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Malpractice

Legal Malpractice Claims Are Now Presumptively Assignable in Utah

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The Utah Supreme Court recently held that legal malpractice claims are presumptively assignable. In doing so, the Utah court rejected the majority rule and a list of policy concerns supporting the majority rule. The court characterized these policy concerns as ''unpersuasive,'' ''inapplicable,'' and ''farfetched.'' The court reasoned that allowing assignment of legal malpractice claims is consistent with ''freedom of contract'' and ''increas[ing] access to justice.'' *See Eagle Mountain City v. Parsons Kinghorn & Harris, P.C.*, 2017 BL 194485, 2017 UT 31, Utah, No. 20150915, 6/7/17.

The decision potentially leaves attorneys more vulnerable to malpractice claims as plaintiffs search for the deepest pockets available.

The Facts

The original controversy in the case arose from a dispute between Eagle Mountain City (the City) and Cedar Valley Water Association (Cedar Valley), with whom the City had contracted to purchase a well. The contract stipulated ''that the City would have an obligation to remit money to Cedar Valley if certain triggering conditions occurred.'' 2017 UT 31 ¶ 5.

The law firm Parsons Kinghorn & Harris P.C. (Parsons Kinghorn) advised the City that those triggering conditions had not occurred, and so the City refused when Cedar Valley began seeking payments. Cedar Valley sued the City, ''advanc[ing] one interpretation of the contractual language describing the triggering events, and the City, on the continued advice of Parsons Kinghorn, offered a contrary interpretation.'' *Id.* ¶ 6.

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Just before the case went to trial, the City settled with Cedar Valley. As a part of the settlement agreement, the City agreed to pursue a malpractice claim against Parsons Kinghorn. After payment of costs, the recovery from the malpractice claim would be split three ways among the City, Cedar Valley, and the law firm representing Cedar Valley.

The City brought the malpractice claim in its own name, using Cedar Valley's lawyers. Parsons Kinghorn filed a motion for summary judgment on the grounds that the settlement agreement amounted to an assignment of a legal malpractice claim, and was void for public policy reasons. The district court granted Parsons Kinghorn's motion, and the City appealed to the Utah Supreme Court.

The Holding

The Utah Supreme Court held that ''there is a strong presumption that legal malpractice claims are voluntarily assignable.'' *Id.* ¶ 3. The court concluded that the ''rationales that have been offered against the assignment of legal malpractice claims are unpersuasive in view of our jurisdiction's procedural safeguards, including our rules of civil procedure and rules of professional conduct.'' *Id.* ¶ 48.

This is not a blanket rule, however. The court recognized the possibility that some future case could present an assignment that violates ''clearly defined and compelling public policy concerns,'' and could therefore be deemed invalid. *Id.* The facts of this case did not implicate any such policy concerns.

Asking the Wrong Question

All parties to the suit believed that the case would turn on whether the settlement actually was an assignment of the malpractice claim. The City insisted it was not because Cedar Valley ''received only a right to recover a portion of the proceeds from the claim, not the claim itself.'' *Id.* ¶ 13 n. 4. Parsons Kinghorn believed it was an assignment because Cedar Valley was given power to compel the malpractice claim and some control over the litigation.

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The Supreme Court disagreed, saying, ''We think this approach asks the wrong question.'' *Id.* ¶ 13. Instead, the court assumed the settlement agreement was an assignment and focused its discussion on whether such an assignment would violate public policy. *See id.* ¶ 14.

Freedom of Contract

Before ''wading into the public policy arena,'' the court noted that it ''indulges in a strong presumption of freedom of contract.'' *Id.* ¶ 15. This presumption can only be rebutted where a contract would violate a ''well-defined and dominant'' public policy. *Id.*

The court concluded that allowing assignment of malpractice claims is, at worst, unseemly. But ''there is no basis in our law for overriding freedom of contract simply because the result would be unseemly.'' *Id.* (internal quotes omitted). Rather, the contract must violate ''clear and compelling public policy.'' *Id.*

Turning to public policy, the court identified four general categories of concerns: (1) ''commoditizing and merchandising of legal malpractice claims,'' (2) ''despoiling the sanctity of the attorney-client relationship,'' (3) incentivizing collusion, and (4) ''fostering public loss of respect for the legal profession.'' *Id.* ¶ 18.

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Addressing concerns of commoditizing legal malpractice claims, other courts have suggested that ''permitting the assignment of legal malpractice claims would spawn a flurry of meritless litigation and debase the legal profession.'' *Id.* ¶ 19.

The Utah Supreme Court dismissed this concern as ''speculative.'' *Id.* ¶ 22. It noted that other jurisdictions, including New Hampshire, have allowed assignment of legal malpractice claims and have seen no corresponding increase in spurious litigation. *Id.* ¶ 22 n. 15.

Furthermore, the assignment of malpractice claims against other professions has been allowed in Utah for years. The court saw ''no reason to single out lawyers for protection against malpractice claim assignment when the legal system forces other professionals to face their clients' assignees for alleged malpractice.'' *Id.* ¶ 22.

The court also expressed a belief that Rule 11 sanctions are an adequate means to separate valid and frivolous claims. ''We are aware of no court to have explained why Rule 11, in its current form, is insufficient to deal with whatever increase there might be in frivolous legal malpractice suits arising from permitting assignment of these claims.'' *Id.* ¶ 25.

Finally, whatever detriment may come from commoditizing legal malpractice claims, it would not outweigh the benefit of ''increasing access to justice'' and not ''allowing a citizen's financial means to curtail his or her ability to vindicate legal rights.'' *Id.* ¶ 26.

Why Can't We Be Friends?

Other jurisdictions have expressed concern that allowing the assignment of legal malpractice claims would sour the attorney-client relationship. Particularly, there is a fear that ''assignment would cause attorneys to temper their zealous advocacy'' and that it would ''interfere with the attorney-client privilege.'' *Id.* 27.

The Utah Supreme Court was not convinced, describing such concerns as ''farfetched.'' *Id.* ¶ 29.

First, the court noted that attorneys have an ethical obligation to zealously pursue their clients' interests regardless of whether malpractice claims are assignable. Failure to do so could result in serious ''sanctions for violating the rules of professional conduct.'' *Id.*

Second, regarding the attorney-client privilege, the court conceded that an attorney will be allowed to reveal some previously privileged information to defend against a malpractice claim. ''But this concern overlooks the fact that the client waives . . . privilege by bringing a legal malpractice claim. The waiver is no broader whether it is the client or the client's assignee bringing the malpractice claim.'' *Id.* ¶ 33.

Cruisin' for Collusion

Those opposing assignment of legal malpractice claims argue that allowing assignment would create an environment ripe for collusion because a ''losing party'' will not have to bear the burden of a suit if they can simply assign a malpractice claim instead. *Id.* ¶ 35. Moreover, opponents argue, there would be no incentive for the client to refrain from conceding exaggerated damages to serve as the basis for damages in the malpractice case. *See id.*

Again, the Utah Supreme Court reasoned that internal safeguards within the judicial system are sufficient to counter this risk. Such safeguards include Rule 11 sanctions for frivolous lawsuits, motions to dismiss, summary judgment, and, if all else fails, a jury. *See id.* ¶ 39.

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Opponents of assignment have also expressed the concern that ''the public may lose respect for the legal system if they observe lawyers shamelessly shift positions between an underlying action and a subsequent malpractice trial.'' *Id.* ¶ 41 (internal quotes omitted).

The Utah Supreme Court was also undaunted by this concern. ''[T]this is the kind of switch that . . . is inherent in a legal malpractice action. There is nothing shameless or disreputable about a client who was the victim of an attorney's negligent advice repudiating the position that it took as a result of that bad advice.'' *Id.* ¶ 45. As long as individuals are going to be permitted to bring legal malpractice claims, these types of switches will be inevitable, and the problem is not necessarily aggravated by allowing assignment of such claims.

CONCLUSION

The Utah Supreme Court systematically discounted the public policy concerns surrounding assignment of legal malpractice claims, concluding that ''the rationales that have been offered against the assignment of legal malpractice claims are unpersuasive.'' *Id.* ¶ 48. It left open the possibility that some future case would present reasons to limit assignability, but *Eagle Mountain City v. Parsons Kinghorn & Harris* was not that case.

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It remains to be seen if other jurisdictions will follow the Utah court's lead by presuming assignability for legal malpractice claims. This case represents a potential major blow to the long-held majority rule against assignment of legal malpractice claims.