University of Baltimore Law Forum

Volume 25
Number 3 *Spring, 1995*

Article 8

1995

# Recent Developments: Advance Fin. Co. v. Trustees of Clients' Sec. Trust Fund of Bar of Md.: Non-Client Is Eligible as a Claimant against the Trust Fund if an Attorney Embezzles a Client's Funds Which Were Intended for the Non-Client

Mark L. Miller

***Advance Fin. Co. v. Trustees of Clients' Sec. Trust Fund of Bar of Md.:***

***NON-CLIENT IS ELIGIBLE AS A CLAIMANT AGAINST THE TRUST FUND IF AN ATTORNEY EMBEZZLES A CLIENT'S FUNDS WHICH WERE INTENDED FOR THE NON-CLIENT.***

In *Advance Finance Co. v. Trustees of Clients' Sec. Trust Fund of Bar of Md.*, 337 Md. 195, 652 A.2d 660 (1995), the court of appeals held that an attorney acts as a fiduciary for a non-client when the attorney disburses a client's funds from the attorney's trust account to the non-client, at the instruction of the client. By elevating an attorney to a fiduciary status in such a transaction, the court expanded the realm of claims the Client's Security Trust Fund must entertain to include not only a client's loss due to an attorney's defalcation, but also any non-client's loss to whom the attorney was instructed by the client to distribute the defalcated funds.

Advance Finance Company ("Advance"), a consumer loan company, made loans to personal injury claim plaintiffs secured by assignments of proceeds of the injury claims. Two Maryland attorneys ("Attorneys"), now disbarred, arranged such loans for their clients in order to pursue personal injury claims. In order to secure a loan, each client was required to execute an "Authorization and Assignment" supplied by Advance, which assigned and directed the Attorneys to pay any such recovery in each client's case to Advance. Over an eleven month period, Advance made seventy-seven loans to the Attorneys' clients, and the Attorneys remitted the money due to Advance from settlement of the cases. Thereafter, the Attorneys ceased remitting to Advance, and Advance filed a claim against each Attorney with the Client's Security Trust Fund of the Bar of Maryland ("Fund"). The Fund denied the claims and Advance filed exceptions with the Court of Appeals of Maryland.

The court began its analysis by setting forth the general purpose of the Fund, which is "to maintain the integrity and protect the good name of the legal profession by reimbursing . . . losses caused by defalcations of members of the Bar." *Advance*, 337 Md. at 200, 652 A.2d at 662 (citing Md. Rule 1228(b)(3)). Turning to the specific criteria for eligibility, the court noted that "the trustees may use the Fund to reimburse a person for a loss that was caused by a defalcation of a lawyer if "... the lawyer caused the loss while acting for the person as an attorney of law or a fiduciary." *Id.* (citing Md. Code Ann., Bus. Occ. & Prof. § 10-312(b)(1) (1989)).

In rejecting Advance's first argument, that the Attorneys were fiduciaries because they were trustees of trusts of which Advance was the beneficiary, the court relied on the Restatement (Second) of Agency: "[a]lthough an agent receives money from his principal for payment to another and, by implication or otherwise, promises the principal to pay the other, he does not ordinarily become a trustee of the money, even though directed to pay over the specific money." *Advance*, at 204, 652 A.2d at 664 (quot-

ing Restatement (Second) of Agency § 342(3) cmt. b (1958)). The court concluded that the loan transactions, as structured by Advance, did not "transcend the ordinary, so as to create a trust." *Id.* at 204, 652 A.2d at 664.

The court then turned its attention to Advance's second exception, that the Attorneys were fiduciaries for Advance as a result of their ethical obligations under rule 1.15(b). The rule provides "[u]pon receiving funds or other property in which a client or a third person has an interest, a lawyer shall promptly notify the client or third person . . . and promptly deliver . . . any funds or other property that the client or third person is entitled to receive." *Id.* at 204, 652 A.2d at 664 (quoting Md. Lawyers' R. of Prof. Conduct 1.15(b)).

The court found support for this proposition in three areas. First, the comment to Conduct Rule 1.15 recognizes that a lawyer should hold the property of others with the care of a fiduciary, and may have a duty to protect third party claims from wrongful interference of the client. *Id.* at 205-06, 652 A.2d at 665 (citing Md. Lawyers' R. of Prof. Conduct 1.15 cmt.). In addition, the comment provides that "a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction." *Id.* at 206, 652 A.2d at 665 (quoting Md. Lawyers' R. of Prof. Conduct 1.15 cmt.). Second, the court looked to *The Law of Lawyering*, whose authors added "Rule 1.15(b) . . . extends its protection to include third party interests as well as those of clients." *Id.* (quoting G. Hazard, Jr. & W. Hodes, *The Law of Lawyering* § 1.15:301, at 459-60 (2d ed. 1990 & Supp. 1994)). Third, the court cited previous disbarment decisions where they had ruled, in the context of tort claim settlement funds, that an attorney has a duty to promptly deliver a client's funds to a non-client pursuant to the client's instructions. *Id.* at 207, 652 A.2d 665-66 (citing *Attorney Grievance Comm'n v. Singleton*, 311 Md. 1, 16, 532 A.2d 157, 165 (1987); *Attorney Grievance Comm'n v. Morehead*, 306 Md. 808, 818, 511 A.2d 520, 525 (1986)).

Based on this authority, the court concluded that an attorney acts as a fiduciary for a non-client within the meaning of the Business Occupations and Professions Code, section 10-312(b)(1) and of Maryland Rule 1228(b)(3), when the attorney disburses client funds from the attorney's trust account to a non-client, at the instructions of the client and pursuant to the obligations recognized in Conduct Rule 1.15. *Id.* at 208, 652 A.2d at 666. The court was careful to point out that it realized that the Conduct Rules were not meant to be a basis of civil liability, but noted that this was a claim by Advance for reimbursement under the Fund, not an attempt to impose civil liability on the Attorneys. *Advance*, at 207-08, 652 A.2d at 666 (citing Md. Lawyers' R. of Prof. Conduct Scope Note, 2 Md. Rules 475 (Md. Code 1994)). Furthermore, the court reasoned that to recognize as a matter of legal ethics that an attorney is the fiduciary of a non-client victim, but then to tell that same non-client victim that it is questionable whether that obligation is civilly enforceable as a basis for monetary recovery against the attorney, would produce the exact result the Fund was created to avoid. *Id.* at 208, 652 A.2d at 666. The court explained by citing the initial report of the M.S.B.A. Committee that recommended a clients' security fund, which had specifically proposed reimbursement whether the loss was caused by a lawyer acting as an attorney or fiduciary because "the public doesn't know the difference between a lawyer as a lawyer who might get a settlement and put the money in his pocket, and a lawyer who was an executor and trustee and thereby gets funds and withholds them in that fiduciary capacity." *Id.* at 209, 652 A.2d at 666 (citing 69 Transactions M.S.B.A. at 225-26 (1964)). In addition, the court emphasized that in the past, the Fund had paid non-client victims of attorney defalcations in the real estate settlement context and, on a claim by a client, issued a joint check to the client and physician in the personal injury context. *Id.* at 210, 652 A.2d at 667. The court saw little differ-

ence in these Fund approved payments and the claim of Advance. *Id.*

The court concluded by giving specific judicial recognition to Advance's argument, holding that it is consistent with the purposes of the Fund to recognize that the fiduciary ethical obligation embodied in Conduct Rule 1.15 is a fiduciary obligation under the Fund's statutes and rules. *Id.* at 210-11, 652 A.2d at 667. The court vacated the Fund's decision and remanded for a determination on reimbursement. *Id.* at 211, 652 A.2d at 667-68.

In its simplest form, the court's decision in *Advance Finance Co. v. Trustees of Clients' Sec. Trust Fund of Bar of Md.* expands a non-client's eligibility as a claimant against the Fund. However, *Advance* derives its true impact from the court's recognition that a non-client's loss from an attorney's defalcation, at least where a client has instructed the attorney to disburse the client's funds to the non-client, is no less damaging to the legal profession's credibility that the same loss to the client. This is precisely the situation the Fund was established to address, and although the court's decision may increase the potential for recovery, it should be welcomed by attorneys at a time when the term "legal ethics" is all too often, whether justifiably or not, considered a misnomer.

*-Mark L. Miller*

***Aetna Casualty & Surety Co. v. Cochran:***

***EXTRINSIC EVIDENCE MAY BE USED BY INSURED TO ESTABLISH INSURER'S DUTY TO DEFEND UNDER LIABILITY POLICY.***

In *Aetna Casualty & Surety Co. v. Cochran, 337 Md. 98, 651 A.2d 859 (1995),* the Court of Appeals of Maryland held that an insured may use extrinsic evidence to establish a potentiality of coverage under an insurance policy when the plaintiff's complaint is silent as to possible defenses entitled to coverage. The court rejected an earlier decision by the court of special appeals which mandated that determining the possibility of coverage of an insured tort defendant be made solely by reference to the language of the insurance policy and the complaint made against him. In so holding, the court remedied any inequities in the interpretation of coverage under liability insurance policies and addressed public policy concerns regarding an insured's reasonable expectations.

Victoria and Robert Beyer sued Robert Cochran for assault, battery, and loss of consortium for injuries Victoria received during a March 19, 1990 altercation between Cochran and his brother at Cochran's office. At the time of the alleged incident, Cochran was covered under two office liability policies issued by Aetna. Although the policies provided no coverage for intentional or expected bodily injury or property damage caused by the acts of the insured, both provided coverage for intentional acts of self-defense. Despite Cochran's contention that Beyer's injuries occurred while he was defending himself against his brother's assault, Aetna refused to provide him with counsel to defend against the Beyer ac-