



## Alerts

### Seventh Circuit Affirms Dismissal of Malpractice Claim Based on Plaintiff's Failure to Plead "But For" Causation

January 9, 2017

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*West Bend Mutual Ins. Co. v. Schumacher*, \_\_\_ F.3d \_\_\_, 2016 WL 7395708 (7<sup>th</sup> Cir. 2016)

#### Brief Summary

Plaintiff, a workers' compensation insurer, filed a legal malpractice action against former defense counsel, alleging that counsel was negligent in defending a workers' compensation claim by admitting liability for the claim. The district court dismissed for failure to state a claim, and plaintiff appealed. The Seventh Circuit affirmed and held that plaintiff failed to allege plausibly that it lost actual, specific and meritorious defense in the underlying workers' compensation proceeding.

#### Complete Summary

Plaintiff brought this legal malpractice action against its former counsel, the defendants, alleging they were negligent in defending an underlying workers' compensation claim filed by John Marzano ("Marzano") against plaintiff's insured. The substance of Marzano's claim was not described. Marzano supported his claim with the deposition of his treating physician, Dr. Sheinkop. He also had undergone an independent medical examination by Dr. Nelson, who provided a written report, which indicated that Dr. Nelson's testimony would be favorable to Plaintiff. Defendants did not speak to or depose Dr. Nelson prior to a scheduled hearing. Instead, without seeking plaintiff's approval, defendants agreed with Marzano's counsel to put a redacted version of Dr. Nelson's report in evidence. Defendants also did not speak to any other witnesses or potential witnesses until the day before the scheduled hearing; when they learned that a witness with relevant testimony was out of town and would not be available to testify the following day.

Prior to the hearing, defendants had other information that was beneficial to plaintiff's defense of Marzano's claim, including that Marzano worked a full day on the day of the incident, that he continued to work for two additional weeks until he was laid off, and his own treating physician could not find any change in the condition of his knee following the incident. Defendants disclosed all of this information, favorable to his client, to Marzano's counsel prior to the hearing. Documents also indicated that Marzano had not reported the incident until after he was laid off and had retained an attorney. On the day of the hearing,

#### Attorneys

Terrence P. McAvoy

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defendants did not request a continuance or a bifurcated proceeding to allow for the presentation of additional evidence. Instead, "without [plaintiff]'s knowledge or agreement," defendants "made the representation to counsel for [Marzano] that [plaintiff] would accept liability of the workers' compensation claim" and the arbitrator was "advised of that position." Plaintiff alleged it "was forced to accept that agreement pending further investigation of other litigation options."

Plaintiff further alleged that as a result of defendants' "unauthorized actions and representations to [plaintiff], [plaintiff] was forced to make significant payments, including temporary total disability [(TTD)] benefits and medical expenses, with little or no likelihood of recovery." Plaintiff alleged that defendants breached duties to plaintiff by virtue of (a) defendants' "unauthorized stipulation concerning compensability"; (b) their failure to adequately investigate the claim or claimant's preexisting medical condition; (c) their subsequent representations to plaintiff regarding litigation options; and (d) their failure to adequately advise plaintiff of material facts and legal options prior to hearing. Plaintiff also alleged defendants were negligent in failing to depose Dr. Nelson, disclosing to Marzano's counsel information beneficial to plaintiff, and their failure to discover and remedy the unavailability of a relevant witness for the hearing. Plaintiff alleged that as a result of defendants' negligence, plaintiff was "forced to accept a disadvantageous position which greatly compromised its ability to defend the claim" and was "forced to pay additional sums and eventually chose to reach a disputed settlement in order to mitigate its exposure."

Although plaintiff technically had the option of contesting the compensability of the claim or filing a motion to terminate benefits after retaining new counsel, those options were not practical as plaintiff had been paying benefits for some time and the Commission was unlikely to undo or reverse such payments. In other words, plaintiff's payment of benefits up to that point severely prejudiced its capability to reverse the concession by defendant.

In dismissing plaintiff's claim, the district court found that plaintiff failed to "explain how any of these alleged acts and omissions harmed its defense." With respect to the allegation that defendants had represented that plaintiff would accept liability, the district court stated that although plaintiff alleged that defendants' negligence forced plaintiff to pay TTD benefits and medical expenses, with little or no likelihood of recovery, and "to reach a disputed settlement in order to mitigate its exposure," these assertions are legally and factually unsupported. As a matter of law, paying benefits pending resolution of a claim does not preclude an employer from contesting liability. Moreover, plaintiff admitted that it could have contested the claim, despite the alleged negligence. The district court concluded that because plaintiff did not and could not allege that defendants' representation was the cause of any damages it may have suffered, plaintiff failed to state a cause of action for malpractice.

The Seventh Circuit affirmed and concluded that plaintiff's allegations left it "to speculate as to whether and how [plaintiff] would have prevailed on the underlying claim in the absence of" defendants' alleged negligence. The court held that plaintiff failed to adequately allege that but for defendants' negligence, plaintiff would have been successful in the underlying workers' compensation action. The court found that plaintiff simply failed to allege plausibly that it lost actual, specific, meritorious defenses in the Marzano claim because of defendants' alleged negligence.

### **Significance of Opinion**

This decision is significant because it demonstrates that even in federal court, in order to state a cause of action for legal malpractice, a plaintiff must plead specific facts concerning the underlying claim(s), each and every element of the underlying claim(s) and that but for the defendant's alleged negligence, the plaintiff would have prevailed in the prosecution or defense of the underlying claim(s).

For more information, please contact [Terrence P. McAvoy](#), or your regular [Hinshaw attorney](#).

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