; that the G&E received approximately $129 million in fees from the Tyco litigation which is at least $86 million less than the $215 million in damages that Gielata sought in his 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 suit was covered under the Policy.

## DISCUSSION

The interpretation of a contract is purely a determination of law.[10] 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.[11] Clear and unambiguous language will be given its ordinary and usual meaning.[12] A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.[13] Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to two or more different interpretations.[14]

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[10] *O'Brien v. Progressive Northern Ins. Co.,* 785 A.2d 281, 286 (Del. 2001).

[11] *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

[12] *Id.* at 780.

[13] *Id.* (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

[14] *Id.* (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.,* 702 A.2d 1228, 1232 (Del. 1997)).

One of the policy terms relied upon by ALPS is section 3.1.15, which 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.[15]

I read 3.1.15 as setting forth two independent clauses. The first clause is "[a]ny dispute over fees or costs," which is separated from the second clause by a comma and the coordinating conjunction "or." What follows the first "or" is the second independent clause. I therefore conclude that any dispute over fees or costs is excluded from coverage under the first clause.

I find that all of the claims set forth in Gielata's complaint are a dispute over fees or costs. The dispute is about whether G&E should not have participated in and should have opposed any effort to seek and obtain fees and costs in excess of the amount provided for in the 2004 fee agreement. It does not appear that there is any part of the dispute set forth in Gielata's complaint that is not about fees and costs.

As mentioned, Gielata's complaint frames his claims using various legal theories, such as breach of fiduciary duty, breach of contract, and legal malpractice. However, the focus is on the essential character of the dispute, not how it is pled.[16]

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[15] Def.'s Ans. Br. in Opp. to Pl.'s Mot. for Summ. J., Ex. F, § 3.1.15 (emphasis in original).

[16] *See Liggett Group, Inc. v. Ace Prop. & Cas. Ins. Co.*, 798 A.2d 1024, 1034 (Del. 2002) (citing *Holz-Her U.S., Inc. v. U.S. Fidelity & Guar. Co.,* 539 S.E.2d 348, 350 (N.C. App. 2002)).

Here, the essential character of the dispute is about fees and costs.

I reach my conclusion fully recognizing that the Gielata suit sought to recover more than the amount of fees which G&E received. Eighty-six million of the "not less than" $215 million sought by Gielata was not received by G&E. It went to co-counsel law firms. However, the first clause of section 3.1.15 does not limit itself to disputes about fees and costs received by the insured alone. I find that the dispute about the $86 million which went to co-counsel is part of a dispute over fees and costs.[17]

**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

[17] Since I conclude that section 3.1.15 is dispositive, I find it unnecessary to address the plaintiff's other contentions.