

Professionals protected against punitive damages

Illinois law bars recovery of punitive damages against attorneys provided their conduct arose out of the performance of professional services — even when the conduct is apparently intentional.

Several years ago, during the height of "malpractice reform" in Illinois, the state legislature passed a statute that prohibits recovery of punitive damages against not only doctors and other healing art professionals but also attorneys. This statute, now codified at section 2-1115 of the Code of Civil Procedure, reads:

"Punitive Damages: Punitive damages are not recoverable in healing art and legal malpractice cases. In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed."

Illinois courts have held that section 2-1115 precludes a plaintiff from recovering punitive damages even when the defendant's alleged conduct was intentional.

In *Williams v. Chicago Osteopathic Medical Center*, 173 Ill.App.3d 125, 527 N.E.2d 409 (1st Dist. 1988), the plaintiffs claimed they were told by their doctors

that their child was born dead. In fact, the baby was born alive and placed in a utility room where the baby could receive no neonatal care. Six hours later a nurse found the baby and removed it from the utility room but was allegedly told by doctors to return the baby. The nurse refused, and the child was put in the newborn nursery. Treatment was initiated an hour later. The plaintiffs were then told that their baby was alive but that the chances of survival were slim. Approximately 11 hours after birth, the baby died. The plaintiffs filed a complaint for fraudulent misrepresentation against the doctors and sought recovery of punitive damages. At trial, the court certified to the 1st District Appellate Court the question:

"Does the statutory prohibition of punitive damages in healing art malpractice cases apply to an intentional fraud action arising from the provision of medical services by health care providers?" *Williams*, 527 N.E.2d at 410.

The appeals court held that any action arising from the provision of medical services would bring a cause within the purview and intent of section 2-1115, and therefore, punitive damages would not be permitted.

It is important to note that in determining whether punitive damages should be allowed, the sole inquiry made by the *Williams* court was whether the conduct arose "from the provision of medical services." The fact that the alleged conduct was intentional made no difference. In part, this is because the term "malpractice" is not synonymous with the term "negligence," and includes any misconduct of a professional nature.

This same rule has been applied in legal malpractice cases. In *Calhoun v. Rane*, 234 Ill.App.3d 90, 599 N.E.2d 1318 (1st Dist. 1992), the court held that section 2-1115 does not permit the recovery of punitive damages against attorneys despite the plaintiff's allegations of willful and wanton conduct.

In *Calhoun*, the plaintiff's Industrial Commission claims were dismissed for want of prosecution, allegedly as a result of the attorney's negligence. The attorney then failed to vacate the dismissals or otherwise reinstate the plaintiff's claims. He also failed to inform the plaintiff that his claims for compensation had been dismissed for want of prosecution. Rather, the plaintiff claimed the attorney falsely advised the plaintiff 2½ years after the dismissal of the Industrial Commission complaints that the

Legal malpractice

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complaints were still pending and that there was an offer of settlement, but that the claims could only be settled for approximately \$500.

In attempting to state a claim for punitive damages, the plaintiff in *Calhoun* argued that:

- The punitive damages were sought for acts that were separated in time from the defendant's original malpractice by approximately 2½ years.

- The defendant's offer of money was clearly an attempt to buy his way out of the malpractice.

- In offering "hush money," the defendant attorney was clearly performing illegal services for himself rather than legal services for the plaintiff.

In spite of the plaintiff's arguments, the 1st District justices stated:

"We find that the allegations of willful and wanton conduct set forth in count III are related to the original acts of professional malpractice set forth in count I, thus section 2-1115 provides a statutory bar to punitive damages in this case." *Calhoun*, 599 N.E.2d at 1323.

Although the *Calhoun* court recognized the plaintiff's arguments and agreed that the allegations against the defendant attorney "are very serious," the court said "such an argument needs to be addressed to the state legislature." *Calhoun*, 599 N.E.2d at 1323.

The holdings in *Williams* and *Calhoun* demonstrate that punitive damages will not be allowed — even for intentional conduct — as long as the conduct arose out of the provision of a professional service. While the court's interpretation of the statutory provision may lend itself to seemingly unjust application when the lawyer's conduct is allegedly intentional and somewhat removed from the initial legal services, as in *Calhoun*, in this writer's opinion, the broad prohibition is needed to protect the vast majority of attorneys whose conduct would not otherwise warrant punitive relief.

Prior to enactment of section 2-1115, many attorneys faced the potential for punitive damages for their acts as lawyers when it was apparent that punitive relief should not even have been sought in the complaint. In effect, the legislature has made a public policy decision that the merits of protecting lawyers as a class from the risk of punitive damages outweighs any harm caused to plaintiffs who might otherwise recover a punitive award.