

Do you have a duty to hold funds for previous counsel?

Thomas B. Olson & Associates, P.A., v. Leffert, Jay & Polglaze, P.A., ___ N.W.2d ___, 2008 WL 4629127 (Minn.App. Oct. 21, 2008).

The Minnesota Court of Appeals recently issued an opinion which illustrates some of the pitfalls for attorneys in negotiating settlements when more than one law firm is involved. If the circumstances are right, attorneys may have fiduciary or contract obligations to ensure settlement funds are held for their clients' previous counsel.

Thomas B. Olson & Associates, P.A. ("Olson") represented minority shareholders Elizabeth and Mary Howell in litigation against the Windsaloft Company. The Howells terminated Olson's representation, and hired the firm of Leffert, Jay & Polglaze, P.A. ("Leffert Jay"). Olson filed an attorney lien against the Windsaloft litigation.

The litigation settled prior to trial, but Windsaloft wouldn't release the settlement funds until the lien issue was resolved. Olson and Leffert Jay communicated about the impasse, and Leffert Jay agreed to hold \$31,000 in its trust account – the amount of

the attorney lien – pending resolution of the lien. Olson then signed a limited release of the lien so that the settlement funds would be released to the Leffert Jay firm.

But before the district court had ruled on the amount of Olson's lien, Leffert Jay withdrew from representing the Howells, after having distributed the \$31,000 elsewhere. Olson sued Leffert Jay, alleging breach of fiduciary duty, breach of contract, and conversion. The district court granted summary judgment to Leffert Jay. But the Court of Appeals reversed on two of the claims.

The Court of Appeals held that there was sufficient evidence to support a finding that the Howells had agreed to withhold \$31,000 for the benefit of Olson - establishing a trust. This imposed a fiduciary duty on Leffert Jay toward Olson, the intended beneficiary. The Court of Appeals also supported the imposition of a fiduciary duty with Minn.R.Prof. Conduct 1.15(b), which prohibits release of trust funds if there is an unresolved third-party claim against them.

The Court of Appeals also reversed summary judgment for Leffert Jay on the

breach of contract claim, holding that the communications with Olson promising that "we will agree" to hold the settlement funds established liability which extended to the firm, not just the Howells. However, summary judgment on the conversion claim was upheld on the grounds that Olson did not have an enforceable property right to the settlement funds because the attorney lien had not been perfected by filing with the Secretary of State, as required by Minn.Stat. § 481.13, subd. 2. The matter was remanded for further proceedings.

Practice Pointer: An attorney who engages in settlement negotiations may inadvertently assume a duty toward the client's unpaid former counsel. Caution should be used in agreeing to hold settlement funds for a third-party's benefit, or in distributing the funds in opposition to that agreement – even at the client's request. Finally, attorney liens must be filed with the Office of the Secretary of State to be enforced against a settlement.

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Minnesota Court of Appeal Finds *De Minimus* Reduction of Attorney Fee Award in Mechanic's Lien Case to Be Inconsistent with Its Remand Instructions

In Southside Plumbing & Heating, Inc. v. Plourde, 2008 WL 4646327 (Minn. App. October 21, 2008), the Minnesota Court of Appeals reduced an attorney fee award in a mechanic's lien case finding that the trial court's \$312.25 reduction of attorney fees after a previous remand complied with the remand order "in form only." In the previous appeal, the Court of Appeals found that attorney fees of \$7,142.50 in prosecuting a \$1,251.33 lien were excessive and remanded the case to the district court to apply the factors in Jadwin v. Kasal, 318 N.W.2d 844, 848 (Minn. 1982) to determine a reduced fee award. Southside Plumbing & Heating, Inc. v. Plourde, 2007 WL 1412969 (Minn. App. May 15, 2007).

In the October 21, 2008 decision, a different panel of the Court of Appeals noted that, although the district court did address the Jadwin factors, the order reducing the fees by only \$312.25 after the remand also contained statements criticizing the "reasoning and conclusion" of the previous award decision. Rather than remand the case for a more "substantive alteration" of the attorney fee award, the Court of Appeals simply modified and reduced the attorney fee award to \$3,753.99 from \$6,830.25 that the trial court awarded after the first appeal.

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