Court's ruling in Collins v. Reynard has its limits

Legal malpractice

By EDWARD J. ROLWES

Edward J. Rolwes, a partner with Hinshaw & Culbertson in Chicago, concentrates his practice in professional liability defense. He has defended numerous attorneys and other professionals in the Illinois courts and federal court for the Northern District of Illinois.

While the Illinois Supreme Court's final decision in *Collins v. Reynard* clarified whether a tort claim seeking economic damages against an attorney could be pleaded under the alternative theories of negligence and breach of contract, the decision did not change the law that existed before *Collins* regarding when it is appropriate to proceed under both theories of recovery.

The Supreme Court's decision in *Collins v. Reynard,* 154 Ill.2d 48, received widespread attention when it was issued in December 1992. At that time it was a hotly debated issue whether the final opinion would extend the *Moorman* doctrine to bar tort claims against attorneys for economic damages (*Moorman Manufacturing v. National Tank Co.*, 91 Ill.2d 69 (1982)).

It is generally known that the *Collins* court concluded an attorney could be sued in either tort or contract even if economic damages are claimed. By refusing to extend the *Moorman* doctrine to attorney malpractice cases, the final *Collins* opinion effectively reverted back to the same rules that predated the *Moorman* doctrine controversy.

The lead opinion in *Collins* was written by Justice James D. Heiple. Justice Heiple cited historical precedent, rather than logic, as his basic rationale for refusing to extend the *Moorman* doctrine, emphasizing that "if something has been handled in a certain way for a long period of time and if people are familiar with the practice and accustomed to its use, it is reasonable to continue with that practice until and unless good cause is shown to change the rule." According to Justice Heiple, the court's ruling "neither change[d] the duties a lawyer owes to his client, nor [did] it change the circumstances under which a lawyer may be sued for malpractice." The court merely "restate[d] the long-standing Illinois practice in [the] matter."

Since *Collins* was not intended to change existing law, the same rules that governed when both tort and contract theories could be pursued against an attorney prior to *Collins* remain in effect. In general, before *Collins,* a redundant contract count was usually dismissed if it did not differ from the negligence claim. For example, in *Land v. Greenwood,* 133 Ill.App.3d 537, 478 N.E.2d 1203 (1985), the court refused to allow a plaintiff to proceed under a contract theory against a lawyer after the negligence claim was dismissed since the contract count pleaded nothing more than the negligence claim.

Before *Collins,* the traditional view in Illinois was that a claim for malpractice against an attorney was a tort claim that arose out of the attorney's breach of his duty to act skillfully on behalf of the client. When a breach of contract count accompanied a negligence claim, it usually was a simple restatement of the negligence charge and subject to dismissal as redundant.

If *Collins* truly did not change prior law, courts should still grant motions to dismiss contract actions that simply restate the same allegations as the negligence suit without more.

The concurring opinion in *Collins* also reflects this theme. The four justices who concurred in *Collins,* which actually makes the concurring opinion the majority opinion, expressly recognized that tort law has "traditionally provided the primary means for resolving claims of attorney malpractice."

There are some instances when it may be appropriate to allow both a breach of contract and negligence claim to stand, but these should be rare.

If an attorney is hired to file a U.S. Estate Tax Return, for example, and negligently prepares the Form 706, then a suit for negligence would be appropriate. However, in this instance, the court should arguably dismiss the breach of contract action since the attorney did do the agreed upon act, namely filed the tax return on behalf of the client, albeit in a negligent manner. On the other hand, if the attorney breached the standard of care by failing to file any return at all on the client's behalf, then both a negligence and breach of contract action should arguably stand.

While admittedly this is an underdeveloped area of the law in Illinois, where the charge is that the attorney failed to do the agreed upon act rather than that he or she performed the act in a negligent manner, contract theories should logically apply apart from the negligence claim. However, if the allegation in the contract action is simply repetitive of the negligence charge that the conduct was below the standard of care, the breach of contract claim, in this writer's opinion, should be dismissed as redundant, even after *Collins,* since it brings into issue nothing more than the question of whether the attorney's conduct complied with the applicable standard of care.

Other states have also recognized this limitation, most recently in the Michigan case of *Brownell v. Garden,* 1993 WL 146 (Mich. App.). As in *Collins,* the *Brownell* court recognized that an attorney can be sued under either contract or tort theories. The *Brownell* court, however, went further and discussed when a contract action is appropriate.

The Michigan court concluded that a contract action requires a "special agreement" to exist between the attorney and the client. Since the plaintiff in *Brownell* did not allege that the defendant agreed that its services would be above the level required by the standard of care or that the defendant guaranteed a specific result, the court concluded that the contract action had been properly dismissed as redundant of the negligence claim.

Illinois courts will continue to struggle with the "contract" versus "negligence" controversy in legal malpractice claims — even though the Illinois Supreme Court has clarified that the *Moorman* doctrine does not apply to bar tort suits for legal malpractice.

While the *Collins* court certainly answered the question of whether a tort and contract claim could be filed for legal malpractice, the Illinois courts should not reflexively extend this opinion to conclude that both theories are appropriate in all cases.