Actionable Legal Malpractice: Tort or Breach of Contract?

By Jeffrey P. Lewis

Back in the day, what constitutes legal malpractice sounding in tort and legal malpractice sounding in breach of contract was crystal clear — claims involving negligent conduct or other breaches of the standard of care is tortuous, and claims involving an allegation that the attorney failed to follow a specific instruction of the client constitutes breach of contract. See, e.g., *Duke & Co. v. Anderson,* 418 A.2d 613 (PA Super. 1980). By way of example, under this approach, should a client retain a lawyer to represent him at a preliminary hearing and the lawyer appears at the hearing and manages to waive a viable issue, that suggests a malpractice claim sounding in tort. But if the attorney fails to appear for the hearing, something that he or she had obligated contractually to do and handle for his or her client, that would constitute a breach of contract.

Beginning with the Supreme Court holding in *Bailey v. Tucker,* 621 A.2d 108 (Pa. 1993), however, there was case law that ignored this older case law, suggesting that a legal malpractice claim sounding in breach of contract can be stated for harm caused by the lawyer's negligent conduct. In other words, if the lawyer does show for the preliminary hearing but does waive a viable issue in his or her handling of it, that too could constitute breach of contract. This proposition was based upon the premise that a lawyer who agrees for payment of money to represent a client has, by implication, agreed to provide the client professional services consistent with those expected of the profession at large. Two different three-judge panels of the Superior Court have embraced this proposition in *Gorski v. Smith,* 812 A.2d 683, 694 (PA Super. 2002) and *Fiorentino v. Rapoport,* 693 A.2d 208, 213 (PA Super. 1997). These holdings are contrary to "[t]he prevailing rule [nationwide] … that there is no cause of action for breach of an express contract unless the wrong sued for is breach of a specific promise." Ronald E. Mallen, *Legal Malpractice,* 2018 Edition, Volume 1, § 8:27, p. 1067.

Recognizing breach of contract for breach of the duty of care claims as a breach of contract creates havoc for defendant lawyers based upon the seeming unavailability of certain defenses. For example, a legal malpractice claim sounding in tort is subject to a two-year statute of limitations, but the statute of limitations for a legal malpractice claim sounding in breach of contract is four years. Moreover, seeming to be unsettled by any reported decision in Pennsylvania, there is a question of whether the defense of contributory negligence, clearly available in response to a claim sounding in tort, is available in the defense of any claim for legal malpractice sounding in breach of contract based upon a breach of the duty of care. There is case law in other jurisdictions that holds that contributory negligence can be asserted under such circumstances.

Further raising the stakes in instances of a breach of contract claim is the issue of the permissible measure of damages. In the view of many trial courts over the years, it had been the view that recovery for breach of contract legal malpractice is limited to disgorgement of fees. Beginning with *Coleman v. Duane Morris, LLP,* 58 A.3d 833, 839 (PA Super. 2012), however, in a three-judge Superior Court decision, consequential damages were deemed recoverable in a breach of contract legal malpractice claim. (The Supreme Court granted a petition for allowance of appeal, but the case settled before the scheduled oral argument; therefore the Superior Court decision in *Coleman* stands, at least for the time being, as binding precedent).

Federal courts presiding over legal malpractice claims in diversity cases have rejected the pronouncements in *Bailey, Gorski* and *Fiorentino* as expressions of binding precedent of Pennsylvania law concerning the contours of a viable legal malpractice claim sounding in breach of contract. They contend that such pronouncements constitute dicta only. See, e.g., *New York Cent. Mut. Ins. Co. v. Edelstein,* 637 Fed. Appx. 70, 72-73 (3d Cir. 2016) (non-precedential). In *Bailey*, for example, the case was decided upon application of the statute of limitations and not based upon its pronouncement concerning the existence of a breach of contract cause of action for breach of the duty of care.

The Pennsylvania Supreme Court seemingly upended this area of the law in *Bruno v. Erie Insurance Co.*, 106 A.2d 48 (Pa. 2014). *Bruno* involved a professional liability claim by a customer against his insurance broker, not a client against a lawyer. There, in a unanimous decision, the Supreme Court applied the "gist of the action" doctrine to draw a distinction between professional liability claims based upon breach of contract and tort. A duty created by the terms of the engagement contract between the customer and his broker involving "a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract," which would constitute breach of contract. On the other hand, if the claim "involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts…it exists regardless of the contract, then it must be regarded as a tort." In short, the view of the *Bruno* court rests upon whether the "gist of the action" constitutes a tort unless it violates "one of the 'specific executory promises which comprise the contract.'"

The Third Circuit in *Edelstein*, again in a non-precedential opinion, and by federal district court in a diversity action, cites *Bruno* and contends that its holding applies to legal malpractice jurisprudence. Accordingly, in the view of the federal courts, this distinction, as previously recognized in *Duke & Co.* and its progeny, is still the law in this commonwealth, although that distinction is not based upon application of the Gist of the Action Doctrine. Members of the plaintiff's bar have argued that the Gist of the Action Doctrine does not apply to legal malpractice claims. But a unanimous three-judge panel of the Superior Court, in a non-precedential opinion, has recently rejected that argument.

In *Seidner v. Finkelman,* 2018 WL 4178147 (PA Super.), the court, in citing Supreme Court authority as old as 1830 (*Zell v. Arnold,* 1830 WL 3261, at *3 (Pa. 1830)), held that the gist of the action doctrine as articulated in Bruno does apply to legal malpractice claims. But *Seidner* is a non-precedential decision, albeit by a unanimous three-judge panel. Therefore, the door is still not shut on precluding the assertion of legal malpractice claims sounding in breach of contract arising out of harm caused by an attorney's negligence. But *Bruno* presents the defense with a compelling argument that this door has been shut.

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